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169	Balak Ram v Kaura	...	2 U P L R (L.) 94.
170	Girindra Chandra Sen v Mahesh Ram Deb	...	*Calcutta High Court.
172	Shah Mahdi Hasan v. Ismail Hasan	..	8 A L J 622; 2 U P L R (A.) 213.
173	Datar Kaur v Ram Rattan	...	2 U P L R (L.) 96; 115 P L R 1920.
174	Mathura Prasad v. Hardeo Bakhsh Singh	...	18 A L J 518; 42 A 477.
175	Madhorao v Kesheorao	...	*Nagpur Judicial Commissioner's Court.
179	Lalta Prasad v Nasir Khan	...	*Allahabad High Court.
180	Nabin Chandra Nath v. Tirthabasi Bhowmik	...	*Calcutta High Court.
181	Radhe Lal v. Bindo	...	18 A L J 609; 2 U P L R (A.) 215.
182	Kanshi Ram v. Lal Chand	...	2 U P L R (L.) 93.
183	Samher Singh v. Sher Singh	...	18 A L J 454; 2 U P L R (A) 158.
184	Kumar Prematha Nath Malia v. Meik	...	(1920) Pat 146; 5 P L J 273; 1 P L T 760.
191	Vir Singh v. Harnam Singh	...	1 L 137.
192	Abdul Rashid v. Sizing Material Co. Ltd	...	2 U P L R (A.) 126; 18 A L J 536; 42 A 480.
193	Pyarelal v. Pannalal	...	*Nagpur Judicial Commissioner's Court.
194	Asa Debi v. Bashi Ram	...	2 U P L R (L.) 98.
199	Venganat Raja Vasudeva v. Naithilath Matathil	...	27 M L T 54.
207	Bal Kaur v Shib Das	...	1 L 151.
208	Muhammad Anwar Ali Khan v. Dara Shah Khan	..	18 A L J 624; 2 U P L R (A.) 217.
209	Lachman Chamar v. Emperor	...	18 A L J 311; 21 Cr L J 417.
210	Inder Sain v. Emperor	...	21 Cr L J 418.
226	Emperor v. Bhagelu Dom	...	21 Cr L J 434.
227	Chatter Singh Damai v. Emperor	...	3 U B R (1919) 194; 21 Cr L J 435.
229	Ram Kishen v Emperor	...	1 L 169; 21 Cr L J 437; 121 P L R 1920.
230	Bhaggi Lal v. Emperor	...	2 U P L R (A) 119; 18 A L J 512; 21 Cr L J 438; 42 A 470.
231	Pertap Rai v. Emperor	...	21 Cr L J 439.
234	Bhola Nath v. Emperor	...	21 Cr L J 442.
235	Jhari Singh v. Emperor	...	21 Cr L J 443.
239	Ram Baran Singh v. Emperor	...	2 U P L R (A) 140; 18 A L J 574; 21 Cr L J 447; 42 A 474.
240	Dassya v. Nibaran Chandra Ghosh	...	31 C L J 371; 21 Cr L J 448; 24 C W N 928.
241	Kannan Narayanan v. Muthalpuredath Ramunni	...	11 L W 328.
242	Peterson v. Shave	...	24 C W N 711.
247	Kasidanbi v. Gangulal	...	*Nagpur Judicial Commissioner's Court.
248	Aidal Singh v. Pearey Lal	...	2 U P L R (A) 157.
248	Majaraddin Kabiraj v. Majibar Rahman	...	*Calcutta High Court.
249	Pentaya v. Kesheorao	...	16 N L R 68.
251	Ghansham Das v. Public Banking and Insurance Co		1 L 154.
253	Ma Ye Baw v. Maung Shwe Hman	...	3 U B R (1919) 192.
254	Prij Lal v. Durga	...	1 L 134.
255	Ma On Me v. Ma Pya Gyi	...	3 U B R (1919) 198.
256	Hira v. Buta	...	1 L 128; 49 P W R 1920.
259	Maung Saw v. Ingraswamy	...	3 U B R (1919) 200.
260	Seshagiri Rao v. Sreenivasa Rao	...	38 M L J 62; (1920) M W N 127; 43 M 313.
262	Official Trustee of Bengal v. Smith	...	(1920) Pat 161; 5 P L J 328; 1 P L T 434.

267	Janaki Nagasawmi Iyer v. Ramasawmi Aiyengar	...	11 L W 6; (1920) M W N 264.
268	Sitaram Maharaj v. Narayan	...	*Nagpur Judicial Commissioner's Court.
270	Krishna Dayal Gir v. Lakshmi Narain	...	1 P L T 486.
272	Indar Singh v. Munshi	...	1 L 124.
274	Ganpat Lal v. Bindbasini Prashad	...	18 A L J 555; (1920) M W N 382; 12 L W 59; 39 M L J 108; 2 U P L R (P. C.) 10?; 24 C W N 954 **P. C.**
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282	Nalinakshya Dutta v. Dhan Krishna Mondal	...	*Calcutta High Court.
283	Tralokhya Nath v. Sarat Kumar Singh	...	1 P L T 526.
286	Darsan Singh v. Sheoraj Singh	...	2 U P L R (B. R.) 22.
286	Shamanandan Prasad v. Mulchand Ram	...	1 P L T 292.
287	Chakarpan v. Nathua	...	2 U P L R (B. R.) 22.
287	Chauras Kunwar v. Jagannath Singh	...	7 O L J 147; 2 U P L R (J. C.) 89.
289	Ramakrishna Rao v. Balakrishna Rao	...	(1920) M W N 261; 43 M 476.
291	Bharath Singh v Munnu Singh	...	7 O L J 151; 2 U P L R (J. C.) 83.
293	Girdhar Das v. Raja Sri Krishna Datt	...	18 A L J 545; 39 M L J 18 **P. C.**
299	Drigpal Singh v. Sukhnandan Lal	...	7 O L J 164; 2 U P L R (J. C.) 96.
302	Firm of Ramchand Manjimal v. Firm of Goverdhandas Vishindas Ratanchand	..	24 C W N 721; 18 A L J 591; 22 Bom L R 606; 39 M L J 27; 12 L W 15; 2 U P L R (P. C.) 94; (1920) M W N 407; 28 M L T 87 **P. C.**
304	Mohammad Ahmad v. Ansar Mohammad	...	7 O L J 158; 23 O C 62.
306	Nageshar Bakhsh Singh v. Ganesha	...	7 O L J 48; 2 U P L R (P. C.) 37; 38 M L J 521; 23 O C. 1; 18 A L J 532; 22 Bom L R 596; 28 M L T 5; 42 A 368 **P. C.**
313	Sripal Singh v. Jagdish Narayan	...	7 O L J 219; 2 U P L R (J. C.) 77.
316	Brij Krishna Das v. Murli Rai	...	4 P L J 703.
320	Drigpal Singh v Nakchhed Singh	...	7 O L J 171; 2 U P L R (J. C.) 99.
322	Deonandan Prasad Singh v. Janki Singh	...	5 P L J 314; 1 P L T 325; 2 U P L R (Pat.) 108; (1920) Pat 266.
325	Louis Dreyfus & Co. v. Purusottum Das Narain Das		47 C 29.
328	Banke Lal v. Swami Dayal	...	7 O L J 207; 2 U P L R (J. C.) 82; 23 O C 72.
334	Umesh Chandra Dutt v. Bibhuti Bhushan Pal	...	47 C 67.
335	Benares Hindu University v. Kishen Das	...	7 O L J 203; 2 U P L R (J. C.) 81
337	Bhuramull Banka v. Official Assignee of Bengal	...	47 C 56.
340	Balkrishna Narayan Sawant v. Jankibai Sitaram Sanzgiri	...	22 Bom L R 289; 44 B 331.
344	Brahmanand Singh v. Dund Bahadur Singh	...	1 P L T 229; (1920) Pat 245; 2 U P L R Pat.) 111.
348	Gokul Prasad v. Sitla Prasad	...	7 O L J 184.
349	Ramchandra Vithal Bhat v. Gajanan Narayan Deshmukh	...	22 Bom L R 296; 44 B 352.
354	Ganesh Prasad v. Bishwa Nath	...	7 O L J 188; 23 O C 30.
358	Ramanathan Chettiar v. Muthiah Chetty	...	38 M L J 247; 11 L W 405; 43 M 429; (1920) M W N 270.
360	Baldeoprasad v. Ghasiram	...	16 N L R 84.
361	Rukminibai Krishnarao v. Laxmibai Narayan	...	22 Bom L R 254; 44 B 304.
366	Pierpont Morgan v. Ramjee Ram	...	(1920) Pat 169; 5 P L J 302; 1 P L T 310.
373	Ram Lal Sen v. Bidhumukhi Dasi	...	47 C 76.
370	Suraj Prasad Pandey v. Boucke	...	1 P L T 190; 5 P L J 371; 2 U P L R (Pat.) 105.
380	Sharif-un-nissa v. Masoom Ali	...	2 U P L R (A.) 57; 18 A L J 314; 42 A 347.
382	Harsalsa v. Bapu	...	*Nagpur Judicial Commissioner's Court.
384	Ponnuswami Chetty v. Vellore Commercial Bank Ltd.		11 L W 28; 38 M L J 70; (1920) M W N 75; 27 M L T 81.
386	Raj Rani v. Ram Kishore	...	2 U P L R (B. R.) 26.
386	Narhar v. Narain	...	*Nagpur Judicial Commissioner's Court.
390	Nakul Chandra Barua v. Sasti Charan Biswas	...	24 C W N 399.
391	Adusumilli Kristnayya v. Adusumilli Lakshmipathi		18 A L J 601; (1920) M W N 385; 24 C W N 905; 39 M L J 7· ; 28 M L T 70; 43 M 670 **P. C.**
395	Ramathai Vadivelu Mudaliar v. Peria Manicka Mudaliar	...	24 C W N 699; 18 A L J 584; 28 M L T ?; 39 M L J 11; 12 L W ?; (92) M W N 38?; 2 U P L R (P. C. 80; 4 M 643 **P. C.**

399	Sadashiv Ramchandra Datar v. Trimbak Keshav Vaze	...	22 Bom L R 266; 44 B 202.
403	Abbas v. Misri Lal	...	5 P L J 376; 1 P L T 339.
411	Amrit Vaman v Hari Govind	...	22 Bom L R 275; 44 B 237.
417	Janki Kuer v Saudagar Ram	...	1 P L T 221; (1920) Pat 177.
419	Waman Balvant Kashikar v. Harshet Shete	...	22 Bom L R 307; 44 B 410.
422	Ugra Mohan v. Lachhmi Prasad Chaudhuri	...	5 P L J 339.
424	Jamsedji v. Husseinbhai Ahmedbhai	...	22 Bom L R 319.
426	Adhikari Kuer v. Lokenath Rai	...	2 U P L R (Pat.) 93; 1 P L T 335.
429	Sakharam Manchand Gujar v. Keval Padamsi Gujar		22 Bom L R 313; 44 B 392.
431	Pasupathi Mukherjee, *In the goods of*	...	24 C W N 326.
433	Mulchand, *In re*	...	18 S L R 212; 21 Cr. L J 449.
434	Packiriya Pillay v. Muthukrishna Iyer	...	21 Cr L J 450.
435	Rahim Bakhsh v. Emperor	...	2 U P L R (A.) 124; 18 A L J 515; 21 Cr L J 451.
436	Kaung Ki v. Emperor	...	3 U B R (1919) 197; 21 Cr L J 452.
437	Pir Ali Kasab v. Emperor	...	21 Cr L J 453.
440	Bugga v. Emperor	...	(1920) M W N 329; 2 U P L R (P. C.) 50; 24 C W N 650; 18 A L J 456; 22 Bom L R 609; 39 M L J 1; 12 L W 296; 1 L 326; 21 Cr L J 456 **P. C.**
446	Gokal Chand v. Emperor	...	1 L 163; 21 Cr L J 462.
449	Nagindas Bhukhandas v. Ghelabhai Gulabdas	...	22 Bom L R 322; 44 B 673.
450	Jakkamreddi Seshadri Reddy v. Subramania Iyer	...	11 L W 536; (1920) M W N 337; 38 M L J 504; 43 M 720.
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452	Saurendra Nath Mitra v. Mritunjay Banarji	...	5 P L J 270; (1920) Pat 227; 1 P L T 645.
454	Sheo Ram v. Dhapan	...	*Lahore High Court.
455	Damu Diga v. Vakrya Nathu	...	22 Bom L R 328; 44 B. 767.
457	Chandmull Goneshmull v. Dhanraj Ganpatroy	...	24 C W N 309.
458	Karam Dad v. Hussain Bakhsh	...	*Lahore High Court.
459	Hari Raghunath v. Antaji Bhikaji	...	22 Bom L R 334; 44 B 406.
461	Gul Muhammad v. Bandu	...	*Lahore High Court.
463	Ramnandan Ram Kandu v. Harnandan Prasad	..	*Patna High Court.
465	Sardha v. Lakhu	...	*Lahore High Court
466	Raghunath Chatterji v. Juthu Chattar	...	2 U P L R (Pat.) 97.
469	Sant Ram v. Kidar Nath	...	*Lahore High Court.
475	Fakhrunnessa Begam v. District Judge of the 24-Parganas	...	24 C W N 339; 47 C 592.
476	Muthusami Iyer v Varada Vyroyan	...	(1920) M W N 289; 11 L W 352.
478	Ganesh Devi v. Darshan Singh	...	2 U P L R (L.) 100
481	Velu Padayachi v. Arumugam Pillai	...	38 M L J 397; 11 L W 343.
484	Sher Mahomad v Jethomal	...	14 S L R 1.
489	Sawaya Ram v Fattu Ram	...	*Lahore High Court.
490	Sheikh Azmat v Bibi Tamzan	...	5 P L J 83; 1 P L T 108.
492	Shahab-ud-din v Vohidbux	...	14 S L R 12.
495	Adya Singh v. Nasib Singh	...	1 P L T 227.
497	Mohamed Yusuf v. Emperor	...	21 Cr L J 463.
498	Subbiah Thevan, *In re*	...	11 L W 561; (1920) M W N 347; 39 M L J 65; 43 M 744; 21 Cr L J 466
500	Emperor v. Deva Kanta Jha	..	5 P L J 267; 1 P L T 297; (1920) Pat 224; 21 Cr L J 468.
501	A Vakil, *In the matter of*	...	18 A L J 419; 2 U P L R (A.) 130; 21 Cr L J 469; 42 A 450.
507	Secretary of State for India in Council v. Lown Karan Marwari	...	5 P L J 321; (1920) Pat 252; 1 P L T 451; 21 Cr L J 475.
510	Packianathan, *In re*	...	11 L W 368; 21 Cr L J 473.
511	Baldeo Koeri v. Lakshmi Narayan Kuer	...	1 P L T 627; 21 Cr L J 479.
512	Chandra Mohon Singh v Emperor	..	1 P L T 628; 21 Cr L J 480.
513	Firm Debi Din-Bhagwan Din v. Firm Sarkar and Co		2 U P L R (A.) 143.
513	Sangayya Tevan v. Pethamall	..	11 L W 377.
514	Firm of Pokerdas Kishindas v. Firm of Vishinji Gordhandas	...	14 S L R 18.
516	Prosunna Chandra v. Boidya Nath	...	31 C L J 360; 24 C W N 706.
518	Basti Ram v. Rustam Singh	...	2 U P L R (A.) 146.
519	Gokarakonda Narasimha Rao v. Gokarakonda Papanna	...	11 L W 394; 38 M L J 327; 43 M 436.

518	Bhagwati Prasad v. Mukand Sarup ...	2 U P L R (A.) 147.
524	Suryanarayana Rao Naidu v. Balasubramania Mudali ...	11 L W 409; 38 M L J 433; (1920) M W N 267; 43 M 635.
526	Brij Narain Rai v Mangla Prasad Rai ...	2 U P L R (A.) 149.
527	Virji v. Karachi Municipality ...	14 S L R 46.
529	Sheikh Mohammad v Janki ...	2 U P L R (B. R.) 55.
530	Yella Krishnamma v Kotipalle Mali ...	38 M L J 467; 11 L W 563; (1920) M W N 380; 28 M L T 88; 43 M 712.
532	Krishna Kishore De v Amar Nath Khettry ...	31 C L J 272; 24 C W N 633.
538	Surat Narain Singh v. Nathuni Rai ...	*Patna High Court.
539	Bhupati Charan Nandi v Golam Ehihar Choudhury	24 C W N 368.
549	Ramachandra Deo Garu v Chaitana Sahu ...	18 A L J 625; (1920) M W N 366; 39 M L J 68; 28 M L T 97; 12 L W 260; 44 C W N 1055; 2 U P L R (P. C.) 122 **P. C.**
541	Radha Kissen Khetry v Lukhmi Chand Jhawar ...	31 C L J 282; 24 C W N 454.
549	Chandan Singh v. Bhora Lal ...	2 U P L R (B. R.) 58.
550	Govind v. Dheklu ...	*Nagpur Judicial Commissioner's Court.
551	Abdul Sheikh v. Mahamad Ayab ...	24 C W N 380; 31 C L J 197.
552	Singaraju Venkatasubbaramaniam v. Rajah of Venkatagiri ...	11 L W 523.
556	Mohamed Kalimuddin v. Stewart ...	31 C L J 247; 47 C 623.
563	Ganapathiya Pillai v. Gopala Aiyer ...	*Madras High Court.
568	Padmabuti Dassi v. Bonomali Seal ...	24 C W N 378.
570	Dip Chand Rai v. Chhetru Lal ...	1 P L T 529.
571	Ram Kissen Joydoyal v. Pooran Mull ...	31 C L J 259.
576	Ghanisham Das v Mubarik ...	*Lahore High Court.
577	Lucas, J. M. v. Official Assignee of Bengal ...	24 C W N 418; 21 Cr L J 481.
582	Ajodhi v. Emperor ..	16 N L R 70; 21 Cr L J 486
586	Grande Venkatta v. Corporation of Calcutta ...	24 C W N 388; 47 C 633; 21 Cr L J 490.
591	Sundar Singh v. Phuman Singh ...	*Lahore High Court.
592	Raghu Singh v. Emperor ...	1 P L T 221; 21 Cr L J 496.
593	Kanatala Venkata Krishnama Charlu v. Kandala Perundevamma ...	*Madras High Court.
595	Bisheshar Lal v Bhuri ...	*Lahore High Court.
597	Kachu Ravji Mindhe Vanjari v. Trimbak Khemchand Gujarathi ...	22 Bom L R 383; 44 B 472.
598	Bayya Sahu v. Krishnachandra Gajapathy ...	11 L W 600.
599	Bisudhanand v. Isri Singh ...	*Patna High Court.
604	Naina Marakayer v. Somasundaram Chettiar ...	11 L W 593.
606	Kripasindhu v Nandu Charan ...	1 P L T 206.
608	Srinivasa Aiyangar v. Narayana Aiyangar ...	11 L W 606; (1920) M W N 364.
610	Jagamohini Dasi v Shiba Gopal Banerjee ...	*Calcutta High Court.
612	Ponnuswami Asari v. Palaniandi Mudali ...	11 L W 602.
615	Kripa Sindhu Panigrahi v Nanda Charan Panipatu	(1920) Pat 209.
616	Ponnambala Mudali v. Vasudeva Pillai ...	*Madras High Court.
620	Sonibai v Dhanraj ...	*Nagpur Judicial Commissioner's Court.
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631	Ram Karu v. Raghbir Singh ...	*Lahore High Court.
632	Hurnandrai Fulchand v. Pragdas Budhsen ...	22 Bom L R 343.
638	Anant Ram v Bharat National Bank, Ltd., Delhi ...	*Lahore High Court.
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645	Hem Kuar v Sewa Ram ...	2 U P L R (B. R.) 15.
646	Srikishna Rai v. Ramsaran Rai ...	1 P L T 267.
647	Shambhu Dayal v. Durga Prasad ...	23 O C 67.
649	Lachmibati Kumari v. Nandkumar Singh ...	1 P L T 269; 5 P L J 400.
649	Sheoghulam Koeri v. Permeshri Lal ...	2 U P L R (B. R.) 10.
651	Fitha v Devkee ...	*Lahore High Court.
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653	Shwe Hman v. Ma E Mya ...	10 L B R 111; 12 Bur L T 251
656	Hardutt Singh v. Jaikaran Singh ...	2 U P L R (B. R.) 13.
657	Jogesh Chandra v. Emperor ...	24 C W N 343; 21 Cr L J 497.
660	Nirghin Mahton v Emperor ...	21 Cr L J 500.

663	Mahomed Hosain v. Ma Pwa Hnit	...	10 L B R 104; 13 Bur L T 43; 21 Cr L J 503.
664	Rekha Ahir v. Emperor	...	1 P L T 494; 21 Cr L J 504.
667	Sundar Singh v. Emperor	...	105 P L R 1920; 21 Cr L J 507.
669	Nurul Hassan v. Emperor	...	21 Cr L J 509.
671	Sri Niwas v. Emperor	...	102 P L R 1920; 21 Cr L J 511.
671	Abdul Karim v. Emperor	...	103 P L R 1920; 21 Cr L J 511.
672	Moula v. Emperor	...	104 P L R 1920; 21 Cr L J 512.
673	Ganpat v. Lalamiya	...	16 N L R 59 **P. C.**
675	Solai Ammal v. Jogi Chetty	...	10 L W 637; 27 M L T 53.
677	Mahabir Prasad Singh v. Manki	...	2 U P L R (B. R.) 14.
677	Shwe Hpan v. Ma Chit Nyein	...	10 L B R 106; 13 Bur L T 34.
678	Braja Sundar Das v. Jagannath Dhal	...	1 P L T 256; (1920) Pat 181.
681	Le Maung v. Ma Kwe	...	10 L B R 107; 13 Bur L T 3.
683	Macintyre, *In the goods of*	...	17 A L J 247; 41 A 248.
683	Manghirmal v Jethanand	...	13 S L R 56.
691	Athar Husain v. Idu Shah	...	7 O L J 271; 23 O C 85; 2 U P L R (J. C.) 105.
692	Narain Das v. Baij Nath Sahai	...	7 O L J 231.
693	Madhusudan Koer v. Badridas	...	31 C L J 93.
696	Tika v Ram Kuar	...	7 O L J 234; 23 O C 106.
697	Rama Singh v. Janak Singh	...	1 P L T 300; (1920) Pat 232; 2 U P L R (Pat.) 121.
699	Hafizuddin v. Mubarak Ali	...	7 O L J 242.
701	Zia-ul-Haq v. Muhammad Ibrahim	...	*Lahore High Court.
707	Tahawwar Husain v. Lachhman Das	...	7 O L J 246.
709	Uberoi Limited v Kirpal Singh	...	*Lahore High Court.
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717	Madho Rao v Ghulam Mohiuddin	...	15 N L R 134 **P. C.**
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726	Nilkanta Ghose v. Swarnamoyee	...	31 C L J 130.
728	Diwan v Jagta	...	1 L 206; 113 P L R 1920.
730	Ambalavana Pandara Sannidhi Avergal v. Meenakshi Sundareswaral Devastanam of Madura	...	18 A L J 594; 2 U P L R (P. C.) 95; 37 M L J 50; 28 M L T 82; 12 L W 212; 43 M 665 **P. C.**
733	Harnaman v Dasondhi	...	1 L 210; 112 P L R 1920.
734	Chiranjilal Ramlal v Tulsiram Jankidass	...	31 C L J 134; 47 C 568.
740	Chhogalal Meghraj v. Kanhayalal Tarachand	...	*Nagpur Judicial Commissioner's Court.
742	Tani v Rikhi Ram	...	114 P L R 1920.
743	Tokhan Pandey v. Sivakanta Prosad Singh	...	*Patna High Court.
744	Gujar Shah v. Barkat Ali Shah	...	1 L 213.
745	Pudai Ram v. Baijnath Lal	...	7 O L J 273; 23 O C 264.
748	Madhabi Sundari Dasya v. Syama Charan Biswas	...	31 C L J 202.
749	Jhiblia v Dawlatya	...	*Nagpur Judicial Commissioner's Court.
751	Raghunath Singh v Har Dayal Singh	...	7 O L J 278.
752	Sukhan Rai v Chakowri Singh	...	2 U P L R (Pat.) 119.
753	Annada Mohan Roy v Atul Chandra Chakrabarti	...	24 C W N 465.
755	Ratipali v. Bhagwan Din	...	7 O L J 279; 2 U P L R (J. C.) 102.
756	Suggi Lal Durji v Mohammad Wali Ullah	...	1 P L T 299.
758	Hem Chandra v. Secretary of State for India	...	31 C L J 204.
759	Nadir Singh v Anpurna Kunwar	...	7 O L J 282; 2 U P L R (J. C.) 113.
761	Haridas Chatterji v. Gahenabai	...	*Nagpur Judicial Commissioner's Court.
762	Mohini Mohan Misser v. Gour Chandra Rai	...	5 P L J 397; 1 P L T 390; 2 U P L R (Pat.) 123.
764	Ma Thu Daw v. Ma Ngwe Nu	...	*Lower Burma Chief Court.
764	Widhya Ram v. Sobha Ram	...	2 U P L R (B. R.) 43.
766	Manna Lal v. Karu Singh	...	1 P L T 6 **P. C.**
769	Bhawal Khan v. Emperor	...	13 S L R 215; 21 Cr L J 513.
771	Emperor v. Sundar	...	2 U P L R (A.) 115; 21 Cr L J 515.
774	Chanan Singh v. Emperor	..	1 L 218; 21 Cr L J 518; 108 P L R 1920.
775	Gowkaran Lal v. Sarju Saw	...	1 P L T 200; 21 Cr L J 519.
777	Nabi Bakhsh v. Emperor	...	1 L 216; 21 Cr L J 521; 109 P L R 1920.
778	Perry v. Official Assignee of Calcutta	...	31 C L J 209; 24 C W N 425; 47 C 254; 21 Cr L J 522.
801	Badami v. Karori	...	2 U P L R (B. R.) 48.
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PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

December 4, 1919.

Present:—Lord Shaw, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

Nawab Bahadur MUHAMMAD RUSTAM ALI KHAN SINCE DECEASED (NOW REPRESENTED BY *Nawab* MUHAMMAD SAJJAD ALI KHAN AND OTHERS) AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE MUNICIPAL COMMITTEE OF KARNAL CITY—DEFENDANTS—RESPONDENTS.

Highway—Dedication to the public—Intention to dedicate—Permissive use by tenants or their visitors, effect of—Dedication to a section of the public, whether sufficient—Punjab Municipal Act (III of 1911), ss. 3, 171—Public street, what is.

In cases where the existence of a public highway is in issue, it is of crucial importance to distinguish between the grant to the public as such of a right of way and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it. [p. 3, col. 2]

A public right of way can be acquired by user of, or by dedication to, the public in general. But in order to constitute a valid dedication to the public of a highway by the owner of the soil there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more, and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment. The *onus* of establishing such an intention lies heavily upon the person asserting the dedication. [p 4, col. 1.]

A person in dedicating land to public use may place such limits as he wishes upon the dedication. There may be a dedication to the public for a limited purpose as for instance an access to a particular building, or a footway, horse-way or drift-way, but there can be no such thing in law as a public right of way constituted by dedication to only a section of the public. [p. 3, col. 2; p. 4, col. 1.]

A plot of ground left open in a market owned by a citizen, and by its nature accessory to shop property and let by him as such to his shop tenants, and neither drained, lighted, nor cleaned by a Municipality would not form a public street, and if the Municipality enters upon it and builds a road across it in spite of the objection of the owner and without taking any steps under the Statute to acquire it, such action amounts to a trespass and the ground still remains the private property of the owner. [p. 4, cols. 1 & 2.]

Appeal from a decree of the Punjab Chief Court (Sir Donald Johnstone, KT., C. J., and Mr. Justice Scott-Smith), dated the 12th April 1916 and reported as 35 Ind. Cas. 458, reversing a decree of the Court of the District Judge, Karnal, dated the 23rd December 1912.

FACTS of the case sufficiently appear from their Lordships' judgment. That judgment, however, is incorrect in stating that the District Judge affirmed, and the decree of the Chief Court disaffirmed, the existence of a public street: on the contrary the District Judge negatived the existence of a public right of way and gave plaintiffs (the Nawab, now appellant) an injunction: but on appeal the Chief Court (Scott-Smith, J., and Johnstone, C. J.) reversed the decision and dismissed plaintiffs' suit.

Messrs. *De Gruyther*, *K. C.*, and *O'Gorman*, for the Appellants:—There is no evidence here from which a dedication to the public of the space between the shops can properly be inferred. The Nawab has held this market for a long time, but this is the first time that his ownership has ever been disputed. Before Act III of 1911 there was an Act XX of 1891 (Punjab) dealing with the same matter—*vide* sections 3 (*g*) and 75 (*g*): but between 1891 and 1911 the Nawab submitted to no acts impugning his absolute ownership. So far from being dedicated, the enclosure had gates, which were shut at night. The way in suit is an occupation way, not a highway.

[SIR LAWRENCE JENKINS.—If the Municipal Committee are right, you would have no right to close the gates. You have to ascertain if the Nawab had an intention to give.]

The right enjoyed by members of the public was limited to coming to the shops: it was enjoyed in the right of the tenants, not as members of the public.

Reference was made to *Poole* v. *Huskinson* (1), *Anderson* v. *Juggodumba Dabi* (2), *Municipal Commissioner of Bombay* v. *Mathurabai* (3), *Kalidas* v. *Municipality of Dhandhuka* (4).

[SIR LAWRENCE JENKINS referred to the Indian Easements Act, 1882, (Act V of 1882), section 21, illustration (*b*), and to *Barraclough* v. *Johnson* (5).]

The respondents did not appear.

JUDGMENT.

LORD SHAW.—This is an appeal from a decree of the Chief Court of the Punjab, dated the 12th April 1916, reversing a decree of the Court of the District Judge, Karnal, dated the 23rd December 1912.

The respondents in the appeal are the Municipal Committee of Karnal City. The proceedings had reference to an alleged public street in Karnal. The District Judge affirmed, and the decree of the Chief Court disaffirmed, the existence of such a public street.

The Municipality has made no appearance by Counsel at the Bar of the Board. Their Lordships are in the position of having to decide what *ex facie* is an important question of public right, in the absence of those who in the ordinary course would defend it. This has added to the difficulties of the case.

By section 3, sub-section 13, of the Punjab Municipal Act, 1911, "street" is defined to mean:—

"Any road, footway, square, court, alley or passage accessible, whether permanently or temporarily, to the public, whether a thoroughfare or not."

And by the same sub section "public street" is defined to mean any street—

"(*i*) over which the public have a right of way; or

"(*ii*) heretofore levelled, paved, metalled, channelled, sewered, or repaired out of the Municipal or other public funds; or

"(*iii*) which, under the provisions of section 171, is declared by the Municipality to be, or under any other provisions of this Act becomes a public street."

On one outstanding fact of the case there would appear to be no difficulty in the judgments of the Courts below, namely that, apart from the question now raised as to the street, the appellants are the absolute owners of Nawab Ganj, a market in the city. Notwithstanding the protest of the appellants, the Municipal Committee recently constructed a metalled road through the Ganj on the plea that the area over which the road was laid was a "public street" under the Municipal Act as above quoted

The Ganj is built in a form of a Katra or rectangular close, to which entrance is obtained by four gates. One of these gates was missing at the institution of the suit. The others existed and were shut at night. Round the close was a series of shops which were leased mostly to grain merchants. The enclosure thus formed is a narrow courtyard, on the floor of which the tenants pile up their grain in separate heaps, and under the courtyard there are masonary bins for storage. There seems little doubt that the solum of the courtyard was necessary, or at least most valuable, to the tenants of the shops, and these tenants not only paid rent for the shops, but paid dues for the use of the courtyard.

The Municipality have under their Act the ordinary powers of draining, cleaning and lighting. Prior to the operations complained of they never exercised any of such powers over the ground in issue, They never drained the courtyard. In the correspondence preceding the action, and in the pleading of the suit, they claimed, however, that the courtyard was municipally lighted; but it turned out, and has been so found by both Courts, that the only lighting was by two lanterns put up by or for a member of the Municipal Committee for his own convenience,

(1) (1843) 11 M. & W. 827; 152 E. R. 1039.
(2) 6 C. L. R. 282.
(3) 30 B. 558; 8 Bom. L. R. 467; 4 Cr. L. J. 23.
(4) 6 B. 686; 3 Ind. Dec. (N. s) 913.
(5) (1838) 8 A. & E. 99; 3 N. & P. 233; 1 W. W. & H. 162; 7 L. J. Q. B. 172; 2 Jur. 839.

As the learned Judges of the Chief Court say, "there is no evidence that the Mandi was properly lit by the Municipal Committee, and the putting up of these two lanterns does not prove that the place was a public one." The cleaning of the courtyard was never done by the Municipality; on the contrary, the responsibility for that was laid by them upon the appellants' predecessor. This important matter will be presently referred to.

A plot of ground of this character owned by one citizen, and by its nature accessory to shop property, and let by him as such to his shop-tenants, and neither drained, lighted, nor cleaned by the Municipality, would not appear in ordinary circumstances to form a public street. The only foundation for such a plea would be that which has been affirmed by the Court below, namely, that there existed through this Ganj a public right of way, and that this had been acquired by reason of dedication as such by the owner. The question in the case is whether this view is correct.

On this question it is admitted that there has been no dedication expressly or in writing. It appears also to be quite clear that there is no user of long duration from which an inference of such a dedication to the public would naturally arise.

Their Lordships have, however, examined the evidence of dedication relied upon by the Chief Court, and it may be at once stated that they found nothing therein which is adequate to support such a transaction.

The Board do not enter upon details, but feel inclined to cite the principal example of the evidence relied on by the Court below. It is that of Mr. Ram Chander. In the judgment appealed from it is stated "that he frequently passed through that part of the Kacha road which previously existed where the Pacca road now is. He is a perfectly independent witness, and we have no reason for disbelieving him."

Their Lordships entirely accept the description of the witness here given. On examination of his evidence, however, it turns out that for a few years back he has gone from his bungalow to his office "generally via Nawab Ganj Mandi." And he says:—

'There used to be a Kacha road previously at the place where the Municipal Committee has now built a Pacca road. I do not know whether it is a public road or not. I often pass by that road."

After explaining that his office has been in the neighbourhood only for the last seven or eight years, he adds:—

"There was no fixed way before the construction of the Pacca road. I used to pass by the way I could find. There was no drain on any side. Previously corn was generally stored on the road also. Some passage was left.....As there was no particular Pacca road and drain, corn was generally stored a little way off the centre. Most of the Banias objected to my passing. When I passed over the corn the shopkeepers objected, saying 'why do you go over the corn?'"

Their Lordships cite this as a sample not of evidence of dedication, but of evidence which is wholly insufficient to suggest dedication, to the public. It is in such cases of crucial importance to distinguish between the grant to the public as such of a right of way, and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it. In the present case it appears to their Lordships extremely doubtful whether the term "dedication" can with propriety be applied to what took place. If the term be employed, it can only be in this sense that the dedication of the solum of the courtyard was dedication not to the public, but to the uses of the shopkeepers and their customers, the principal use being the storing and display of grain. At night, when business was over, the place was shut up and the gates were closed.

It is true that members of the public would get access to a place which was used by customers, and might or might not pass through it. This on the point of dedication infers nothing. A person in dedicating land to public use may, of course, place such limits as he wishes upon the dedication, if he make those limits clear and definite. That is to say, he may announce to the public that a certain road is dedicated to it as access, say, to a particular building or for a particular purpose. But there can be no such thing in law as a

public right of way, constituted by dedication to only a section of the public. As Baron Parke said in *Poole* v. *Huskinson* (1):—

"There may be a dedication to the public for a limited purpose, as for a footway, horse-way, or drift-way; but there cannot be a dedication to a limited part of the public."

A further *dictum* of that very learned Judge may be also cited:—

"In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."

Upon this point the evidence appears to their Lordships to be substantially all in one direction. According to it, intention to dedicate (apart from the user, of which a sample has been given) there was none. On the contrary, so recently as the year 1902, the Municipality itself treated the Ganj not as public but as private property. On an application of the shopkeepers therein, the municipal authority wrote, to the propierter of the Ganj asking that a well should be protected by a wooden structure, while as to the right of way, etc., the Municipality put the matter thus:—

"The way in the market is in a very bad condition, and the sweeper deputed by the State does not do any work. A bad smell is spreading in the market. It is requested that the way in the market should be paved with concrete, because the income of the octroi duty of the market is deposited in the treasury of the Nawab. If you be so generous as to get this amount deposited in the Municipal Fund, the Municipal Fund shall be responsible for cleanliness and for getting the road in the market made Pucca, otherwise you should make your own arrangements in connection therewith."

No date is assigned by the Court below for the alleged dedication; but it cannot be said that it occurred after the date of this letter: and the letter itself is a negation of the idea of dedication to the public having been made.

Notwithstanding this, the Municipality entered upon the ground and built a road across it inspite of the objection of the Nawab and without taking any steps under this Statute to acquire the ground. In the opinion of their Lordships, this was a trespass. The ground still remains the private property of the appellants.

Their Lordships will humbly advise His Majesty that the appeal be allowed, and that the decree of the Chief Court of the Punjab, dated the 12th April 1916 be recalled with costs, and the decree of the District Court be restored. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Ranken & Chester.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 744 OF 1916.

August 28, 1919.

Present :—Sir Asutosh Mookerjee, KT.

KALYAN SINGH AND OTHERS—PETITIONERS

versus

RAMGOLAM SINGH AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151—Act of Court—Party, whether can be prejudiced by act of Court—Judge, duty of—Inherent power of Court to make order required by justice.

On an appeal coming before the High Court that Court suggested that the matters in dispute should be investigated in a separate suit; this was accepted by both parties, with the result that the appeal was not heard on the merits. It transpired, however, that the matters could not be so investigated, and the parties were thus relegated to the position of not having the matters in controversy between them decided by the High Court. In these circumstances an application was made to the High Court for restoration of the appeal so that it might be heard on the merits:

Held, that the Court had inherent power to make the restoration in order to enable it to discharge the duty cast upon it as a Court of Justice to determine the controversy between the parties, and that applying the maxim *actus curiæ neminem gravabit* (an act of the Court shall prejudice no man), the failure of the Court to decide a case after submission could not be permitted to defeat the substantial rights of the litigants. [p. 6, col. 1.]

KALYAN SINGH *v.* RAMGOLAM SINGH.

Rule in the matter of Appeal from Original Order No. 495 of 1904, decided by Maclean, C. J., and Mockerjee J., on the 12th February 1906.

Babus *Dwarka Nath Chuckerbutty* and *Kali Kinkar Chuckerbutty*, for the Petitioners.

Babus *Biraj Mohan Mozumder* and *Ramendra Mohan Mozumdar*, for the Opposite Party.

JUDGMENT.—This is an application to vacate an order made by the late Chief Justice Sir Francis Maclean and myself on the 12th February 1906 in Appeal from Original Order No. 495 of 1904. That appeal was directed against an order of the Subordinate Judge of Monghyr, dated the 6th June 1904, in the matter of an application for restitution in execution proceedings. The effect of the order of the Subordinate Judge was that the objection to the grant of restitution was overruled. The judgment of this Court which was delivered by the Chief Justice was as follows:—

"We think this case has fallen into a little confusion, possibly, speaking with all respect, by reason of the order made by a Division Bench of this Court; but let that pass. We suggested to the learned Vakil for the appellants that perhaps the best way to deal with the case would be that the appeal should be withdrawn, leaving it to the present appellants, who are the judgment-debtors and objectors, to bring a suit to recover possession of the property in dispute, the present decree-holders, respondents, undertaking that neither the present proceedings for restitution, nor the fact that the previous suit brought by the present appellants (No. 359 of 1900) was subsequently dismissed for non prosecution on the 5th of March 1903 shall in any sense be treated as a bar to any fresh suit which the present appellants may be advised to institute in relation to the disputed property. Both parties agreeing, we by consent make the order accordingly. We make no order as to the costs of this appeal."

This order was made in the presence of Mr. Digambar Chatterjee and Mr. Dwarkanath Chakrabarti who represented the appellants and of Dr. Rashbihari Ghosh, Maulvi Muhammad Yusoof and Mr. Haribhushan Mookerjee who represented the respondents. The parties and their representatives thought that a satisfactory way had been found for the investigation of the matters in controversy. On the 19th April 1911 a suit was instituted, as contemplated by the order of this Court, in the Court of the Subordinate Judge at Monghyr. The suit was tried on the merits and was dismissed on the 14th August 1912. The plaintiffs lodged an appeal in this Court on the 6th January 1913. The papers were printed in due course, and the appeal was set down for disposal before Fletcher and Richardson, JJ., on the 4th June 1915. The Court, of its own motion, raised the question, whether the suit could be maintained in view of the dismissal for non-prosecution on the 5th March 1903 of the suit of 1900. The question was not taken up at the instance of either party. The plaintiffs could not possibly raise a question as to the competence of their suit. The defendants, who had not raised any such objection in the trial Court and had obtained a decision on the merits in their favour, were anxious to have the dispute concluded by a pronouncement on the merits of the controversy by this Court. The Bench, however, notwithstanding the terms of the judgment of the 12th February 1906 and inspite of what had happened in the trial Court and what the litigant parties anxiously desired in this Court, proceeded to deal with the question of the maintainability of the suit, came to the conclusion that the suit was barred under section 103 of the Civil Procedure Code of 1882 and dismissed it on that ground. Fletcher, J., stated explicitly that as the point was one for which the plaintiffs themselves were not responsible, he thought there should be no order for the costs of the appeal. The plaintiffs, thus baffled in their search after justice, have applied to me to rescind the order made by Sir Francis Maclean and myself on their appeal on the 12th February 1906 so that the appeal may be restored and heard on the merits. I feel no doubt that the application should be granted in the interest of justice.

I am not called upon to consider the correctness of the decision of Fletcher and Richardson, JJ. I assume for the purposes of this application that the order was right and appropriate. The position thus is that the matter in controversy between the parties has never been decided by this Court

—not in 1906, because we were of opinion that it could be investigated by a separate suit, not in 1915 because another Division Bench of this Court took the view that the matter could not be investigated in a separate suit. The parties are in no way to blame for the embarrassing situation in which they now find themselves. The judgment of Sir Francis Maclean makes it abundantly clear that the suggestion first came from the Court that the matters in dispute should be investigated in a separate suit, and, as might be expected, it was accepted by both the parties. The result was that the appeal was not heard on the merits. This course was adopted on the assumption that the question could be investigated in a separate suit. That anticipation has not been realised. In such circumstances, the Court has inherent power to vacate the order to enable it to discharge the duty cast on it as a Court of Justice to determine the controversy between the parties. It would constitute a just reproach to the administration of justice by this Court, if a litigant were sent from post to pillar and from pillar to post without even ultimately obtaining a hearing on the merits of his case. In the events which have happened here, the maxim applies *actus curiæ neminem gravabit*, an act of the Court shall prejudice no one. This maxim is, in the language of Cresswell, J., in *Freeman* v. *Tranah* (1), founded upon justice and good sense and affords a safe and certain guide for the administration of the law. It is the duty of a Judge to try the causes set down for trial before him, and the failure of the Court to decide a case after submission cannot be permitted to defeat the substantial rights of a litigant. There is thus no escape from the conclusion that the order made by Sir Francis Maclean and myself on the 12th February 1906 should be vacated.

The opposite party has laid stress on the delay which has taken place in bringing this matter before the Court. The judgment of Fletcher and Richardson, JJ., was pronounced on the 4th June 1915. The application was ready on the 20th December 1915, though it was not actually moved before me till the 1st September 1916. Mr. Dwarkanath Chakrabarti, who was in charge of the matter, has explained that though the papers were made ready, he really found it difficult to advise his clients as to the appropriate procedure, in view of the extraordinary circumstances of the case, which, he added, were unique in his long experience. He further stated that an additional difficulty was created by reason of the fact of the establishment of the High Court at Patna. Finally, the matter was mentioned to me in Court much earlier than the date on which it was actually heard. In all these circumstances, I thought that a Rule should be issued and I have heard nothing to change my opinion.

The result is that the Rule is made absolute and the order of the 12th February 1906 revoked. The consequence will be that Appeal from Order No. 495 of 1904 will stand restored to the file of this Court as an undisposed of appeal and will be heard by such Bench as may be appointed by the Chief Justice by virtue of the authority vested in him.

As regards the costs of this Rule, it has been argued by the opposite party that they are not responsible for what has happened; that they have been throughout ready and willing to submit to a decision on the merits by this Court, both in the appeal from original order and in the appeal from original decree; and that in view of the peculiar circumstances of the case, they were bound to enter appearance in this Rule. There is much force in these contentions and they point to the conclusion that the opposite party should have the costs of this Rule. We assess the hearing fee at five gold *mohurs*.

The records will be retained in this Court till the final disposal of the appeal.

Rule made absolute.

(1) (1852) 12 C. B. 406; 21 L. J. C. P. 214; 16 Jur. 1141.

RADHA KISHEN v. RATTAN LAL.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2443 OF 1919.

March 26, 1920.

Present:—Mr. Justice Chevis, Acting Chief Justice.

RADHA KISHEN—DEFENDANT—APPELLANT

versus

RATTAN LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Enhancement of rent, effect of—Agreement to vacate within one month of receipt of notice—Notice to quit not expiring with end of month, validity of—Transfer of Property Act (IV of 1882), . 106.

Mere enhancement of rent does not put an end to an existing tenancy. [p. 8, col. 1.]

Defendant executed a lease in plaintiffs' favour on the 30th August 1916, under which rent was fixed at Rs. 16 per mensem payable on the 2nd day of each Hindi month. The lease also contained an agreement to the effect that the defendant would within one month of receipt of notice pay the rent and vacate without objection. On the 27th May 1917 the parties agreed to raise the rent to Rs. 40 per mensem, but there was no other change in the terms of the tenancy. On the expiry of the lease on the 30th August 1917 no new lease was executed. On the 8th August 1918 plaintiffs sent defendant a notice to vacate within one month from receipt of notice This notice was received by the defendant on the 10th August, which was the 3rd day of a Hindi month. The defendant having failed to vacate, the plaintiffs sued for ejectment and for recovery of rent:

Held, (1) that the raising of the rent to Rs. 40 per mensem did not create any fresh tenancy and after the expiry of the lease the old terms still continued to apply as no fresh ones were agreed upon. [p. 8, col. 1.]

(2) that as there was a clear contract in the lease to vacate at one month's notice, section 106 of the Transfer of Property Act did not apply and the notice was perfectly valid, even though it was not received on the 2nd day of the Hindi month. [p. 8, col. 1]

Bradley v. *Atkinson*, 7 A. 899: A.W.N. (1885), 288; 4 Ind. Dec. (N. S.) 990; *Sahtawan* v. *Mohan Singh*, A. W. N. (1896), 51; *Shaikh Sona Ullah* v. *Troylukho Nath Gorai*, 2 C. W. N. 383, distinguished.

Second appeal from the decree of the District Judge, Delhi, dated the 3rd November 1919, reversing that of the Munsif, 1st Class, Delhi, dated the 13th August 1919.

Mr. *Des Raj Sawhny*, for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—The plaintiffs are the landlords, defendant is the tenant of a shop in Delhi City.

Plaintiffs sue for ejectment and rent.

There was a lease, dated 30th August 1916, under which rent was fixed at Rs. 16 per mensem payable on the 2nd day of each Hindi month. One clause in the lease is: "When the landlords want me to vacate I will, within one month of receipt of notice, pay my rent and vacate without objection."

On 27th May 1917 the parties agreed to raise the rent to Rs. 40 per mensem but there is no evidence as to any other change in the terms of the tenancy. The lease expired on 30th August 1917, but no new lease was executed. On 8th August 1918, the plaintiffs sent defendant a notice to vacate *within one month from receipt of notice*, rent in default to be at Rs. 125 per mensem. This notice was received by defendant on the 10th August, which was the 3rd day of a Hindi month.

The first Court gave a decree for rent only, holding that the notice was invalid as it was a monthly lease and the notice did not expire concurrently with the end of a month of the tenancy. The learned District Judge on appeal held that the notice was valid as it complied with the terms of the old lease which were still in force, and he gave a decree for ejectment as well as for rent, including rent for one month at Rs. 125. The defendant appeals to this Court.

As a matter of fact it does not much matter whether the decree for ejectment stands or not, as I am told by defendant's Counsel that defendant still holds possession by a new arrangement, paying Rs. 80 per mensem as rent.

Two points are argued before me, (1) that the notice was invalid, and (2) that the rent for the last month decreed by the District Judge at Rs. 125 is unreasonably high.

As to (1) reliance is placed on *Bradley* v. *Atkinson* (1), *Sahtawan* v. *Mohan Singh* (2) and *Shaikh Sona Ullah* v. *Troylukho Nath Gorai* (3) and it is urged that the Munsif's decision is correct. But all these rulings relate to cases where there was no contract, and section 106 of the Trans-

(1) 7 A. 899; A. W. N. (1885), 288; 4 Ind. Dec. (N. S.) 990.
(2) A. W. N. (1896), 51.
(3) 2 C. W. N. 383.

fer of Property Act applies to such cases. "But that section begins by saying in the absence of a contract to the contrary," so where there is a contract to the contrary the section does not apply. Here we have a clear contract in the lease to vacate at one month's notice, the month to count from date of receipt of notice. So I consider the notice was perfectly valid, even though it was not received on the 2nd day of the month.

No authority has been cited for the proposition that mere enhancement of rent put an end to the old tenancy. For plaintiffs, on the other hand, Woodfall's Law of Landlord and Tenant, 19th edition, page 259, and Lord Halsbury's Laws of England, Volume 18, pages 467 and 550, are cited. I hold that the raising of the rent to Rs. 40-0-0 created no fresh tenancy. After the year expired the old terms would still apply, as no fresh ones were agreed upon. The notice was then quite valid in my opinion.

As to rent I think Rs. 125 rather unreasonable. The new terms to which the parties have now agreed seems to me a good guide.

I accept the appeal only so far as to reduce the rent for the last month, covered by the District Judge's decree, from Rs. 125 to Rs. 80.

The appeal fails in other respects and the defendant must pay costs in this Court.

Costs in the lower Courts to be as ordered by the District Judge.

Appeal partly accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 123 OF 1918.

August 28, 1919.

Present:—Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

NURUNNESSA KHANUM—

PLAINTIFF—APPELLANT

versus

Khoja MUHAMMAD SAKRU—

DEFENDANT—RESPONDENT.

Muhammadan Law—Dower, claim for, nature of—Relinquishment of dower, valid, requisites of—Burden of proof.

There is nothing in the Muhammadan Law to render valid the relinquishment of a claim for dower which was prompted when the lady was not a free agent or in a position to exercise free and deliberate judgment, and was under an influence which she was not in a position to overcome. [p. 11, col. 1.]

According to Muhammadan Law, the character of the obligation to pay the dower is a debt. The moment the dower is settled it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may, therefore, deal with or dispose of it before taking possession of the same. The dower is the right of the woman solely; and hence it is that she is empowered to give it up or relinquish it in the continuance of the contract. As the debt is enforceable under the Contract Act, it can also be released under section 63 of that Act. [p. 10, col. 2]

There is nothing in the Muhammadan Law which requires that a relinquishment of a claim for dower, to be valid, must take place immediately after the husband's death. The lady can relinquish it at any time. No consideration is needed for such relinquishment, but it must be shown that the lady had the opportunity of considering the matter when it is said she gave up her claim. [p. 11, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Dacca, dated the 22nd December 1917.

Babus *Dwarka Nath Chuckerbuty* and *Sasadhar Roy* (*Sr.*), for the Appellant.

Babus *Mahendra Nath Ray* and *Bhupendra Chandra Guha*, for the Respondent.

JUDGMENT.—This is a suit for dower by a Mohamedan lady of rank against her husband's brother. The husband died on the 13th April 1913, leaving her and his brother his legal heir. The claim is based upon a Kabinnama said to have been executed on the 27th July 1907, when the lady was a minor. The dower settled was Rs. 15,000, one-half payable on demand and the other half on dissolution of marriage. She attained majority in January 1913, that is, about three months before the death of her husband. That there was a Kabinnama was disputed by the defendants and it was also said that she had verbally relinquished her claim for dower after the death of her husband and thus released the estate from liability. The learned Subordinate Judge has held the first point in the plaintiff's favour, and as regards the second point he discusses the evidence and says that although there are minor discrepancies, he is 'inclined to believe that

the plaintiff released the dower" when her husband's dead body was being removed.

It was argued on behalf of the plaintiff that even if it be so held, effect ought not to be given to any words of release she might have used, as she was then overwhelmed with grief and could not have made a relinquishment of her free-will that there was evidence that her mother and sister urged her at that time to make such a remission and that such release, if any, ought not to be considered as valid and binding upon her. The learned Subordinate Judge "did not think there was any force in this argument, as the plaintiff knew that it was her sacred duty to make her late husband free from liabilities to her, and she released her dower voluntarily although her sister and mother might have reminded her of her duty at that time, when it was the duty of every near relation to bid good-bye to the departed soul and wish him a safe voyage to his place of rest." This issue having been held in the defendant's favour and her suit dismissed, she has preferred this appeal.

It is an admitted fact in the case that "the plaintiff and her late husband had very great love for each other, and that she became overwhelmed with grief for his untimely death" (paragraph 7, written statement). What happened at the time the dead body was taken away is described by the defendant's witness Saliman Bibi in this way: "There was great noise there on account of crying. At the time of seeing the dead man's face, Nurunnessa's mother and sister held her and took her there. They took her there near the dead body to show her his face. The face was shown while they stood in front of the door of the hall. They were within the hall when they saw the face. Even when she was looking at the face, Nurunnessa (the plaintiff) was crying loudly ... ... Nurunnessa said this when she forgave 'I have relinquished my claim to Rs. 10,000 as dower, May God also pardon you' ... ... The dead body was taken away as soon as the face was shown." Another witness Mahabatjan said "The ladies were in the hall; they saw the face; the plaintiff was amongst the ladies; ... ... She began to weep very much; her mother and her sister requested her not to weep but to do her duty then and forgive the Moharana. She then gave up her Moharana saying: 'I have forgiven my Moharana, may God also forgive you.' She said this while she was weeping, ... The plaintiff was weeping very much at the time of seeing the face ... ... when she came to see the dead body her mother or sister took her there by holding her arm; her arm was being held when she gave up the claim." Khaja Enaet Hossein said: "The plaintiff then saw the face and wept aloud; her elder sister then told her to give up the Moharana; the plaintiff while weeping said 'I have forgiven my Moharana, God will also.' The dead body was then taken out." Khaja Fakirulla said: "The plaintiff was brought to the front of the door frame by her mother, her elder sister, Musa Miah's mother and my sister Latifunnessa Bibi. The plaintiff was weeping then; she was overwhelmed with grief ... ... The plaintiff's mother said something to her and her sister too said something."

It has been argued before us that even if the discrepancies in the statements of the witnesses as regards the amount and the manner in which the Moharana was said to have been given up be overlooked and the finding of the Subordinate Judge that the plaintiff relinquished her dower at that time be accepted, yet no effect should be given to it, as an act of that character must be shown to have been voluntarily and deliberately made; that her free will and deliberate judgment had been exercised. If it was a case of a document executed at that time relinquishing her dower, the Court would have required proof that she had independent advice, and was capable of exercising her judgment, that she was free from influences. It was argued that a lady in that state of mind, at such a critical time and in such surroundings was likely to be greatly influenced by any expressions of opinion that her act was a meritorious and a religious one and she might thus have felt impelled to make a relinquishment, but advantage ought not to be taken of that fact and effect ought not to be given to it, when she is not prepared to give up her claim after consideration, that there is nothing in the Muhammadan Law that

such relinquishment cannot be made except on that occasion.

Baillie in his Digest says (2nd Edition, part I, page 55?, 1875) that "the gift of dower to a dead husband is valid on a favourable construction of the law." A footnote adds "to release him from responsibility at the date of judgment." Ameer Ali in his Muhammadan Law, 4th Edition, Volume 1, Chapter II, section 111, page 174, says, "A woman may release her dower to her deceased husband, that is, a widow is entitled to exonerate or discharge the estate of her deceased husband from the liability of her dower-debt." In the 4th Edition of Wilson's Digest of Muhammadan Law we find a new section added as 47A, which runs thus: "The release of dower by a wife to husband is expressly sanctioned by the Koran (K. IV 4, which is a mistake for IV 3) and is, therefore, not void for want of consideration." The passage in the Koran runs thus: "Give the women their dower freely; but if they voluntarily remit unto you any part of it enjoy it with satisfaction." Sale's Koran IV 3; see Wherry's Edition (Trubner's Oriental Series), Volume II, page 69. The same Surah is translated by Rodwell thus:—"Give women their dowry freely: but if of themselves they give up aught thereof to you, then enjoy it as convenient and profitable." (The Koran: Everyman's Library Edition, page 411). The above passage refers to remission of the dower to the husband in his lifetime. "Voluntarily" in its ordinary sense means freely, without compulsion, not under any obligation: *Att.-Gen.* v. *Ellis* (1). It was held in *Jyani Begam* v. *Umrao Begam* (2) that according to Muhammadan Law a dower is a debt and its remission by a widow without acceptance by the heirs of the husband is effective. It was argued in that case that according to Muhammadan Law the remission of a debt extinguishes it and it is not necessary that there should be any acceptance of the remission on the part of the debtor. It was contended on the other hand that the formlua pronounced "I have given up my dower for the sake of God and his Apostle" showed that the remission was in the form of a Sadaka (religious gift), that a gift according to the Muhammadan Law requires tender, acceptance and seisin (Hedaya, 2nd Edition, Book XXX, Chapter I, page 482): that the intention of the donor ought to be declared in the presence of the donee and in the case of Sadaka, seisin is necessary (Hedaya, page 489). The learned Judge accepted the view that according to Muhammadan Law a debt remitted is a debt extinguished and that no acceptance is required. In *Abi Dhunimsa Bibi Ammal* v. *Muhammad Fathiudini* (3) it was held that a relinquishment of her right to dower by a Mahomedan woman, who is a minor under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872). That case decided as to whether the relinquishment of a dower was "an act in the matter of the dower" and protected by section 2 of the Indian Majority Act. Both the above cases are not of much help in this case. According to the Muhammadan Law it is well established that the character of the obligation to pay the dower is a debt. The moment the dower is settled it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may, therefore, deal with or dispose of it before taking possession of the same. [Shama Charan Sircar's Muhammadan Law, Tagore Lecture (1874) page 361]. The dower is the right of the woman solely; and hence it is that she is empowered to give it up or relinquish it in the continuance of the contract. (Hamilton's Hedaya, Book II, Chapter III, page 45.) As the debt is enforceable under the Contract Act, it can also be released under section 63 of the Contract Act, but the question is whether the remission which is said to have been made in this case can be considered as binding upon the lady and irrevocable. We think that in all such cases free assent must be established. It might be shown that the lady voluntarily and deliberately gave up her right. It is quite true that members of the family to which she belonged knew the precept in the Koran, if it can be so called; and she also knew instances in her own family where dower had been given up and that it was looked upon as a meritorious act. But she was overwhelmed with grief at the time, the body was just about to be removed for burial and that

(1) (1895) 2 Q. B. 466; 64 L. J. Q B. 813; 15 R. 584; 73 L. T. 190 & 350; 44 W. R. 13; 59 J. P. 774.

(2) 32 B. 612; 10 Bom. L. R. 764.

(3) 44 Ind. Cas. 293; 41 M. 1026; 23 M. L. T. 78; (1918) M W. N. 246; 35 M. L. J. 465.

very near relatives spoke to her about its being a meritorious act. She was surrounded by female relatives and it is very natural that under those circumstances a very young woman was led to say something which was understood as a relinquishment of her dower debt, without having considered the matter from her personal point of view and under a sudden emotional impulse. Circumstances of this character have impelled Hindu women to perform the Sati. If a document had been given by this lady at that time—relinquishing her rights in favour of the heir, it would have been looked upon with disfavour and we think that an alleged verbal relinquishment under such circumstances ought not to be favoured. There is nothing in the Muhammadan Law that such relinquishment, to be valid, must take place immediately after the husband's death. She can relinquish it at any time. It can be remitted in favour of the heir after the husband's death. No consideration seems to be needed for such relinquishment, but what we have to see is whether she had the opportunity of considering the matter when it is said she gave up her claim. She was in the presence of death and in great mental distress. She had no time for freedom of thought and action. It is also conceded by the learned Vakil for the respondent that free assent must be established. That is a question irrespective of Muhammadan Law. We think she was prompted and was not a free agent at the time. She was not in a position to exercise free and deliberate judgment and influence was exercised which she was not in a position to overcome. It is immaterial that she was influenced by her own mother and sister. Under those circumstances we are unable to uphold the alleged relinquishment as valid.

The learned Subordinate Judge has drawn an adverse inference against her from the fact that the Kabinnamah is not forthcoming. He thinks that inasmuch as the lady relinquished her claim it was not looked upon as a valuable document and that no care was taken to preserve it. The fact is that it was with the mother who is dead, and it cannot be found. The loss of the document need not be taken against her. She has married again and it may be that she has been influenced by her present husband to make the claim, but it is a legal debt which was due to her and which is not time-barred. She is in possession of some of the husband's immoveable properties. That debt, according to the Muhammadan Law, is a lien upon the property in her possession. It was argued that the lien could not be discharged by a verbal relinquishment; that under the Registration Act it was necessary to have a registered document. There is some force in this contention, but even if we do not accept it as correct, having regard to the circumstances of the case we cannot hold that the relinquishment is operative.

After the case had been fully argued before us, an application was made yesterday on behalf of the respondent that he should be allowed to argue certain other points which we were told his Vakil considered worthy of discussion, namely, that there was no sufficient evidence about the due execution of the Kabinnamah and also about its loss. No points other than those referred to in our judgment were even indicated when the appeal was argued. The arguments took the best portion of two days and we think it is too late to re-hear the matter. We cannot do so in the absence of the other side. One of us is going to leave India for six months, and this is the last day before the long vacation. We are unable to accede to the prayer.

We allow the appeal with costs in both Courts. There will be a decree for Rs. 15,000 in favour of the plaintiff against the estate left by her husband Khaja Mahomed Arjoo, with interest at 6 per cent. from date of suit.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 189 OF 1920.

March 26, 1920.

Present:—Mr. Justice Martineau.

AHMAD YAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAADULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Abadi—*Mortgage of house by non-proprie-*

tor—Presumption—Suit for possession, whether maintainable.

The initial presumption is against a non-proprietor being able to alienate the site of, and his right of residence in, his house without the consent of the proprietary body.

In the case of such an alienation the proprietors are entitled to a decree for possession.

Second appeal from the decree of the District Judge, Mianwali, dated the 8th November 1919, reversing that of the Munsif, 1st Class, Mianwali, dated the 27th May 1916.

Mr. *Abdul Razaq*, for the Appellant.

Lala *Bishen Nath*, for the Respondents.

JUDGMENT.—The house and courtyard in suit were in the possession of Rahman. He has died and his nephews (defendants Nos. 1 and 2) have mortgaged the property to defendant No. 3. The present suit for possession of the property was first brought by Bakhtan, widow of Kamal, but Kamal's sons were afterwards substituted as plaintiffs. They alleged that the property belonged to their father Kamal, who had given it to Rahman for residence, and they disputed the right of defendants Nos. 1 and 2 to mortgage it.

The defendants denied these allegations and pleaded that they had been in adverse possession for more than 12 years.

The Munsif found that the site belonged to the plaintiffs, but that it was Rahman who had built the house on it, and that the defendants' possession was not adverse. He gave the plaintiffs a decree for possession of the site, with permission to the defendants to remove the materials of the house.

On the defendants' appeal the District Judge, after referring to a clause in the *wajib-ul-arz* with regard to the non-proprietors, held that there had been no abandonment of the house by the defendants, who were still living in the village, and apparently on this ground he accepted the appeal and dismissed the suit.

The plaintiffs have filed a second appeal in this Court.

The District Judge does not appear to have understood the case correctly, for no question of abandonment arises at all.

In the first place both the Courts below have assumed that defendants Nos. 1 and 2 are non-proprietors, though it does not appear to have been admitted that those defendants are non-proprietors and their Counsel does not admit it.

In the second place if they are non-proprietors, the question then to be determined is whether they were entitled by custom to alienate the site and their right of residence in the house to defendant No. 3, the initial presumption being against them (paragraph 236 of Rattigan's Digest of Customary Law). This point has not been gone into at all. If the custom (supposing that the defendants allege it) is not proved, the mortgage to the third defendant is invalid.

It is contended for the respondents that even if the mortgage was invalid, the plaintiffs would not be entitled to possession of the property during the lifetime of the mortgagors, but this contention does not appear to be correct as there are several cases in which decrees for possession have been given, *e.g.*, *Mirza* v. *Samdili* (1), *Kahan Singh* v. *Waris Khan* (2) and *Mal Singh* v. *Munshi Ram* (3). If defendants Nos. 1 and 2 are non-proprietors and are not competent by custom to alienate the site or their right of residence, the plaintiffs would apparently be entitled to a decree.

I accept the appeal, set aside the decree of the District Judge, and remand the case to him under Order XLI, rule 23, Civil Procedure Code, for fresh disposal of the appeal before him with reference to the foregoing remarks. The Court fee paid on the appeal in this Court will be refunded. Other costs will be costs in the case.

Appeal accepted;
Case remanded.

(1) 99 P. R. 1892.
(2) 48 P. R. 1899.
(3) 7 Ind. Cas. 711; 69 P. R. 1910; 96 P. W. R. 1910; 125 P. L. R. 19.0.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1325 OF 1918.

December 11, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Sesbagiri Aiyar.

KOLANGERETH RAMAN NAIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOLIMATAMULLATHIL MARIYOMMA AND OTHERS—DEFENDANTS Nos. 2 TO 7—RESPONDENTS.

Malabar Law—Landlord and tenant—Denial of title—Forfeiture—Denial, what amounts to—Kudima *and* adima tenures—*Denial to render service—Resumption, liability to.*

In order that a denial of the landlord's title by a tenant may operate as a forfeiture of the tenancy, such denial must be brought home to the knowledge of the landlord, and it must be unequivocal and clear. The mere acceptance and retention by a tenant of a document in which he is spoken of as the *jenmi* would not operate as a denial of the landlord's title, but the setting up of a prescriptive title would. [p. 14, col. 2.]

In the case of *kudima* and *adima* tenures in Malabar, a grant made for past services cannot be resumed, but a grant made for future services, can be resumed for failure to perform the services and a denial of title is tantamount to a denial to render services [p. 15, col. 2; p. 16, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Tellichery, in A. S. Nos. 465 and 477 of 1916 (A. S. Nos. 345 and 362 of 1915, District Court), preferred against the decree of the Court of the District Munsif, Kuthuparamba, in O. S. No. 707 of 1913.

FACTS.—Suit in ejectment on the ground of forfeiture consequent on an alleged denial of title. The tenure is Kudima Jenmam and the tenancy comprises three items And the date is more than 60 years prior to the alleged denial of title. Kudima Jenmam is a permanant tenure which confers substantial rights on the tenant. Both the Courts below dismissed the suit. The defendants say in their written statements that at a prior date they denied the landlord's title.

This second appeal come on for hearing on the 19th March 1919 (Oldfield and Seshagiri Aiyar, JJ.)

Mr. *K P. M. Menon*, for the Appellants.—Where there is an unequivocal repudiation of the proprietary title of the landlord, forfeiture is worked and the landlord can eject. No doubt, if the denial is purely incidental as by a mention of same in dealing with properties other than the subjects of the tenancy, there may not be a forfeiture. When it appears from the pleadings of the tenants that at a prior date they repudiated the landlor's title, that is sufficient to prove the denial.

Mayan Thariyakath Kathijakutti Umma v. *Ithikamparambil Kuthussa* (1) (the allegation of purchase before suit).

[OLDFIELD, J.—The denial, if any, is communicated to the landlord only by the written statement which is after suit and so is of no value.]

Communication to the landlord is not necessary. The very object of forfeiture clauses would make it unnecessary.

Kizhekkekath Komalukutti v. *Puthiakath Muhamad* (2) has no application to the present case, for the denial was made only incidentally. Here the tenant's sub-tenant has described the tenant as the holder of the Jenmabhogam and necessarily the counterpart would contain the same description by the tenant himself. An oral assertion is quite sufficient for the purpose. And the counterpart may have been oral.

There is no authority, legislative or judicial, for the positions that the denial must be addressed to the landlord.

[SESHAGIRI AIYAR, J.—See Napier, J., in *Kizhekkekath Komalukutti* v. *Puthiakath Muhamad* (2).

Only if the Transfer of Property Act applies, where an overt act by the landlord is necessary. See *Rama Iyengar* v. *Anga Gurusami Chetti* (3). But where the filing of the plaint for ejectment is sufficient, no communication is necessary.

[OLDFIELD, J.—The principle of the Transfer of Property Act is followed in the case of agricultural leases.]

No doubt the principle is followed, but the overt act and the communication which is thereby rendered necessary form a special feature of the Act and not of the general principle.

And the repudiation need not be verbally direct or express.

(1) 5 Ind. Cas. 924; 20 M. L. J. 415; 7 M. L. T. 173; (1910) M. W. N. 158.
(2) 45 Ind. Cas. 743; (1918) M. W. N. 200; 41 M. 629; 34 M. L. J. 170; 23 M. L. T. 178; 7 L. W. 291.
(3) 46 Ind. Cas. 62; 8 L. W. 102; 35 M. L. J. 120

Venkata Chariar v. *Ranjaswami Ayyangar* (4) is a similar case.

Mr. *Mir Zynuddin*, for the Respondent.—Rule 187 of the Civil Rules of Practice. The plaintiff Devaswom had notice of the claim petition put in by us, when these lands were attached as belonging to the Devaswom. No notice need be given under rule 187. Further there has been acceptance of rent subsequent to the alleged forfeiture and so forfeiture has been waived. Even if forfeiture has not been waived, we have perfected our title by limitation and adverse possession. Though it is alleged that the landlord came to know of the forfeiture only in 1915, there is no finding that it was so. Claim by adverse possession is resisted by saying that rent was being received. That is found against. Under Article 143 no knowledge is necessary and the date when the forfeiture is incurred is the material date.

JUDGMENT.—The first question in this case is whether there is a denial of title and if so, does the denial cover all the items in the suit or only some. The 2nd question is, supposing there is a denial, whether, having regard to the nature of the tenure, no forfeiture is incurred. On the first question the Subordinate Judge had made some obvious mistakes which have confused the issue. He is clearly wrong in saying that the denials in Exhibits II, III, and IV are only repetitions of the denial in Exhibit D. Exhibit D relates to item I. Exhibits II, III and IV relate to items 2 and 3, and the nature of the denials in these two sets of documents is altogether different. Exhibit D will be considered later on. As regards the other documents we may first deal with Exhibit II, as observations with regard to one of them would apply to the others as well. Exhibit II is a sub lease executed to the defendants. In that, the sub lessee uses the expression with reference to the property demised "belonging to you the Jenmi." In another place the language used is "without the Jenmi's permission." Mr. Menon argued that as the defendant accepted these documents without raising objection to the language employed, he must be deemed to have tacitly assumed the role of a Jenmi and to have denied the title of the plaintiff. This seems to be a very far-fetched suggestion. It is well-understood in this Presidency that the denial must be brought home to the knowledge of the landlord and it must be unequivocal and clear. In *Kichekkekath Komalukutti* v. *Puthiakath Muhamad* (2) and in *Rama Iyengar* v. *Anga Guruswami Chetti* (3) this principle was distinctly stated. See also the decision in *Venkatachariar* v. *Narasimha Ayyangar* (5) Here the defendant did no act which can be said to amount to a denial of the title of his landlord. It has not been pointed out to us that the landlord was made aware of any denial of title by the defendant. Under these circumstances the receipt and retention of a document by the defendant in which he is spoken of as the Jenmi could not operate as a denial of the plaintiff's title. Therefore, so far as items 2 and 3 are concerned, the decision of the lower Appellate Court should be confirmed though not for the reasons given by it.

The case as regards item 1 is different. The alleged denial is contained in Exhibit D. That was a claim petition presented in the year 1876 by the defendants' predecessor-in-title. The occasion for this claim was an attempted sale of the property in execution of a decree against the plaintiffs' predecessor-in-title. In the claim it was stated that the property should not be sold as the "Jenm right of the Devaswom on this Paramba is barred by limitation." This is in effect denying the title of the Jenmi to the property. In Foa on Landlord and Tenant it is stated that the setting up of a prescriptive title would amount to a denial of the landlord's title. The decision in *Neall* v. *Beadle* (6) is referred to. Although that judgment is not quite explicit on the point, it stands to reason that where a tenant impeaches the title of the landlord on the ground that there is no subsisting title as the property vested in him by virtue of adverse possession, such an attitude should be regarded as amounting to a denial of title.

(4) 51 Ind. Cas. 709, 9 L. W. 282; 25 M. L. T. 223; 36 M. L. J. 532; (1919) M. W. N. 336.

(5) 48 Ind. Cas. 301; (1918) M. W. N. 846; 35 M. L. J. 647; 24 M. L. T. 469; 9 L. W. 164.

(6) (1913) 107 L. T. 646; 57 S. J. 77.

Now comes the important question, whether having regard to the nature of the estate in the possession of the defendants such a denial would entail forfeiture. It is now well established in this Presidency, following the Privy Council ruling in *Abhiram Goswami* v. *Shyama Charan Nandi* (7), that a perpetual lease can be forfeited by the tenant denying the title of the landlord. In the present case the defendants claim that they have been in possession of the property for a very long time and that they have made improvements upon the property. The plaintiffs' allegation is that the properties in suit belong to the Devaswom of which the plaintiffs are Uralans and that they were leased to the Tarwad of the defendants on Kudima Jenmam. As to when it was so leased and whether it was within the memory of man, does not appear. The findings of the Court below, which may be accepted, are that the property belonged originally to the plaintiffs' Devaswom and that the 1st defendant's predecessors must have come into possession at some time under the Devaswom The contention of the respondents is that a Kudima or Adima right is not resumable under any circumstances. There are no considered decisions upon the point. In *Thikkillath Tarawad* v. *Manchu Nair* (8) it was held that an assertion of Jenmam right by the Kudima will not work a forfeiture so as to enable the landlord to eject him. The decision cited by the learned Judges is not applicable to the present case. On the other hand in Second Appeal No. 1413 of 1903 Benson and Krishnaswami Aiyar, JJ., confirmed a judgment of Mr. Phillips as District Judge, in which he held that an Adima right can be forfeited by denial of title. The judgment of the High Court simply says: "We think it is a perpetual lease. The second appeal is dismissed with costs." In Second Appeal No. 987 of 1904 Benson and Wallis, JJ., upheld the decision of Mr. Venkatramana Pai, the District Judge, who refused to disturb the Kudima tenant from his holding although there has been a denial of title. In the judgment of the High Court there was no discussion of the question.

A consideration of the nature of the tenure suggests that this case cannot be disposed of without further enquiry. In Graem's Glossary an Adima Grant is described thus:—

"The Adima Grant of a Paramba or garden was also often conferred by a superior lord, or Tala Udaya Tamburan, upon his own Adiyan or vassal; but here it was in the nature of an Inam or gift, no consideration having been received for it by the proprietor. An annual trifling tribute of superiority is, however, reserved to the proprietor to prevent the garden being entirely alienated. The garden reverts to the proprietor on failure of heirs on the part of the Adiyan, and if the Adiyan takes part with the enemies of his patron, the latter may resume the property. Under any other circumstances the Adiyan cannot be dispossessed, and he has the right of burial within the garden."

'In this (describing a Kudima grant) the land is made over in perpetuity to the grantee, either unconditionally as a mark of favour, or on condition of certain services being performed. The terms Adima and Kudima mean a slave, or one subject to the landlord, the grant being generally made to such persons. A nominal fee of about two fanams a year is payable to the landlord to show that he still retains the proprietary title. Land bestowed as a mark of favour can never be resumed; but where it is granted as remuneration for certain services, to be performed, the non-performance of such services, involving the necessity of having them discharged by others, will give the landlord power to recover the land. The non-payment of the annual fee will form no ground for ousting the grantee, but it will be recoverable by action. The hereditary property of Native Princes cannot be conferred on this tenure, the Ruling Prince having only the right of enjoyment during life without power to alienate" (Proceedings of the Court of the Sadder Adalat No. 18, dated 5th August 1856).

Logan in his Malabar Law accepts the above description. In the report submitted by the Malabar Land Tenures Commission the above quotation is accepted as correctly defining the Kudima and Adima Tenures. The question in this case is whether the

(7) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 14 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 (P. C.).

(8) 27 Ind. Cas. 863; 2 L. W. 102.

grant was made for past services or for future services. If the former, apparently the tenure cannot be resumed. If the latter, there can be no question that for failure to perform the services the lands can be resumed. It may be taken that the denial of title is tantamount to a denial to render services. Therefore, before finally deciding the case, it is necessary to call for a finding whether the Devaswom granted the lands in question to the defendants' Tarwad for past services or for future services.

A further question must also be considered by the lower Court. Exhibit D is dated 1876. Since its date it was suggested the Devaswom has received the prescribed rent and has, therefore, waived its right to enforce the forfeiture. There is no finding whether the Devaswom was aware of its right to eject the defendants' Tarwad on account of forfeiture for denial of title. The difficult question whether the landlord is entitled to enforce the forfeiture after a considerable period of time, even though he was aware of it and acquiesced in the tenant holding on as if there had been no forfeiture, need not be discussed at this stage. The lower Appellate Court must be asked to return findings on these questions on fresh evidence, if any, tendered within 3 (three) months from this date. Seven days are allowed for objections.

In obedience to the order contained in the above judgment, the Temporary Subordinate Judge of Tellicherry submitted the following

FINDINGS.—I have been ordered to submit findings on the following three issues:—

1. Whether the Devaswom granted the lands in question to the defendants' Tarwad for past services or for future services?

2. Whether the Devaswom has received the prescribed rent and has thereby waived its right to enforce the forfeiture?

3. Whether the Devaswom was aware of its right to eject the defendants' Tarwad on account of forfeiture for denial of title?

2. *Issue No.* 1.—After remand plaintiffs have examined two witnesses. Defendants have adduced no new evidence. The Tarwad of defendants Nos. 1 to 4, called Kolimata Mulathil, appears to be an ancient, rich and influential Mopla Tarwad in the locality. Kunkan Nayar, examined by the plaintiffs, states, "The Tarwad of defendants Nos. 1 to 4 is an ancient one. I have seen it to be a rich and influential Tarwad." This Kunkan Nayar, who is aged 54, states that he knows this Devaswom for the last 50 years. The other witness examined by the plaintiffs Kannan Nambiar, who is aged 55, states that he knows this Devaswom for the last 30 years. These two witnesses do not know under what circumstances the Kudima grant now in question was granted. No one is now able to say as to when it was granted. If the allegation in Exhibit D is true, it is one granted more than 90 years ago. Plaintiffs' case now appears to be that it is one granted neither for past services nor for future services. It is not alleged by the defendants that they have undertaken to perform any service or that they are performing any. The two witnesses examined by the plaintiffs state that Moplas are not allowed to make any offering to the temple or to perform themselves or through any one else any service in the temple. It is clear under the circumstances that the grant in question is one made not for future services. As to whether it is one granted for past services, there is no evidence. My finding, therefore, on this issue is that the grant in question is not one made for future services and that there is no evidence to show that it is one made for past services.

8. *Issues Nos.* 2 *and* 3.—No new evidence has been adduced regarding the point involved in these issues. The suit was instituted on 10th July 1913. In paragraph 8 of the plaint the cause of action is alleged to have arisen on and after January 1913. There is admission in paragraph 3 of the plaint that Porapad was paid till 1079, 1903-04. Narayanan Nambiar (P. W. No. 1), Kariasthan of the plaint Devaswom, states, "It was in 1913 or 1912 that 2nd plaintiff told me that the Tarwad of defendants Nos. 1 to 4 was keeping Porapad in arrears and claiming, Jenm right in respect of the plaint items." Second plaintiff has not been examined. Again he states, 'Before I got Exhibit D, the Devaswom was not aware of the claim made by the Tarwad of defendants Nos. 1 to 4. I got Exhibit D only two days before filing is in Court." The evidence on record shows that the Devaswam has not collected Porapad after knowing the denial of title. Th

claim evidenced by Exhibit D was made when property was attached for decree obtained against the Devaswom. There is no evidence to prove that the Devaswom had notice of this claim. The District Munsif considers this question in paragraph 14 of his judgment. There is no evidence on record to show that the Devaswam became aware of this claim about the time it was filed in Court. For waiver there should be knowledge of the denial of title. There is no evidence to prove such knowledge. I, therefore, find issue No. 2 in the negative and on issue No. 3, I find that the Devaswom became aware of its right to eject on account of forfeiture of the denial of title only in 1912.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the second appeal with costs. (One set).

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1467 OF 1916.

March 24, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

NANAK CHAND—DEFENDANT—APPELLANT

versus

TEK CHAND AND OTHERS—PLAINTIFFS AND DEVI DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), ss. 13, fourthly, fifthly, 14 (c)—"Staircase," meaning of—Step to a thara, whether an "entrance from the street"—Election between two equal pre-emptors—Suit instituted and decree passed before repeal of Act—Applicability of Act.

One *D.* sold a house to *J.* for Rs. 1,000. *T.* and others brought a suit for pre-emption on the ground that their house was adjacent to the house sold and that a party-wall was jointly owned by them and the vendor. *N.* and others brought a second suit for pre-emption of the same house on similar allegations. *T.* and others claimed a superior right of pre-emption by reason of the fact that a step leading to a *thara* which formed part of their house and the house sold was common to both. The first Court held that both sets of plaintiffs had equal rights of pre-emption and that the vendors having elected *N.* and others, they were entitled to a decree under section 14 (*c*) of the Punjab Pre-emption Act, 1905. On appeal the District Judge held that *T.* and others had a preferential right under section 13, fifthly, and passed a decree in their favour. *N.* and others thereupon preferred a second appeal to the High Court:

Held, (1) that the sale having been made and the suit having been instituted while the old Act was in force, it was governed by the Punjab Pre-emption Act of 1905; [p. 18, col 2.]

(2) that the step leading to the *thara* could not be called a "staircase" within the meaning of section 13, fourthly, of that Act; [p. 18, col. 2.]

(3) that it could not be said to be an entrance from the street within the meaning of section 13, clause fifthly; [p. 19, col. 1.]

(4) that, therefore, *T.* and others did not have a preferential right of pre-emption and *N.* and others, having been elected by the vendor, were entitled to a decree. [p. 19, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 20th January 1916, reversing that of the Subordinate Judge, 2nd Class, Gujrat, dated the 21st December 1912, decreeing the claim on payment of Rs. 1,000 on or before 1st April 1916.

Bakhshi *Tek Chand*, for the Appellant.

Lalas *Fakir Chand* and *Balwant Rai*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for pre emption. On the 13th of March 1912 Devi Dayal and others sold to Jagan Nath a house situate in Jalalpur Jattan for Rs. 1,000. Two suits were brought to pre-empt the sale. Tek Chand and others instituted their suit on the 27th of June 1912 on the ground that their house was adjacent to the house sold, and that a party-wall belonged jointly to the owners of the two houses. They further alleged that the plaintiffs and the vendors had a common *thari* forming part of their respective houses. A fourth ground was also alleged, which being immaterial for the decision of this appeal need not be mentioned.

The second suit was instituted by Nanak Chand and others, who also claimed the right of pre emption on the ground that their house was adjacent to the house sold and the party-wall between their house

and the house sold was jointly owned by the owners of the respective houses. A further ground on the basis of an easement was also urged. For the sake of convenience the house sold has been described in the judgment of the lower Appellate Court as A; the house owned by Tek Chand and others as B, and that owned by Nanak Chand and others as D, and for the purpose of deciding this appeal we shall also adopt the description given in the judgment of the lower Appellate Court. There was no dispute as to the existence of the custom of pre-emption. The Court of first instance held that the owners of both the houses B and D had equal right of pre-emption, for the reason that both of them were adjacent to the house A and that the party-walls were jointly owned by the vendors and the respective owners of the houses B and D. The vendors having elected Nanak Chand and others as pre-emptors, the Court held that under section 14 (*e*) of the old Punjab Pre-emption Act, the latter were entitled to a decree. The suit of the rival pre-emptors Tek Chand and others was dismissed. A superior right of pre-emption was claimed by Tek Chand and others by reason of the fact that a step leading to the *thara* was common between the owners of the house B and the house sold. This plea was repelled by the Court of first instance. It was urged that the common step leading on to the *thara* owned by the owners of the houses A and B came within the definition of a staircase and brought their case under section 13, clause fourthly, of the Act. On an appeal by Tek Chand and others the lower Appellate Court took a different view and held that the owners of the house B had a preferential right under section 13, fifthly, and passed a decree in their favour.

The rival pre-emptors Nanak Chand and others have preferred this second appeal and it has been contended on their behalf that the steps leading on to the *thara* cannot come under the description of "a common entrance from the street" and, therefore, cannot give to Tek Chand and others a preferential right of pre emption under section 13, fifthly, of Act II of 1905. The simple question, therefore, which arises for decision in the appeal is whether the step marked Y in the plan can be called "a common entrance" leading to the houses A and B. An alternative plea set up by Tek Chand and others was that the step at Y answered the definition of a staircase and entitled them to claim a preferential right under clause fourthly also. This alternative plea was, however, overruled by the lower Appellate Court, but as it has been set up again on behalf of the respondents by their learned Counsel we have to decide this plea also. We may at once dispose of this plea by saying that as regards the decision on this point we entirely agree with the lower Appellate Court that the step in question cannot be called a staircase and the case of the plaintiffs, therefore cannot come under clause fourthly. A plea was also raised on behalf of the respondents that the suit was not governed by Act II of 1905 and that, therefore, the plaintiff Nanak Chand and others were not entitled to the benefit of the election made by the vendors in their favour under section 14 (*e*) of the Act. We do not think that there is any force in this contention. The sale in question was made while the old Act was in force, and the suit was also instituted and the decree of the trial Court was passed before the present Act came into existence. We are clearly of opinion that the present suit is governed by the old Act II of 1905. The only question, therefore, which remains for decision is whether the step Y has been rightly held by the lower Appellate Court as "a common entrance" from the street to the houses A and B. The question is by no means an easy one to decide. In Webster's Dictionary an "entrance" is defined as "a door", "a gateway," or "a means of entrance." The step in question in this case is neither a door nor a gateway, but it has been contended on behalf of the respondents that it answers the description of "a means of entrance". Before the District Judge it was admitted that the owners of both the houses A and B used the step as a means of approach to their respective houses. This is not strictly true. It is really only a means to assist people who are not sufficiently active to get on to the *tharas* and having regard

to the popular meaning of the term we are of opinion that it cannot be said to be an "entrance from the street" within the meaning of clause fifthly of section 13 of the Pre-emption Act II of 1905. One might just as well say that any part of the *tharas* appertaining to the house in dispute is an entrance from the street, because one has to enter upon it in order to reach the actual dwelling house.

For the reasons set fourth above we set aside the judgment and decree of the lower Appellate Court and restore those of the Court of first instance with costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1163 OF 1918.

August 27, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Cuming.

NITYA GOPAL BANERJEE—

PLAINTIFF—APPELLANT

versus

PROVAS CHANDRA MUKHERJI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Temple—Pala *or turn of worship, transfer of, validity of—Custom, requisites of—Right of management and right of service in connection with temples, distinction between—Compulsory and private alienation—Private alienation, when permissible*—Shebait, *duties and power of—Sale of priestly office for benefit of* shebait, *legality of*—Pala, *sub-division of, legality of—Question of law—Appeal, second—Separation of* pala *from immoveable property of endowment, whether permissible.*

Custom, if established, may render private alienation of a *pala* valid, but in determining the question, the benefit to the idol must be taken into consideration as a matter of primary importance. Property dedicated to a deity is *extra commercium*, and is entitled to special protection of the sovereign whose duty it is to intervene to prevent fraud and waste. Persons having the management and possession of the property of an idol must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property. The manager of the endowment is by virtue of his office the administrator of the property attached to it. As regards the property he is in the position of a trustee. Sale of the trusteeship for pecuniary gain is not permissible. The sale of a priestly office for the benefit of the *shebait* is illegal. Right of worship is property, but has not all the incidents of property. A distinction has been made between transfers *inter vivos* and transfers by Will. The *shebait* is manager or *quasi* trustee for the benefit of the idol and as the office endures only for his life, he has no right of devise by Will, as his Will only comes into operation on his death when there is nothing for him to alienate. [p. 23, cols. 1 & 2.]

The requisites of custom are that it should be ancient, and invariable, uniform, reasonable, not immoral, certain and consistent. About its being ancient it must have existed "so long as the memory of man runneth not to the contrary." [p. 22, col. 1.]

There is a distinction between the right of management and the right of service in connection with temples, private and public, and between compulsory and private alienations. Private alienations are not absolutely prohibited but alienations to strangers are not favoured. In the case of private alienations the prohibition is not of general application and custom and usage govern and prevail over the text law which prohibits both partition and alienation. [p. 22, col 2; p. 23, col. 1.]

The question as to whether a *pala* is divisible or not is a point of law and can be raised for the first time in second appeal. [p. 24, col. 2.]

Division of a *pala* by inheritance is on a different basis from division by transactions *inter vivos* or by devise. [p. 24, col. 2.]

Separation of a *pala* from the immoveable property of an endowment is not a reasonable method of management of the property or of conducting the *sheba*. Where there is no custom of separation of the *pala* and the endowed property, sub-division *inter vivos* of the *pala* alone should not be allowed, as it cannot be for the benefit of the deity. [p. 24, col. 2; p. 25, col. 1.]

Appeal against the decision of the Additional District Judge, Hooghly, dated the 22nd January 1918, reversing that of the Subordinate Judge, Howrah, dated the 29th July 1915.

Babus *Brojo Lal Chuckerbutty* and *Upendra Narain Bagchi*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Chandra Sekhar Sen*, for the Respondents.

JUDGMENT.—One Nilmony Chakravarti was entitled to a turn of worship of a deity known as Malai Chandi which extended to 69 days in the year. Nilmony died on the 14th November 1913. The plaintiff claimed that turn of worship as his heir. Nilmony, however, a few days before his death executed a *kobala* in favour of defendant No. 1 in respect of 33 days out of his turn. The *kobala* purports to have been for consideration for a sum of Rs. 300, said to have been spent during the illness of Nilmony. The learned Subordinate Judge held that there

was no consideration for the *kobala* and that undue influence had been exercised over Nilmony who was ill and that misrepresentations had also been made to him. He held that the transfer was only of the turn of worship irrespective of the *debutter* property and as according to him no custom for such transfer had been made out, there was not an effective transfer. On both the above grounds he decreed the plaintiff's suit. He, however, found that the defendant No. 1 was on the line of succession, being the sister's son of the *shebait* Gobinda Chakravarti, and that he could become a *shebait* if Gobinda died without any sons.

On appeal the learned District Judge agreed with the trial Court that it had not been established that there was money consideration for the document. He, however, found that the defendant and his wife resided for some time on a portion of Nilmony's homestead, and that as Nilmony's health did not permit him to perform the *pooja*, defendant No. 1 had for some time performed the *pooja*; that during his last illness defendant No. 1 and his wife attended on him and that the *kobala* was executed openly, and after consultation with other *shebaits*: that the document had been presented by Nilmony himself for registration and he was satisfied upon the evidence that Nilmony quite understood what he was doing, and although the word "sale" had been used in the *kobala*, he found that Nilmony desired to convey the *pala* to the extent of 33 days to defendant No. 1; that he had by a subsequent document made a gift of the remaining six days to his Purohit Dharmadass. He also found that it was a perfectly natural thing for Nilmony to desire to transfer the right of worship to defendant No. 1. On the death of Kalachand, who was the original defendant, his son Nonilal has been brought upon the record. The learned Judge did not find that Nilmony was induced to make the transfer by undue influence, and he held that although the document purported to be a *kobala* it should be looked upon as a gift, although the consideration mentioned was fictitious and imaginary. He also held that transfers of *palas* had been proved to have been made for a great number of years beginning from at least 1259 B. S. (1852 A. D.). He held upon the oral evidence and the documents produced before him, principally Exhibits C, D, E, F, G, J, K, that the *palas* of this Thakurani were transferable by custom. He found nothing in the cross-examination of the *shebait* witnesses to indicate that "the custom of transfering *palas* was restricted to transferences of *palas* along with the *debutter* land." He held "immemorial origin, continuity and certainty of the custom of transfers of *palas* of the goddess in question established" and disagreeing with the learned Subordinate Judge, he dismissed the plaintiff's suit.

It was urged before us on behalf of the appellants (1) that no custom had been established and the immemorial origin referred to by the District Judge was an overstatement, as there was no evidence of any transfer before 1852; (2) that the transfer was bad, not being to one in the line of succession or to a *shebait*, but to a person who, although connected with one of the *shebaits* and his possible heir, was not competent to take; (3) that the transfer of a *pala* apart from the *debutter* property was void; (4) that the document, being one of sale stated to be for consideration; ought not to be treated as a gift; (5) that as the man was suffering from death illness, the document having been executed on the 10th November 1913 and registered on the 13th November and the man dying on the 14th, the transfer could not be treated as being *inter vivos*; (6) that the division of the *pala* into two portions, 33 days to defendant No. 1 and six days to another, rendered both illegal.

In answer to the above it was argued that having regard to a series of transfers dating from 1852 and the finding arrived at by the learned Judge as regards custom, such finding could not be set aside or questioned on second appeal; that the transfer in this case was to one in the line of *shebaits*, not to a stranger, but to a person who was performing the service in the life-time of Nilmony; that the transfer was openly made with the consent of several other *shebaits* and ought to be looked upon as for the benefit of the trust, which is the governing principle for determining such questions; that the transfer of a *pala* apart

from transfer of the property was not a question which was raised at the earlier stages of the case; that the document in question showed that the transfer was to Kalachand "as a *shebait*," but whether these words actually covered a transfer of the *debutter* property or not was not of importance as the plaintiff had merely prayed to have the transfer of the turn of worship set aside; that there was evidence on the record to show that the plaintiff had himself sold his share in some of *debu'ter* properties which he purported to have inherited from Nilmony; that an ostensible deed of sale may be treated as a deed of gift and it had been rightly treated as such in this case; that the transfer was not affected by the fact that the man died shortly after the execution of the document; that a *pala* being divisible by inheritance, there was no reason why the holder who had the right of gift *inter vivos* could not apportion the period of his turn to different persons; that in all these cases the principal thing to be kept in view was whether the transaction was against the interest of the deity, if not so found, there was nothing on principle which prevented such a division; that no point as to the divisibility of the *pala* had been made in the trial and the appeal Courts and not even taken in the grounds of appeal before this Court and it should not, therefore, be entertained. It is, therefore, necessary to examine the case at some length.

The origin of this foundation is not known. The Thakurani is established in a village. The plaint mentions 33 persons as the present *shebaits*, all of whom have been made defendants. They are Banerjis, Mukerjis, Chatterjis, Chakravartis, Roys and consist of males and females. Defendant No. 1, in his written statement, gives the names of 70 other persons, males and females, including Chakravartis, Chatterjis Banerjis and one Sarkhel. The Chakravartis appear to have been the original *shebaits*, and daughters, sisters' sons, widowed daughters in-law, maternal grandfather's heirs have taken by transfers or descent. In what sense all these persons are *shebaits* is not very clear. Whether they have merely a right of management, or are the representatives of priests who served the idol, does not appear. There is some immoveable *debutter* property and offerings are also received which are taken by the persons enjoying the *palas*. There is some evidence, says the Subordinate Judge, that "the *palas* have been assigned and transferred to one who could come in the line of succession if there was no direct descendant in the line of the son." Whether the endowment is private or public does not clearly appear, although it is apparently the latter as a village sanctuary is mentioned and offerings from the public are received. The transactions evidenced by documents are all of them conveyances except one the earliest in date, which is a Will (Exhibit K) dated 30th Sravan 1259, corresponding to 19th August 1852. It transferred the entire *pala* of the testator and his share of the *debutter* property to his widowed daughter-in-law as she was the most competent person to carry on the worship, by which supervision of the worship was meant. The testator had no son, but had a daughter with a son who was residing elsewhere. The next in order of date is a *kobala* Exhibit G, dated 30th Sravan 1289 (14th August 1882). The vendor had got the *pala* and property by inheritance but as he was not a resident of the place he sold both to a co-sharer *shebait*. There are two *kobalas*, Exhibits C & D, in 1292. Both the vendors were females who had inherited the *pala* and property from their husbands. In one the sale was to a co-sharer *shebait*, in the other to reversionary heirs, but both sales included the *pala* and property. Having regard to the names of the *shebaits* who are Banerjis, Mukerjis, Chatterjis, etc., it is not a violent inference that the present *shebaits* represent both the male and female lines of the original *shebaits* and also transferees by will or sale. It is clear that non-resident *shebaits* have from time to time, for a great number of years, transferred their rights to co-sharer *shebaits*. Exhibit J, a *kobala* dated 19th Sravan 1292 (6th August 1885) is, however, said to be an instance of a sale to a stranger, but the document itself refers to him as a *shebait* and we must treat him as such.

In speaking of custom in connection with the transfer of the rights of *shebaits* in respect of shrines and sanctuaries, there

is likelihood of confusion between the rules of the shrines and the rules observed amongst those who manage the shrines, between the rules of a sect and the rules of management of the endowment, betwen *shebaits* as trustees of the endowed property and as managers of the service in respect of which they are holders of an office. We have nothing to do in this case with sectarian rules, but with an alleged custom of transfer of turns of worship by *shebaits*. The requisites of custom are that it should be ancient and invariable, uniform, reasonable, not immoral, certain and consistent. About its being ancient it must have existed "so long that the memory of man runneth not to the contrary." In *Garurudhwaja Pershad Singh* v. *Saparandhwaja Pershad Singh* (1) the evidence of an unbroken custom for 80 years was held sufficient. It was also held in *Ramanathan Chetti* v. *Murugappa Chetti* (2) that an unbroken usage for a period of 19 years was conclusive evidence of a family arrangement as to *palas*, or turns of worship, to which the Court was bound to give effect. Here we have evidence of some transactions which date as far back as 1852 and the question is, can we deduce the necessary elements of custom from them. It appears from the evidence that transfers of *palas* were not always made to heirs or co-sharer *shebaits*, but in one case at least to a relative considered competent to carry on or supervise the worship. The periods of the turns have been determined by descent and apparently the *shebaits* have treated themselves as co-sharers of the endowed properties, their shares being determined in the same manner as if the property was secular, inheritable by descent, that is to say, a *shebait* with a *pala* of 39 days in the year has been treated as co-sharer of the endowed property to the extent of 39/365. In every instance so far as the documents are concerned the co sharer's *pala* and his so-called share in the *debutter* property have been transferred at the same time. It is from that fact that the learned Subordinate Judge inferred that the custom pointed to transfers of both of them jointly, that one was not separated from the other. He considered the joint character of the transfer reasonable, as the worship was likely to suffer if the property was separated from the *sheba*. The property in this case was undoubtedly endowed for the *sheba* and must be so used. The managers of the service are also managers of the endowed property in this case, and it is evident that for convenience of management the *shebaits* have treated themselves as co-sharers in respect of the *palas* and the endowed property, but in no instance has a *shebait* treated his *pala* and right of management of the *debutter* property separately. The two are intimately associated together and do not appear to have been dealt with one independently of the other. The sub division has been, as a rule, by descent, although occasionally varied by transfers within a limited circle. The transferee had both at the same time, and after his death his heirs have become vested with his rights to both by descent. The mere transfer of the *pala* involves the possibility of its discontinuance, on failure of funds. The property was endowed for securing the permanence of the worship. It further involves two lines of descent. If the transferor merely transfers the *pala* and keeps hold of his share of the property, two separate lines of descent may be created—one for the *pala* and one for the property—each disconnected from the other. In this particular instance the transfer appears to be merely of the *pala* and the offerings, spoken of in the document as *utpana* profits. It does not deal with the immoveable property. If it was intended to deal with the landed property, the document would have been differently stamped, particulars of the property would have been given as required by the Registration Act and the extent of the share would have been mentioned. From these circumstances it has been taken by both the Courts below that the *pala* only has been transferred and with it the right to take the offerings. The plaintiff has treated Nilmony's share of the endowed property as his by descent and the transferee has not so far questioned it. There is a distinction between the right of

(1) 27 I. A. 238; 23 A. 37; 10 M. L. J. 267; 5 C. W. N. 33; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724 P. C.).

(2) 29 M. 283; 4 C. L. J. 189; 10 C. W. N. 825; 33 I. A. 139; 1 M. L. T. 327; 3 A. L. J. 707; 16 M. L. J. 265; 8 Bom. L. R. 498 (P. C.).

management and the right of service in connection with temples, private and public, and between compulsory and private alienations. Private alienations have not been held as absolutely prohibited, but alienations to strangers have not been favoured. In the case of private alienations the prohibition has not been held to be of general application, and custom and usage have been held to govern and prevail over the text law which prohibits both partition and alienation. These question are discussed at some length in *Rajaram* v. *Ganesh* (3). It is useless to refer to the decided cases in detail as they depend upon separate sets of facts and circumstances, although some general principles may be deduced from them which may be thus summarised. Custom, if established, may render private alienations valid, but that, in determining the question, the benefit to the idol must be taken into consideration as a matter of primary importance. Property dedicated to a deity is *extra commercium*, and is entitled to special protection of the Sovereign whose duty it is to intervene to prevent fraud and waste [*Bhupati Nath Smritiitirtho* v. *Ram Lal Mitra* (4)]. Persons having the management and possession of the property of an idol must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property [*Prosunna Kumari Debya* v. *Golab Chand* (5)]. The manager of the endowment is by virtue of his office the administrator of the property attached to it. As regards the property he is in the position of a trustee [*Ramanathan Chetti* v. *Murugappa Chetti* (2)]. Sale of the trusteeship for pecuniary gain is not permissible: [*Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (6)]. The sale of a priestly office for the benefit of a *shebait* is illegal: *Narasimma Thatha Acharya* v. *Anantha Bhatta* (7) and *Kuppa Gurukal* v. *Dorasami Gurukal* (8).

(3) 23 B. 131; 12 Ind. Dec. (N. S.) 87.

(4) 3 Ind. Cas. 642; 10 C. L. J. 355; 37 C. 128; 14 C. W. N. 18.

(5) 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 2 I. A. 145; 3 Suth. P. C. J. 102.

(6) 1 M. 235 (P. C.); 4 I A. 76; 3 Sar. P. C. J. 687; 1 Ind. Jur. 134; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156.

(7) 4 M. 391; 1 Ind. Dec. (N. S.) 1107.

(8) 6 M. 76; 7 Ind. Jur. 75; 2 Ind. Dec. (N. S) 331.

Right of worship is property, but has not all the incidents of property. A distinction has been made between transfers *inter vivos* and transfers by will. It has been said that the *shebait* is manager or *quasi* trustee for the benefit of the idol, and as the office endures only for his life he has no right of devise by Will, as his Will only comes into operation on his death when there is nothing for him to alienate [*Rajeshwar Mullick* v. *Gopeshwar Mallick* (9)]. This case is not is consonance with *Mancharam* v. *Pranshankar* (10), which was disapproved in *Rajeshwar Mullick* v. *Gopeshwar Mullick* (9), but it has since been followed in this Court in *Nirodbarani Dasi* v. *Shiba Das Pal* (11), where "clear benefit to the Thakur" was considered to be the right standard. In the case before us there is evidence of transfer of the *pala* and property by Will. The deed of sale has been held inoperative as such, but the learned Judge has treated it as a deed of gift, as a transaction *inter vivos*. The donor, however, who was very ill, died within a very few days of the execution of the document, and it seems a fairly reasonable deduction that it was executed in anticipation of his death and to operate after his death. The document mentions money consideration which has been disbelieved by both the Courts. We should not treat untrue recitals in deeds with any degree of complacency when the giver and the taker are parties to them. They are intended to mislead and may acquire the sanctity of truth with age. This very transaction, although discarded by the Courts as a conveyance, may yet be relied upon by future *shebaits* as affording good evidence of custom. This transfer, however, was not for pecuniary advantage. There is evidence that the giver was not actuated by any dishonest motives. He was on his death bed and acted after consultation with other *shebaits*. He had no near heirs. He was anxious to provide for due carriage of the *sheba* and he knew the taker who had done the work satisfactorily when he was ill. These circumstances may lessen the heinousness of a false recital, namely, that of a fictitious considera-

(9) 35 C. 226; 12 C. W. N. 323; 7 C. L. J. 315.

(10) 6 B. 298; 6 Ind. Jur. 426; 3 Ind. Dec. (N. S.) 655.

(11) 3 Ind. Cas. 76; 36 C. 975; 13 C. W. N. 1084.

tion, but all the same the transaction must be looked upon as reprehensible, especially as it relates to a religious trust. The giver made a lying statement to benefit the taker and it is clear that the taker was primarily responsible for it. Both took a discreditable part. The learned Judge has, on the strength of *Ismail Mussajee Mookerdam* v. *Hafiz Boo* (12), treated the document as a deed of gift. There was an issue in that case as to whether the donor who was capable of making the transfer was of unsound mind or not, but none with regard to undue influence which was the case suggested at a later stage, when the first contention failed. The Judicial Committee found the evidence insufficient to establish the latter contention. They took into account the existing circumstances at the time of the transaction, namely, that the mother was extremely hostile to her son and did not intend him to take; that she was old and in case of her death her son would have inherited the greater part of her property. The only way to prevent it was to transfer it in her lifetime. A power of attorney which had been executed by the mother showed that she contemplated an absolute gift to the daughter. The lady's object could not have been attained by any *benami* transaction. It was found that the consideration mentioned in the deed of transfer did not pass, but having regard to the above facts the Judicial Committee held that the deed of sale was intended to be a deed of gift and treated it as such. The transfer in the case was not for pecuniary advantage and was intended to provide for the due performance of the *poojah* and there was no near heir to transfer to and it may not be unjust to treat it as a deed of gift and although it was intended to operate as a Will, having regard to, the fact that transfers by Will have taken place, and as early as 1852, that circumstance also may be taken in its favour. The learned District Judge has differed from the Subordinate Judge on the question as to whether the *pala* can be rightly held transferable by custom although the *debutter* property has not been included. The latter has strongly relied upon *Muhamaya Debi* v. *Haridas Haldar* (13). Evidence as regards the custom in this case has gone up to 1852 and may be held established, but the severance of the *pala* from the property does not seem to have taken place before this transaction and cannot be held established by custom. Their separation is fraught with consequences which may not be beneficial to the deity. They are intimately associated with each other. Allowing the *pala* to one and the property to another is likely to create trouble to the detriment of the endowment. They were not intended to be severed and have not been treated as severable. Division by inheritance is on a different basis from division by transactions *inter vivos* or by devise. In this case the donor's 39 days have been divided into two parts, 33 days to Kalachand and 6 days to the *purohit* Dharmadas, whom we do not find spoken of as a member of the family. Although objection to such division of the *pala* does not appear to have been taken before this, the respondent cannot be said to have been taken by surprise. It is a point of law. He had sufficient time to consider it. The fact of division is admitted. In the Kalighat temple case, *Mahamaya Debi* v. *Haridas Haldar* (13), *palas* were found heritable, partible and also devisable by custom. They had been the subject of sales, gifts, mortgages and leases, although within a limited circle. The *palas* seem to have been treated as not connected with the immoveable property, if any, belonging to the maker. The facts of that case are different. The transactions extended over a long period and were of a different character. That case deals with accepted principles but otherwise does not apply to this case. We do not think that it was competent for Nilmony to sub-divide the period of his *pala*. The *palas* would again be sub-divided by descent and instead of one branch having 39 days, there is a possibility of three branches being created with two divisions of the *pala* and one branch holding the property. There may be sub divisions again *inter vivos*

(12) 33 C. 773; 3 C. L. J. 484; 10 C. W. N. 570; 3 A. L. J. 353; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 I. A. 86 (P. C.).

(13) 27 Ind. Cas. 400; 20 C. L. J. 183; 42 C. 455 19 C. W. N. 208.

on the strength of the present sub division. We do not certainly think that it is a reasonable method of management of the property or of conducting the *sheba*. It is bound to create dissension and confusion, which certainly cannot be for the benefit of the Thakur. There is every likelihood of the property being diverted for other purposes and dissipated and the *sheba* discontinued. In that view we think the appeal ought to be allowed. If it had merely been a question of the sub-division of the *pala* into two parts and if it was said that opportunity should be given to the defendant to give evidence on the point we would have remanded the case, but as we agree with the view taken by the Subordinate Judge that the custom of separation of the *pala* and the property has not been proved and of the unreasonable character of such separation, that it cannot be for the benefit of the deity, the appeal should be allowed on that ground alone. Each party to pay his own costs in all Courts. The defendant will not be held liable for rendering any account of the offerings or the dealings with them. The plaintiff will not be allowed to recover anything from him on that account. The transfer is held inoperative and void and there will be a declaration to that effect.

Appeal allowed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION CASE No. 926 OF 1919.

March 30, 1920.

Present:—Mr. Justice Martineau.

MAULA BAKHSH—DEFENDANT—PETITIONER

versus

RAM DAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 141, O. IX, r. 13—Application for setting aside ex parte *decree—Dismissal for default—Application for restoration, whether entertainable—Limitation Act IX of 1908), Sch. I, Art.* 181.

Plaintiff obtained an *ex parte* decree on the 13th January 1919. On the 4th July the defendan applied to have it set aside, but the application was dismissed for default on the 16th October. On the 25th November the defendant made a fresh application:

Held, that the application of the 25th November should be treated as one for the restoration of the application of the 4th July and as such was entertainable, the procedure laid down in Order IX, rule 13, Civil Procedure Code, being applicable to it by the operation of section 141 of the Code; [p. 26, col 1.]

(2) that the application was governed by Article 181 of Schedule I to the Limitation Act and was within time. [p. 26, col. 1.]

Petition, under section 25 of the Small Cause Courts Act, for revision of the order of the Judge, Small Cause Court, Lahore, dated the 8th December 1919.

Mr. *Badr ud-Din Kureshi*, for the Petitioner.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—On the 13th January 1919 the plaintiff obtained an *ex parte* decree. On the 4th July the defendant applied to have it set aside, but on the 16th October the application was dismissed for default. On the 25th November the defendant made a fresh application, which the Judge of Small Cause Court has dismissed as time-barred. The defendant applies for revision of the order.

The application of the 25th November would no doubt be barred by limitation, as the lower Court observes, if it were regarded as one for setting aside the *ex parte* decree (which in form it is), and also if it were regarded as one for review of the order of the 16th October. But I think it would be fair and equitable to treat the application as one for the restoration of the application of the 4th July, and the question is whether such an application can legally be entertained and whether it is within time.

The learned Judge of the Small Cause Court has held on the authority of *Ganda Mal* v. *Sughra Bibi* (1) that such an application is not a miscellaneous application and can only be treated as one for review. In the case relied upon by him an appeal had been dismissed for default, and an application to have it restored to the file was also dismissed for default. An application was made to set aside the latter order of dismissal, and was rejected by the Additional District Judge on the ground that the proceeding was a proceeding in an appeal

(1) 5 P. R. 1900; P. L. R. 1900 p. 30.

and not a miscellaneous proceeding to which section 647 of the Civil Procedure Code would be applicable, and it was held by the Chief Court that the Additional District Judge's view was correct. That decision, however, was given when the Civil Procedure Code of 1882 was in force and there is a material distinction between section 647 of that Code and the corresponding section 141 of the present Code.

Section 647 of the old Code provided that the procedure prescribed in that Code should be followed, as far as it could be made applicable, in all proceedings in any Court of civil jurisdiction *other than suits or appeals*, and it was because the proceeding in which the application referred to in *Gandamal* v. *Sughra Bibi* (1) was made was an appeal, that section 647 was held to be inapplicable. But in section 141 of the Code now in force the words "other than suits or appeals" have been omitted, and the procedure provided in the Code in regard to suits is to be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The application made by the defendant on the 25th November, if treated as one for restoring the application dismissed on the 16th October, is clearly entertainable, the procedure laid down in Order IX, rule 13 of the Civil Procedure Code, being applicable to it by the operation of section 141.

Such an applicatian is governed by Article 181 of the 1st Schedule to the Limitation Act, as there is no other Article which applies. The period of limitation under that Article is 3 years, so that the application is within time.

I accordingly accept the application for revision, set aside the order of the lower Court, and direct that Court to dispose of the application of the 25th November 1919 on the merits, treating it as one for restoration of the application of the 4th July. The Court fee on the application for revision will be refunded. Other costs will be costs in the case.

Petition accepted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 115 OF 19.8.

July 21, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

KAMALAMBAL—PLAINTIFF—RESPONDENT—APPELLANT

versus

DORASAMI CHETTIAR—DEFENDANT—No. 1—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Compromise—Agreement between parties, when amounts to completed compromise.

The question when a contract becomes complete depends on the facts of each particular case. If a *consensus ad idem* has been reached between the parties on all the proposed or disputed terms, there is a contract. If, however, two persons agree in writing that, up to a certain point, the terms shall be the terms of the contract, but that the minor terms shall be subjected to a mediator and shall be as are approved by him, or if they are otherwise left unsettled, there is no contract. But if all the terms are agreed to, any stipulation to embody these terms in a formal document will not affect the contract, except when there is a further stipulation, express or implied, that the contract shall not be treated as complete till the formal document is drawn up and signed. [p. 31, col. 2; p. 32, col. 1.]

Appeal against the order of the Court of the Subordinate Judge, Negapatam, dated the 18th March 1918, in I. A. No. 130 of 1918, in Original Suit No. 49 of 1916.

This appeal coming on for hearing on the 17th and 24th of October 1918, the Court (Ayling and Krishnan, JJ.) delivered the following

JUDGMENT.—There is no doubt that paragraph 7 of Exhibit A is ambiguous and it is desirable that evidence should be taken as to what the parties intended thereby.

We must call for findings on the following issues:—

(1) What were "the other terms of the Razinama" referred to in paragraph 7 of Exhibit A?

(2) Was the settlement of the matters dealt with in Exhibit A conditional on a settlement being subsequently arrived at on the "other terms" referred to in the above first issue?

Each side may adduce evidence. The findings will be submitted within six weeks and seven days will be allowed for filing objections.

KAMALAMBAL v. DORASAMI CHETTIAR.

In compliance with the order contained in the above judgment, the Subordinate Judge of Negapatam submitted the following

FINDINGS.—I am directed by the High Court to submit findings on the following issues:—

(1) What were "the other terms of the Razinamah," referred to in paragraph 7 of Exhibit A?

(2) Was the settlement of the matters dealt with in Exhibit A conditional on a settlement being subsequently arrived at on the "other terms" referred to in the above 1st issue?

2. *1st issue.*—Paragraph 7 of Exhibit A runs as follows—

"After consulting the Vakils about all the remaining Razi terms (* *) etc., another Razinamah should be written and filed into Court in accordance with the reliefs which each party has to get." The 1st defendant called 3 persons, who admittedly acted as mediators in bringing about the compromise in question, as his witnesses to prove what was meant by the words 'the other terms of the Razinamah' in paragraph 7 of the Exhibit A. They all swear that all the points in difference between the plaintiff and the 1st defendant were completely settled by Exhibit A. Petitioner's 1st witness particularly deposes that all the terms in Exhibit A had been settled and agreed to by both parties before it was begun to be written, that when the signatures of the parties were taken in it, the amount also was settled and agreed to by them as Rs. 16,000 and that the plaintiff signed Exhibit A consenting to this figure. He has also deposed that the moveables mentioned in Exhibit A were the only moveables she wanted to be given. It further appears from his evidence and that of petitioner's witnesses Nos. 2 and 3 that the plaintiff wanted that the Will on which she relied on in this suit must be recited in the Razinamah as true and that the 1st defendant insisted on the adoption on which he relied on should also be recited therein as true, and that the mediators said that the Pleaders must be consulted to find out what sort of recitals should be made as regards those points in the Razinamah. Petitioner's 1st witness swears that the words '*Baki yavathu rajinamah sharathugal*' (the other terms of the Razinamah) in paragraph 7 of Exhibit A were intended to mean what had to be subsequently written about the adoption and the Will after consulting the Pleaders as above stated. It clearly appears from his evidence and also from the evidence of petitioner's witnesses Nos. 2 and 3 that it was not intended to consult the Pleaders on any other point. The sum and substance of their evidence is that by the words '*Baki yavathu rajinamah sharathugal*' in paragraph 7 of Exhibit A it was not meant that any terms relating to the reliefs which the plaintiff or the 1st defendant wanted in the suit had to be arrived at by consultation of Pleaders, but that only the form in which the Razinamah must be worded, especially with regard to the recital as to the adoption and the Will, must be settled after consultation of Pleaders and put in the Razinamah petition to be presented to the Court. All these witnesses are respectable and admittedly acted as mediators between the parties in arriving at the compromise. Petitioner's witnesses Nos. 2 and 3 were summoned by the plaintiff herself to give evidence in this enquiry. There is absolutely no ground why their evidence should be discredited and that of the plaintiff and her Pleader's clerk, the writer of Exhibit A, who clearly appears to be interested in her, which is highly improbable, as will be shown later on, should be believed. Petitioner's 3rd witness distinctly deposes that the terms in Exhibit A and what the Pleaders might advise to be recited about Will and adoption had to be embodied in another paper to be presented in Court and that the plaintiff did not insist on any new reliefs not granted by Exhibit A to be given to her. This witness was the plaintiff's witness in the suit itself, being an attestor in the Will relied on by her.

(3) The plaintiff, on the other hand, who was examined on commission at her instance, has given out a story, the object of which seems to be more to back out of the terms of Exhibit A than to make out that by the words '*Baki yavathu rajinamah sharathugal*' it was meant that some additional reliefs which she claimed had to be considered and settled after consultation of Pleaders,

She has stated: "The 1st defendant told then that his adoption should be mentioned. I objected to that and said that my husband's Will should be recognised and that the monies payable to Venkatachela and to the charities under the Will should be paid to Venkatachela. I also said that the amount mentioned in the Will for the charities should be set apart and provision should be made for the charities. I wanted two houses for my residence. The diamond earring worn by the 1st defendant should be handed over to me. Chain collar and iron safe should be given over to me. The amount to be fixed as compromise should be paid in cash to me. The amount of maintenance payable to the 2nd defendant should be fixed and a receipt obtained from her. Debts incurred by me, by my husband and by husband's brother, Subbia Chettiar, should not bind me. If any defect were to arise in the titles to immoveable property I should not be held liable for the same. These were the terms that I wanted them to incorporate in the Razinamah." She proceeds to say that it was finally settled that she should get Rs. 16,000, that she asked the mediators as to why the above terms were not incorporated in Exhibit A and that they said that it was merely a memo and that the Razinamah would be written only after consulting the Vakils. She states that Saminatha Mudaliar, petitioner's 1st witness, said that the above terms were to be included in the Razinamah and that it was so stated in paragraph 7 of the memo. But none of the mediators supports her in this, as already shown. Petitioner's 1st witness clearly states that there was no talk that plaintiff must have two houses, that there was no reference to any family charity and that plaintiff did not want any release of 2nd defendant's maintenance right. Petitioner's 2nd witness swears that plaintiff did not insist on Rs. 16,000 being paid in cash in one payment and that she did not want any dwelling house. Petitioner's 3rd witness also swears that plaintiff did not want a dwelling house and that she did not insist on the ear rings which the 1st defendant was wearing, to be given to her. In fact he swears that she did not insist on any new reliefs being granted to her other than those in Exhibit A. Petitioner's 1st witness swears that the talk of compromise was on the line that plaintiff must get money and 1st defendant should get properties.

(4) Even the plaintiff's own witness, her Pleader's clerk, Doraisamy Aiyar, does not go to the length of supporting her completely, though he has tried his best to support her. He has deposed that when Exhibit A was read out to the plaintiff, the 1st defendant said that adoption must be recited as admitted in it, while she said that Will must be recited as true, that she also asked for more moveables and insisted on money being paid in cash in one payment, that she also insisted on a diamond earring and other moveables, which he does not now remember, being given to her and that the mediators said that the amount alone might be fixed then and that the other matters might be included after consultation of Pleaders. He adds that the plaintiff signed Exhibit A on his telling her in the presence of the mediators that if the other matters were not settled and included in the Rezinamah, that document would be a waste paper.

(5) Afterwards this witness went to Mr. B. S. Nataraja Sastrial, the 1st defendant's Pleader, to get a formal Razinamah written. But curiously enough he consulted him only as regards the recital to be made about the alleged adoption and Will which is found in paragraph 1 of Exhibit I. The rest of the contents in Exhibit I was written by himself in his Pleader's house without consulting Mr. B. S Nataraja Sastrial. He has changed therein some of the terms in Exhibit A and added new terms of his own accord, which he deposes to have done on the basis of what the parties (plaintiff) represented to him when Exhibit A was executed. In other words by the changes introduced in Exhibit I by him, he intended to make it acceptable to the plaintiff. But his evidence shows that she did not agree to abide by the terms of Exhibit I, and so no formal Razinamah could be drafted and presented in Court.

(6) If really it was intended in the beginning to consult the Pleaders as regards the matters now enumerated by the plaintiff, he would naturally have consulted Mr. B. S. Nataraja Sastrial on them all and would not have confined the consultation to the recital to be made as regards Will and adoption as he did. As regards the plaintiff's

alleged insistence on Rs. 16,000 being paid in cash in one payment, his evidence is that she objected to the payment of it by instalments a little, and wanted the amount to be paid in cash, that the mediators said that it would be difficult for the 1st defendant to get Rs. 16,000 at once, but that they would ask him to pay it if he could get it by the time of the filing of the Razinamah in Court and that they did not say what should be the case if the 1st defendant was not able to raise that amount by that time. The result of that evidence is that the plaintiff was not serious in her request to be paid Rs. 16,000 in cash in one payment; else, she would not have signed Exhibit A, which provides for a payment of Rs. 5,000 only in cash in one payment and for the payment of the rest in instalments. After all, this witness's impression as to what matters were intended to be meant by the wards '*Baki yavuthu rajinamah sharathugal*' in paragraph 7 of Exhibit A, on which the Pleaders had to be consulted, is that they relate to (1) what sort of wording should be used about the adoption, (2) about the Will, and (3) what should be written in the Razinamah to safeguard the parties' rights against a possible suit by a reversioner. From this it is clear that by those words it was not intended to come to a settlement on questions relating to the various reliefs which the plaintiff says in her deposition she claimed and were left open when Exhibit A was signed by her. With regard to the diamond ear-rings in particular this witness's evidence is that the plaintiff wanted them, that the mediators simply said "Are you going to wear them?" and that on her again repeating her demand they said '*Agattum*' (let us see). This shows clearly that there was no clear understanding that her request should be subsequently considered and that a decision should be arrived at on it.

(7) When Exhibit I was prepared by her Pleader's clerk, her father, Natesa Pillai, the 1st defendant's agent, Natesa Thevar and Nagalinga Mudaliar (petitioner's witnesses Nos. 2 and 3) were present, but none said then that any more terms should be added to those in Exhibit I. From this also it is clear that the plaintiff's deposition, about her insistence on additional reliefs and the mediators leaving them for subsequent consideration, is false.

(8) I find on the evidence above discussed that by the words 'the other terms of the Razinamah' in Exhibit A, paragraph 7, it was meant only to introduce a recital as regards the Will relied on by the plaintiff and the adoption relied on by the 1st defendant with the advice of the Pleaders and to make the language of Exhibit A more formal so as to make it fit to be filed directly into Court, as for instance, by introducing the name of the Court, the number of the suit, the description of the parties, etc., and that those words were not intended to cover the question whether any other terms, by way of reliefs, to be given to the plaintiff or the 1st defendant should be introduced after consultation of Pleaders.

(9) *2nd issue*:—On this issue also my finding is against the plaintiff. There is no evidence worth the name that the settlement of the matters dealt with in Exhibit A was conditional on a settlement being subsequently arrived at later on on any other terms. Petitioner's 1st witness has deposed that there was no understanding that only on the settlement of any terms left not settled, the Razinamah in Exhibit A should come into force. He has further deposed that there was no talk as to what should happen if a formal Razinamah could not be prepared. Petitioner's 2nd witness also has deposed that there was no talk as to what should happen if those things were not done, those things being according to him (1) the 1st defendant's handing over Rs. 5,000 and the moveables mentioned in Exhibit A to Saminatha Mudaliar (petitioner's 1st witness) to be handed over to the plaintiff, and (2) the subsequent filing of a Razinamah on the hearing date in Court. Petitioner's 3rd witness also swears that there was no talk as to what should happen if a formal Razinamah could not be prepared. The plaintiff's evidence that if all her demands as mentioned in her deposition were not settled and included in Exhibit A, that document must be deemed to be a waste paper and that she was made to understand so by the mediators, cannot be believed for a moment in the light of the above evidence of the mediators. Her 2nd witness's evidence (counter-petitioner's 2nd witness) also on th

point cannot be believed, especially as it has been found that there were no further terms by way of reliefs in her favour to be decided and included in Exhibit A when it was signed by the plaintiff. His evidence, that he pointed out to the plaintiff paragraph 7 of Exhibit A to show that it would not be binding on her unless all her demands were settled and provided for in it, is not countenanced by that paragraph for nowhere in that paragraph is it stated that a settlement of the terms to be further settled should affect the binding nature of the settlement of the terms included in Exhibit A.

This appeal came on for final hearing after the return of the finding of the lower Court on the issues referred by this Court for trial.

The Hon'ble Mr. *T. Rangachariar* (with him Mr. *N. M. Malim Sahib*), for the Appellant.—Exhibit A is not a completed contract. It is dependent on the drawing up of another formal Razi petition after consulting the Vakils. To that petition, Exhibit I, the plaintiff was not a party and she refused to sign it. There was, therefore, no lawful compromise within the meaning of Order XXIII, rule 3, Civil Procedure Code. Exhibit A only embodies the terms of the negotiations and they did not develop into a final, concluded compromise. When plaintiff declined to sign Exhibit I, the compromise fell through.

The Subordinate Judge's findings as to the nature and effect of Exhibits A and I are wrong. The matter that was left to be decided was not merely formal. The other terms, referred to in paragraph 7 of Exhibit A, relate to separate and distinct matters.

See *Winn* v. *Bull* (1), *Appleby* v. *Johnson* (2), *Stanley* v. *Dowdeswell* (3) and *Von Hatzfeldt Wildenburg (Princess)* v. *Alexander* (4).

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *K. S. Jayarama Aiyar*), for the Respondent.—Exhibit A evidences a completed contract. The terms were all settled and only formal matters were pending decision. The Subordinate Judge so finds it expressly. There has been a concluded adjustment which cannot be re-opened. See *Winn* v. *Bull* (1).

JUDGMENT.—The only point for decision in this case is whether Original Suit No. 49 of 1916 has been validly compromised between the plaintiff and the 1st defendant by a lawful agreement written under Order XXIII, rule 3, of the Code of Civil Procedure, as alleged by the 1st defendant. Plaintiff's case is that though there was a mediation between the parties and an agreement was arrived at on some of the points in dispute, there were still other points outstanding to be settled, and, therefore, there was no completed contract. The Subordinate Judge decided in favour of the 1st defendant that Exhibit A signed by the parties evidenced a completed agreement and gave a decree in its terms. Hence the appeal to us by the plaintiff.

The plaintiff admits Exhibit A, but contends that that it is only a memorandum of the points provisionally agreed to by her and that the matter remained in a state of negotiation still and that it was only after certain further points were settled after consultation with Vakils and a formal Razinamah petition was drawn up and signed by her embodying all the terms that the contract would become complete. She declined to sign Exhibit I, which was the formal petition that was so drawn up, and she contends that there was, therefore, no agreement binding on her and that the attempted compromise fell through.

In Exhibit A there is a statement in clause 7 which seemed to lend some support to her case. It says "that in respect of all the other terms of the Razinamah, Vakils shall be consulted and another Razinamah prepared and filed in Court regarding" the reliefs to be granted to each. Now, as the expression "the other terms of the Razinamah" was ambiguous and it was not clear whether it referred merely to the wording of the Razinamah as defendant contended or to other terms of dispute on the merits between the parties and as the Subordinate Judge had disposed of the matter in the first instance on the affidavits of the parties and as plaintiff's affidavit did not state what those other terms were according to her, we considered it proper that evidence should be taken of the mediators and others who took part in bringing about the alleged

(1) (1877) 7 Ch. D. 29; 47 L. J. Ch. 139; 26 W. R. 230.
(2) (1874) 9 C. P. 158.
(3) (1875) 10 C. P. 102; 23 W. R. 389.
(4) (1912) 1 Ch. 284; 81 L. J. Ch. 184; 105 L. T. 434.

settlement under Exhibit A to explain the clause and we, therefore, remanded the case for the purpose and directed the Subordinate Judge to take evidence and return findings as to what the "other terms" were and whether the settlement under Exhibit A was conditional on the settlement to be arrived at on those other terms. The Subordinate Judge has taken the evidence and has returned findings on both points in favour of the defendant. He finds that "the other terms" did not refer to any points of dispute on the merits between the parties, but only to the introduction of a recital as regards the truth of the Will relied on by the plaintiff and of the adoption relied on by the first defendant with the advice of Pleaders in the Razinama and to make the language of Exhibit A more formal so as to make it fit to be filed in Court, and on the 2nd issue he finds that it was not intended that the settlement under exhibit A was to be conditional on any other terms being settled later.

Mr. T. Rangachariar for the appellant contended that his findings on these issues were wrong. On the evidence on record we are inclined to agree with the Subordinate Judge that all matters in dispute between the parties were really settled before Exhibit A was drawn up and that the "other terms" in clause 7 really refer to what the Subordinate Judge finds. The plaintiff wanted a recital of the truth of her Will and the defendant of the truth of his adoption in the final Razinama petition; but in view of the terms agreed to in Exhibit A these recitals were of no importance and apparently were not a matter of dispute between the parties. The parties, having disputed these points in the suit, apparently wanted to consult the Vakils to find out if it was proper to add such admissions in the Razi petition and if so, how they should be worded. This is what the plaintiff's witnesses say and we think it is most likely. Even the 2nd witness for the plaintiff admits this was what was meant by clause 7. There is no real foundation for the suggestion that the introduction of these recitals was a matter of dispute between the parties, which was arranged to be settled between them after consulting their respective Vakils. The statement of plaintiff's 1st witness in cross-examination to which our attention was drawn that "the plaintiff said that Will must be recited as true and defendant that adoption was true and we mediators said that on those points the Pleaders must be consulted and decision arrived at," must be read with the rest of his evidence and the evidence of the other mediators, when it will be clear that what he meant was that the Vakils were to decide how the recitals could be properly made, and not that the parties should decide whether the recitals should be made at all. We are unable to credit the plaintiff when she enumerates a number of items of dispute as referred to in clause 7, for she is not corroborated in it by her own 2nd witness. We accept the finding of the Subordinate Judge as to the meaning of clause 7.

We also accept the Subordinate Judge's finding that the settlement under Exhibit A was not in any way dependent on the settlement of any other terms afterwards. It is fully supported by the evidence on record and was hardly attacked by the appellant's Pleader. All the mediators whose evidence we have accepted support this view.

In these circumstances, can it be said that Exhibit A does not evidence a completed contract? We do not think so. Mr. Rangachariar cited several English cases as in his favour, *viz.*, *Winn* v. *Bull* (1), *Appleby* v. *Johnson* (2), *Stanley* v. *Dowdeswell* (3) and *Von Hatzfeldt Wildenburg* (*Princess*) v. *Alexander* (4), while on the other side the cases in *North* v. *Percival* (5) and *Gray* v. *Smith* (6) were cited. It is not necessary to refer to them in detail, as the law on the point as to when a contract should be viewed as complete and when not is fairly clear. The question has to be decided in each case on its own facts. If a *consensus ad idem* had been reached between the parties on all the proposed or disputed terms, there is a contract: but if, as Jessel, M. R., puts it in the case in *Winn* v. *Bull* (1) "if two persons agree in writing that up to a certain point the terms shall be the terms of the contract but that the minor terms

(5) (1893) 2 Ch. 128; 67 L. J. Ch. 321; 78 L. T. 615; 46 W. R. 552.

(6) (1890) 43 Ch. D. 208; 59 L. J. Ch. 145; 62 L. T. 335; 38 W. R. 310.

shall be submitted to a Solicitor and shall be as are approved of by him" or if they are otherwise left unsettled there is no contract; this is so even if they are minor terms. But if all the terms are agreed to, any stipulation to embody those terms in a formal document will not affect the contract except when there is a further stipulation, express or implied, that the contract shall not be treated as complete till the formal document is drawn up and signed. The English cases cited illustrate these principles.

In the present case we have found that though the parties desired to have a formal Razinamah petition prepared and to have the recitals above referred to included in it, this no way affected the agreement come to in Exhibit A. These were formal matters left to the Vakils to arrange as they thought fit without affecting the contract between the parties. We think the objection raised by the appellant that the contract under Exhibit A was incomplete and unenforceable fails. It may be that she is entitled to have the recitals put in the Razi petition but she never asked for it.

The appeal against order fails and is dismissed with costs.

M. C. P.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

December 16, 1919.

Present:—Viscount Finlay, Lord Sumner and Lord Parmoor.

THE TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA—APPELLANTS

versus

CHANDRA KANTA GHOSH—RESPONDENT.

Calcutta Improvement Act (V of 1911), ss. 41, 42, 69, 81—*Improvement scheme—Land acquisition—Recoupment principle—Land affected by execution of scheme, what is.*

Under section 42 of the Calcutta Improvement Act, 1911, an improvement scheme may provide for the acquisition, by the Board of Trustees appointed under the Act, of any land comprised in the scheme which will in their opinion be affected by the execution of the scheme. [p. 33, col. 1.]

It is not necessary that the land should be physically affected by the operation of the scheme, or that it should be injuriously affected by severance or otherwise. [p. 36, col. 2.]

Land is affected by the execution of a scheme whenever its value is thereby enhanced or diminished. [p. 36, col. 1.]

Even though the land is only taken for the purposes of recoupment, the Board has the same powers of compulsory acquisition and the assessment of the value is regulated by the same principles, as if the land were required for the actual working of the scheme. If it is required for any of the purposes of the Act, whereof recoupment is one, the provisions for compulsory acquisition apply. [p. 37, col. 2.]

Appeal from a decree of the Calcutta High Court (Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Cuming), reported as 36 Indian Case 749, affirming a decree of the First Subordinate Judge of the 24-Pergunnahs.

FACTS of the case will sufficiently appear from their Lordships' judgment and from the report of the High Court proceedings in *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). From these it will be seen that Mookerjee and Cuming, JJ., affirmed the view of the trial Court that the powers of compulsory acquisition, which the Act conferred upon the Trustees, did not extend to cases where the land was only acquired for the purpose of recoupment and because it was believed that its value would be enhanced by the scheme.

Sir *John Simon, K. C., Dunne, K. C.*, Sir *W. Garth, K. C.*, and Mr. *G. B. MacNair*, for the Appellants, submitted that the decisions of the lower Courts were erroneous. The Trustees had power to acquire the land in suit under section 41 of the Calcutta Improvement Act. It was sufficient under that section that the land was in their opinion required for the execution of the scheme. It was not necessary that it should be land required for the actual widening of Russa Road—land to form part of the widened road. That the powers of acquisition were not confined to such land was clear from section 39, which gave power to acquire land for the purpose of laying out the area with new roads and of forming building sites. But in any case there is power under section 42 to acquire

(1) 36 Ind. Cas. 749; 41 C. 219; 24 C. L. J. 243; 21 C. W. N. 8.

any land which will, in the opinion of the Board, be affected by the execution of the scheme. This does not mean merely "physically affected": it is sufficient that the land is affected in value. A Full Bench of the Calcutta High Court has rightly decided, since this case was heard, that the Calcutta Improvement Act authorises the Board to acquire land compulsorily for purposes of recoupment, either by selling or otherwise dealing with the land under section 81 or by abandoning it in consideration of a payment by the owner under section 78.

Mani Lall Sing v. *Trustees for the Improvement of Calcutta* (2).

We rely on and adopt the reasoning of Woodroofe, J., in the order of reference in that case.

Any other interpretation of section 42 of the Act makes that section almost meaningless: it cannot have been intended merely to authorize the acquisition of land which is afterwards found not to be wanted. It is argued against us that section 42 might be arbitrarily or improperly applied, if it has the scope for which we contend: but there is little danger of this, as under section 49 the sanction of the Local Government is required for the scheme.

The powers conferred upon a public body entrusted by the Legislature with the duty of making public improvements in a city are not to be construed so severely and restrictively as if those powers were bestowed upon a body of adventurers: *Galloway* v. *Mayor and Commonalty of London* (3).

(Reference was also made to sections 40, 68, 69, 81 and 122 of the Act).

Messrs. *Upjohn*, *K. C.*, *De Gruyther*, *K. C.*, and *Dube*, for the Respondent.—The land here was not required for the execution of the scheme under section 41 of the Act: the resolution provides only for the widening of Russa Road, and it is not contended that it was needed for that purpose. Section 42 does not bring into the Act any land which is not part of the scheme for the execution of the works. If it had been intended to introduce into the Act the principle of recoupment, it would not have been done by mere inference, as appellants contend, but on specific terms not admitting of mistake. There is a whole chapter of the Act devoted to finance, and such a provision, if it were desired to introduce it, would have been included in that chapter. "Land affected" in section 42 (*a*) must mean land which is itself affected, not land the value of which is affected. "Affected" here has the same meaning as "injuriously affected" in the Lands Clauses Act, 1845: it covers a physical interference with a right, whether public or private, which an owner (of land) is entitled by law to make use of, in connection with the (land).

Metropolitan Board of Works v. *McCarthy* (4).

The phrase "injuriously affected" is adopted in section 23 of the Land Acquisition Act (I of 1894). One object of section 42 is to enable the Trustees to take land in respect of which they anticipate a heavy claim for severance under that section. There has been no expression of opinion by the appellants, either by resolution or otherwise, that the land in suit is in fact affected by the scheme. We submit that it was included in the scheme merely in order to hold us to ransom under section 78 of the Act.

Sir *John Simon*, *K. C.*, in reply, referred to the terms of the resolution published in the Calcutta Gazette, which set out that the land was "required to be taken by Government at the expense of the Calcutta Improvement Trust for a public purpose, *viz.*, for the street scheme known as the Scheme No. IV," etc.

JUDGMENT.

LORD PARMOOR.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 22nd August 1916, affirming a judgment and decree of the First Subordinate Judge of the 24-Pargunnahs. The respondent brought the present suit for a declaration that the appellants had no power under the provisions of a Road Improvement Scheme, framed under the Calcutta Improvement Act of 1911, to

(2) 44 Ind. Cas. 770; 45 C. 343; 22 C. W. N. 1; 27 C. L. J. 1.

(3) (1866) 1 H. L. 34; 35 L. J. Ch. 477; 12 Jur. (N. S.) 747; 14 L. T. 865.

(4) (1874) 7 H. L. 243; 43 L. J. P. C. 385; 31 L. T. 182; 23 W. R. 115.

acquire certain land owned by him, and that all proceedings in connection with the acquisition of such land were *ultra vires* and of no effect. Both the lower Courts have decided in favour of the respondent, holding that the land in question is not required for the Road Widening Scheme and that its acquisition for any other purpose is not warranted under any of the provisions of the said Act. The appellants obtained leave to appeal to His Majesty in Council and submit that the judgments and decrees of both Courts should be reversed and the suit dismissed.

The decision of the appeal depends upon the construction to be placed on certain sections of the Calcutta Improvement Act, 1911, an Act under which improvement schemes for Calcutta may be framed by the appellants (therein called the Board) and sanctioned by the Local Government. Whenever the Local Government does sanction an improvement scheme, there is a duty to announce the fact by notification, and the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. This provision does not affect the right of the respondent to institute a suit to have it declared that the Board in framing the scheme acted *ultra vires*, or that the scheme as sanctioned does not authorise the appellants to acquire by compulsion the land in question. During the course of the argument the attention of thier Lordships was directed to a number of decisions upon various Acts of Parliament giving a compulsory power for the acquisitions of land, but in each case the decision must depend upon the provisions of the particular Act and the purposes for which and conditions under which in such Act land may be compulsorily acqred. It bec omes necessary, therefore, to consider what were the considerations on which the Board acted in framing the scheme, and whether the scheme as sanctioned gives the Board the powers which they are seeking to enforce.

The preamble of the Act recites in general terms that it is expedient to make provision for the improvement and expension of Calcutta by opening up congested areas, laying out and altering streets, providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes, and for the re housing of persons of the poorer and working classes displaced by the execution of improvement schemes, and otherwise as thereinafter appearing. It is not necessary further to consider the preamble.

Section 2 enacts that an improvement scheme means a general improvement scheme or a street scheme, or both. In the present case the scheme was a street improvement scheme framed for the purpose of creating new, or improving existing, means of communication and facilities for traffic. Section 39 enacts (*inter alia*) that whenever the Board are of opinion that for the purpose of creating new or improving existing means of communication and facilities for traffic, it is expedient to lay out new streets or to alter existing streets (including bridges, causeway and culverts), the Board may pass a resolution to that effect and shall then proceed to frame a street scheme for such area as they may think fit.

At a meeting of the Board on the 17th September 1912, Resolution No. 5 was passed. This resolution was approved at a meeting of the Board on the 8th October 1912 at which it was resolved that the scheme for the widening of Russa Road, as far as Hazra Road, prepared in accordance with Resolution No. 5 of the 17th September 1912, should be adopted and notices issued under sections 43 and 45.

It was argued on behalf of the respondent that lands had been included by the Board within the area of the scheme, not because they were wanted for any of the purposes of the Act, but with the object of exacting an exemption fee from the owners, although the Board were actually not anxious to acquire the buildings and would possibly, or probably, fail to make a profit, if they did actually acquire and re-sell the land. Under section 78 owners may apply to the Board requesting that the acquisition of their land should be abandoned in consideration of the payment of a sum to be fixed by the Board in that behalf. The object of this section is to give an opportunity to owners of land to request the abandonment of its compulsory acquisition, and it only comes into operation where land has been properly included in a scheme

as required for purposes of the Act. To have included land within the area of the scheme, not because it was wanted for purposes of the Act, but in order to exact an exemption fee from the owner would, in the opinion of their Lordships, have been a misuse of the powers conferred upon the Board, and if in fact the Board had included the land of the respondent in the scheme merely for the purpose of exacting exemption fees, the Board would have acted *ultra vires* and the respondent would have been entitled to succeed in his action, although it might have been anticipated that, by means of such fees, funds would be obtained to ease the burden of the expenditure to be incurred in the execution of the scheme. After the scheme had been sanctioned, an application of the respondent requesting that, under section 78, the acquisition of his land should be abandoned, in consideration of a payment by him, was considered by the Board and rejected on the ground that his land was required for the "lay-out," which evidently refers to the lay-out of land not actually required in the execution of the street widening. The same expression is to be found in the evidence of Mr. Bompas, the chairman of the Board, but their Lordships do not find that the evidence of Mr. Bompas is in any way inconsistent with the inference to be drawn from the record of what passed at the Board when Resolution No. 5 was passed on the 17th September 1912.

On the 17th September 1912 a proposal was brought before the Board in favour of gazetting all land from which there was a reasonable chance of obtaining an exemption fee. This proposal was directly negatived, and only two members of the Board voted in its favour. In the opinion of their Lordships, this decision disposes of the allegation that the Board framed the area of the scheme on the principle of including land for the purpose of exacting exemption fees, whether or not such land might, in their opinion, be required for the execution of the scheme or affected by the execution thereof.

At the same meeting, and after the above proposal had been negatived, the chairman asked for definite instructions in regard to the Russa Road scheme, and, after voting, it was determined that all properties abutting on the Russa Road should not be gazetted for acquisition, but only those properties which as a matter of fact it would pay the Board to acquire and sell again. The effect of this decision would be to limit the proposal of land acquisition to those properties only of which the value, in the opinion of the Board, might be enhanced by the execution of the scheme, or, in other words, to those properties from which a sum, in the nature of recoupment, might, in the opinion of the Board, be obtained in aid of the expenditure to be incurred. Finally, the chairman asked the opinion of the Board as to the area which should be included in the Russa Road scheme. There were three alternative projects. It was decided that the scheme should provide only for the widening of Russa Road and the taking up for recoupment purposes of land unoccupied or occupied by buildings of small value. A plan showing the area finally included in the scheme was submitted to the Local Government, and a copy, as sanctioned, was produced before their Lordships. It is not suggested that the land of the respondent is required for the execution of the road widening, and it is, at no point, nearer than 55 feet to the widened line on the west side of the street.

After an improvement scheme has been framed certain notices must be given, and after the hearing of persons entitled to make objection, representation or dissent, the Board may apply to the Local Government for sanction of the scheme. The sanction of the Local Government was notified in the Calcutta Gazette of the 21st January 1914, and the publication of a notification in respect of any scheme is conclusive that the scheme has been duly framed and sanctioned. It becomes necessary, however, to consider whether the Board had authority under the Act to frame a scheme on the terms of Resolution No. 5 of the 17th September 1912, and secondly, whether, if the scheme was duly sanctioned by the Local Government, it gives the Board the powers of com-

pulsory acquisition of the land of the respondent.

Section 41 of the Act enacts that every improvement scheme shall provide for the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be required for the execution of the scheme. It was argued on behalf of the Board that the land of the respondent came within the provision of section 41, in that it was land which, in the opinion of the Board, was required for the execution of the scheme. It is not necessary to consider what might be included under the terms of section 41, but the scheme, now under consideration, was a scheme for the widening of Russa Road, as far as Hazra Road, and it cannot be said that the land of the respondent was required for the execution of this widening. As already stated, the land of the respondent at the nearest point was 55 feet away from the western border of the Russa Road after it had been widened to 100 feet as proposed in the scheme.

The case really depends upon the construction of section 42. Under this section, an improvement scheme may provide for the acquisition by the Board of any land in the area comprised in the scheme which will, in their opinion, be affected by the execution of the scheme. The land of the respondent is within the area delimited on the plan attached to the schme, but it was argued on his behalf that it was not land affected by the execution of the scheme. The land was included in the scheme because, in the opinion of the Board, it would pay them to acquire it and sell it again, and the question arises whether land can be compulsorily purchased in order that the Board may have the benefit of such enhanced value, and use any profit on the transaction in ease of the burden of the public expenditure. "Land" is defined to have the same meaning as in the Land Acquisition Act, 1894, in which the expression "land" includes benefits to arise out of land; but, apart from this definition, land would, using language in its ordinary natural sense, be said to be affected by the execution of a scheme, whenever its value was thereby either enhanced or diminished. It is not immaterial to observe that there was at the date of the passing of the Calcutta Improvement Act no novelty in the recoupment principle [*Galloway* v. *Mayor and Commonalty of London* (3).] But whether this principle has been sanctioned in the Calcutta Improvement Act must be determined on the language used, and the case of *Donaldson* v. *South Shields Corporation* (5) shows, if authority is necessary, that where an Act authorises land to be taken for the actual works only, a local authority, or other public body, will be restrained from taking more than is actually necessary for such works. There would appear to be nothing either in the general scheme of the Act, or in the special context, which is inconsistent with giving the word "*affected*" its ordinary and normal sense, but it was suggested in the argument on behalf of the respondent that the Act did not authorise the Board to acquire land unless such land was either physically affected by the execution of the scheme, or injuriously affected, whether by severance, or in some other manner. Land which would be physically affected by the scheme comes under the provision of section 41, and to limit the land which a Board may acquire under section 42 to the land, which they must acquire under section 41, would be in effect to make illusory the powers granted in section 42. The meaning of the phrase "injuriously affected" was well known in compensation law and practice when the Calcutta Improvement Act was passed, and the phrase occurs in section 23 of the Land Acquisition Act, 1894. To introduce the limitations connoted by the word "injuriously" would be in effect to alter the language of the section, and, had the Legislature desired to introduce this limitation, there would have been no drafting difficulty of any kind. A special argument that section 42 should be limited to cases of severance was based on the terms of section 49 of the Land Acquisition Act, 1894, as read in conjunction with section 42 and section 78 of the Calcutta Improvement Act, 1911. Section 49 of the Land Acquisition Act, 1894, is a section not unusual in Acts giving power for the compulsory acquisition of land, and enacts that the provisions of the Act shall not be put in force for the purpose of acquir-

(5) (1899) 79 L. T. 695; 68 L. J. Ch. 162.

ing a part only of any house, manufactory, or other building, if the owner desire that the whole of such house, manufactory, or other building shall be so acquired. There is no limitation to cases of severance either in section 42 of the Calcutta Improvement Act, 1911, or section 78, and there is no ground for implying any limitations as affecting the authority of the Board for the acquisition of land under section 42. The result is that, in the opinion of their Lordships, none of the suggested limitations to the usual and normal meaning of the word "affected" in section 42 are admissible, and that there is no reason, either in the general purpose of the Act or the special context, that the word should not be construed in its ordinary sense, and that, as so construed, section 42 authorises the acquisition of the land of the respondent, which was inserted in the scheme, because, in the opinion of the Board, it would be enhanced in value by its execution.

Among the cases called to the attention of their Lordships was that of *Metropolitan Board of Works* v. *McCarthy* (4). In that case McCarthy was a lessee and occupier of a house in close proximity to a draw-dock which opened into the Thames. He had no right in any way to the use of the dock except as one of the public, but his premises being in close proximity to it, his use of it for the purposes of his business was very constant. The dock was entirely destroyed by the works of the Thames Embankment, and McCarthy sought compensation. The case submitted to the Court stated that "by reason of the destruction of the dock, and the destruction thereby of the access to and from the Thames, the plaintiff's premises became and were, as premises either to sell or occupy in their then condition and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value." It was held in this case that McCarthy was entitled to compensation, but if in such a case compensation was properly given to the owner, it would not appear to be unfair that where premises in close proximity to a widened street are thereby enhanced in value such value should enure to ease the burden of public expenditure provided that the interests of the owner are properly protected. In this case the respondent would be entitled to the value of his land assessed on the same principle as the value of land actually required for the execution of the widened street, and the effect would be not to deprive him of the value of his property, but only that he would not obtain the additional value due to the proximity of his land to the improvement scheme.

It was further argued on behalf of the respondent that, although the land of the respondent might be acquired by agreement, it was not subject to compulsory acquisition. Section 69, under the head of "compulsory acquisition," empowers the Board, with the previous sanction of the Local Government, to acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act. It was said that to take land for the purpose of recoupment is not to take it in order to carry out any of the purposes of the Act, but only to provide a means whereby such purposes can be carried out. It is difficult to understand the distinction which is suggested. If the Board are authorised to acquire land affected in value by the execution of the scheme, in order to provide funds in ease of the public burden, the acquisition of such land is directly within the purposes of the Act and, the powers of compulsory acquisition are clearly applicable thereto. Section 81 of the Act confers on the Board wide powers for the holding or disposal of any land vested in them or acquired by them under the Act, amply sufficient for dealing with any land acquired under section 42 and not required for the actual execution of the street scheme.

In the result their Lordships are of opinion that the appeal should be allowed with costs here and below and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the Appellants:—Messrs. *Morgan Price & Co.*

Solicitors for the Respondent:—Messrs. *W. W. Box & Co.*

UMED ALI *v.* HABIBULLAH.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 666, 890, 1209, 1214, 1244, 1486 TO 1491, 1523 TO 1529 OF 1916.

May 5, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Duval.

UMED ALI AND OTHERS—APPELLANTS

versus

Nawab Khaje HABIBULLA AND OTHERS —RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885*)*, *ss.* 50, 52 (6) *—Landlord and tenant—Additional rent for additional area, suit for—Burden of proof—Standard of measurement—Evidence Act (I of* 1872*)*, *ss.* 32 (2), 34—Talab baki *papers, evidentiary value of.*

In a suit for additional rent for additional area, the landlord must, under section 52 of the Bengal Tenancy Act, prove that there has been an increase in the area for which rent was previously paid and in order to do so, he must show that the land was measured at the time of the inception of the tenancy by a particular standard of measurement, and that there has been an increase in the area on measurement by the same standard. [p. 39, col. 2.]

The words "at the time the measurement on which the claim is based was made" in sub-section (6) of section 52 of the Bengal Tenancy Act refer to the measurement made at the time of the original settlement, and not to the measurement upon which the excess area is found out before the institution of the suit for additional rent. [p. 39, col. 2]

Under section 34 of the Evidence Act *talab baki* papers are not sufficient evidence to charge any person with liability. The *talab baki* papers prepared by the agent of a landlord may be evidence under section 32 clause (2) of the Evidence Act, if the landlord shows that the person making the statement is dead and that the entries were made by him in the ordinary course of business. [p. 39, col. 1.]

Appeal against the decision of the Subordinate Judge, 2nd Court, Tipperrah, dated the 24th November 1915, modifying that of the Munsif, 1st Court, Chandpur, dated the 18th November 1914.

IN APPEALS Nos. 1244 AND 1523 to 1529 OF 1916.

Babu *Ramesh Chandra Sen*, for the Appellants.

Babu *Surendra Nath Guha*, for the Respondents.

IN APPEALS Nos. 1209, 1486 TO 1491 OF 1916.

Babu *Surendra Nath Guha*, for the Appellants.

Babu *Ramesh Chandra Sen*, for the Respondents.

IN APPEALS Nos. 666, 890 AND 1214 OF 1916.

Babu *Surendra Nath Guha*, for the Appellant.

Babu *Jatindra Mohan Ghose*, for the Respondents in No. 666.

Babu *Birendra Chandra De* (for Babu *Gopal Chandra Das*), for the Respondent in No. 890 of 1916.

No one appeared for the Respondent in No. 1214 of 1916.

JUDGMENT.

SECOND APPEALS Nos. 1244, 1523 TO 1529 OF 1916.

These appeals arise out of suits for recovery of rent and also for enhancement of rent on the ground of a rise in the prices of staple food crops.

The defence was that the rent was not liable to enhancement and the defendants relied upon the presumption under section 50 of the Bengal Tenancy Act.

The learned Subordinate Judge says:—"The defendants have not exhibited their *dakhilas*. They, however, rely upon the plaintiffs' papers to show that their *jamas* have not been altered for the last 20 years. But I do not think that the presumption under section 50 of the Bengal Tenancy Act can help the case for the defense in any way, for the presumption has been rebutted by the plaintiffs. The *talab baki* of 1281 goes to show that the *jamas* originally payable by the defendants were altered in that year."

It is contended before us that *talab baki* papers are merely corroborative and not independent evidence. No doubt, under section 34 of the Evidence Act such papers are not sufficient evidence to charge any person with liability. There is divergence of judicial opinion, however, upon the question whether the papers sought to be used for rebutting the presumption under section 50 (as in the present case) can be said to be used for the purpose of charging a person with liability. It has been held in some cases that they are not. See the cases of *Belaet Khan* v. *Rash Beharee Mookerjee* (1), *Dukha Mandal* v. *Grant* (2). A contrary view has been taken in other cases: see *Surnomoyi* v. *Johur Mahomed Nasyo* (3), and also in the latest case on the point, namely, the case of *Aktowli* v. *Tarak Noth Ghose* (4). The plaintiffs have proved that the papers of 1281 were prepared by same agent of theirs

(1) 22 W. R. 549.

(2) 16 Ind. Cas. 467; 16 C. L. J. 24.

(3) 10 C. L. R. 545.

(4) 17 Ind. Cas. 266; 16 C. L. J. 328; 17 C. W. N. 774.

and that they were in the handwriting, and bear the signature, of the said agent; but there is no evidence to show whether the person is alive or dead. If the person is dead, the papers may be evidence under section 32, clause (2), as being the statements of a deceased person made in the ordinary course of business. The defendants did not take any objection to the admissibility of these papers in the Courts below, and in fact they relied upon these papers for a period of 20 years immediately preceding the suit. They now take objection to the admissibility of the papers of 1281, which show that there was variation of the rent in that year. In order, however, that the papers might be evidence under section 32 (2), it was for the plaintiffs to show that the person making the statement was dead and that the entries were made by him in the ordinary course of business before the collection papers could be admitted. Under these circumstances, we think that there should be an enquiry in this matter and that the plaintiffs should be given an opportunity of adducing evidence on this point. If the papers are admissible in evidence under section 32, it would be unnecessary to consider whether they are admissible under section 34.

We accordingly direct the Court below to take any evidence which the plaintiffs may adduce on this point and send up its finding on the point to this Court within one month of the arrival of this order in the Court below. The question whether those papers are admissible in evidence under section 34 of the Evidence Act (if necessary to be considered) and the other question, namely as to the right of enhancement under section 30 and the date from which the enhancement is to take effect, will be considered after the finding on the above point is received in this Court.

SECOND APPEALS NOS. 1209, 1486 TO 1491 OF 1916.

These appeals arise out of the same suits, and the main questions in these cases are, *first*, whether the lower Appellate Court has misunderstood the provisions of sub-section (6) of section 52 of the Bengal Tenancy Act and, *secondly*, whether that Court has erred in not taking into consideration matters which should have been considered under this section in determining the question whether the plaintiffs are entitled to additional rent in respect of additional area.

Section 52, sub-section (6), runs as follows: "When in a suit under this section the landlord or tenant proves that, at the time the measurement on which the claim is based was made, there existed, in respect of the estate or permanent tenure or part thereof in which the tenure or holding is situate, a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area of the tenure or holding specified in any *pottá* or *kabuliyat*, or (where there is an entry of area in counterfoil receipt corresponding to the entry in the rent roll) in any rent roll relating to it, has been entered in such *pottá*, *kabuliyat*, or rent roll after measurement."

The learned Subordinate Judge was of opinion that the practice of recent measurement would not help the plaintiff. The learned Pleader for the appellant contends that the words "at the time the measurement on which the claim is based was made" in sub-section (6) of section 52 refer to the measurement upon which the excess area is found out before the institution of the suit, and that it does not refer to the measurement made at the time of the original settlement. We are unable, however, to hold that this is what is meant by the section. The landlord has to prove under the section that there has been an increase in the area for which rent was previously paid, and in order to do so, it has been held that he must show that the land was measured at the time of the inception of the tenancy by a particular standard of measurement, and that there has been an increase in the area on measurement by the same standard. The section merely provides that if the landlord proves that at the time the measurement on which the claim is based was made there existed a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area specified in the *potta*, *kabuliyat* or counterfoil rent receipt was entered in it after measurement. So that if the landlord can prove such a practice, it will be presumed that the area entered in the *potta*, *kabuliyat* or rent receipt was entered after measurement; though he is not able to prove that as a matter of fact the lands in the particular

case were settled after measurement ; see the case of *Uma Singh* v. *Rai Tarini Prosad* (5).

If the contention of the appellant were accepted, it would follow that the landlord on showing that there is a recent practice of settlement of land after measurement (which may be started by the landlord a few years before the suit) would be entitled to ask the Court to presume that there has been such a practice 50 or 60 years before the institution of the suit when the tenancy was created. We do not think that that is the meaning of the sub-section, although the language used makes it somewhat ambiguous. We are accordingly of opinion that so far as the contention is based upon sub section(6) of section 52, it must be over-ruled.

The learned Subordinate Judge, however, does not deal with the facts of the case bearing on the question of measurement. In the first place, he says that the plaintiffs have given evidence as to the recent practice prevailing in the Mouzah about the settlement of lands. It has been pointed out to us that the plaintiffs adduced evidence to show that lands had been settled after measurement from the year 1842 and there were produced papers of 1258 and 1280 which are referred to in the judgment of the Munsif. Besides there appears to have been a survey and settlement of lands in the year 1276. The learned Munsif appears to have considered the entire evidence bearing upon the question. The lower Appellate Court has not come to any finding upon the facts and has practically proceeded upon the proposition of law mentioned in his judgment.

We think, therefore, that the case should go back to the lower Appellate Court in order that the question may be considered and findings arrived at upon the evidence on the record, and the appeal disposed of according to law.

Costs to abide the result.

This judgment will govern Second Appeals Nos. 666 and 890 of 1916, the question in these cases being similar,

SECOND APPEAL No. 1214 OF 1916.

The respondent has not appeared in this case. This appeal arises out of a suit for enhancement of rent and also for additional rent for additional area.

(5) 25 Ind. Cas. 532; 19 C. L. J. 451 at p. 452.]

The holding originally belonged to the defendant's father. There was a subsequent division of the holding into three parts. The learned Subordinate Judge says: "It does not appear when the holding in question was created. There is nothing to show that the settlement with the defendants was made on the basis of any measurement or that they have been holding any land beyond the boundaries of the lands let out to them. In short the plaintiffs have failed to prove that the defendants are in possession of any excess land." It appears, however, from the Munsif's judgment that the quantity of land and the amount of rent of the original holding have varied from time to time, and that being so, the incidents of the original tenancy would govern the incidents of the three holdings in the possession of the defendants, into which the original holding was sub-divided. In these circumstances we do not see any reason why the plaintiffs should not be entitled to additional rent for additional area.

The result is that so far as this case is concerned, the decree of the lower Appellate Court is set aside and that of the Court of first instance restored.

We make no order as to costs of this Court, but the plaintiffs will be entitled to costs of the Court of Appeal below.

Appeals Nos. 1244, 1523 *to* 1529, 1209, 1486 *to* 1491 *of* 1916 *remanded.*

Appeal No. 1214 *of* 1916 *allowed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 402 OF 1918.

July 7, 1919.

Present:—Mr. Justice Das.

BHIKHAN QASSAB—DEFENDANT—APPELLANT

versus

Sheikh MARDAN ALI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 142—Possession and dispossession—Suit for possession—Burden of proof—Bengal Tenancy Act (VIII B. C. of 1885), s. 103 B—Record of Rights, entry in, value of—Presumption of correctness, rebuttal of—Evidence prior to publication, whether admissible—Appeal—Appellate Court, duty of—Failure to consider weight of evidence.

BHIKHAN v. MARDAN ALI.

When a plaintiff brings a suit for possession on the allegation that while in possession he was dispossessed by the defendant, he must show when exactly he was dispossessed and he must bring his suit within 12 years of the date of dispossession. [p. 42, col. 1.]

Evidence of a date prior to that of the publication of a Record of Rights is admissible in evidence and ought to be taken into consideration by a Court and weighed in determining whether the presumption created by an entry in the Record of Rights has been rebutted. [p. 43, col. 1.]

The failure by an Appellate Court to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the defendant amounts to a substantial error of procedure. [p. 43, col. 2.]

Appeal from a decision of the 2nd Sub-Judge, Muzaffarpur, dated the 23rd February 1918, modifying that of the Munsif, Sitamarhi, dated the 18th January 1917.

Mr. *Khurshaid Husnain*, for the Appellant.

Mr. *B. N. Mitter*, for Mr. *L. N. Singh*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the respondent for ejectment of the appellant from the land in dispute by demolishing the house, which, it is alleged, the appellant has erected on that land.

The plaintiff's case is that the land in dispute is included in Survey Plot No. 2815, which the plaintiff purchased from one Kaburuddin in 1907. He alleges that the defendant dispossessed him from the same in Baisakh 1319 by erecting a house on that land.

The defence is that the land in dispute does not form part of Survey Plot No. 2815 and that it did not belong to the plaintiff's predecessor-in interest and does not belong to the plaintiff. Alternatively, the defence urges that the defendant erected the house 18 or 19 years ago and that he has been in possession thereof ever since and that the plaintiff's suit is barred by limitation.

The lower Appellate Court has come to the conclusion that the plaintiff has proved his title to 1 *cottah* 12½ *dhurs* of land within the land in suit. It has come to this conclusion on a review of all oral and documentary evidence in the case, including the Kobala, Khatian and the Commissioner's report. In my opinion, the finding of the lower Appellate Court on this point is a finding of fact and is binding on me in second appeal.

There, however, remains the question of limitation which the defendant specifically raised. His case is, as I have stated before, that he built this house 18 or 19 years ago and that he remained in possession thereof ever since. The plaintiff, on the other hand, says that the defendant built this house in Baisakh 1319. It is, therefore, admitted that the defendant ousted the plaintiff by building a house on the land. It is, in my opinion, therefore, of vital importance to determine when the house was actually built by the defendant. If the defendant's case be true on this point, then it is obvious that the plaintiff has not been in possession of a portion of the land in dispute within 12 years of the date of suit and his action must consequently fail. If, on the other hand, the plaintiff's case be true on this point, then he is entitled to succeed in this action to the extent of 1 *cottah* 12½ *dhurs* of land.

The Court of first instance pursued this method of enquiry and in a careful judgment, which has impressed me considerably, came to the conclusion that the defendant built this house 18 or 19 years ago and that he has been in possession of the land in dispute ever since.

The lower Appellate Court has, however, pursued another method altogether. It found that Survey Plot No. 2815, in which according to the finding of the lower Appellate Court 1 *cottah* 12½ *dhurs* of the land in dispute falls, is shown in the Record of Rights as in the possession of the plaintiff's predecessor-in-interest. Having found that as a fact, it laid down as a proposition of law that the plaintiff's possession must be presumed to continue until the date which the plaintiff gives in the plaint as the date of dispossession, unless the defendant can establish that he has acquired a title by adverse possession. The line of reasoning, so far as I have been able to understand the judgment of the lower Appellate Court, is this: The Record of Rights was finally published on 8th March 1898. It records that the plaintiff's predecessor-in-interest was on that date in possession of the land. Therefore, the Court is bound to presume that the plaintiff's predecessor-in interest was in fact in possession of the land in dispute on the 8th March 1898. Therefore, the Court must further presume that the plaintiff's predecessor-in-interest and after him the plaintiff continued to

remain in possession of the land until the date which he gives in his plaint as the date of his dispossession. In my opinion this argument is a fallacious one. It must be remembered that the Record of Rights is merely an item of evidence, though an item of evidence which must be presumed to be correct until the contrary is shown. Supposing the plaintiff had in this case proved by evidence which the Court accepted as conclusive that he was in possession of the land in dispute on the 8th March 1898, would the Court then be entitled to say "I shall now presume that the plaintiff continued to be in possession until the date which the plaintiff gives in his plaint as the date of dispossession, unless the defendant establishes that he has acquired a title by adverse possession?" It seems to me that the proposition has only to be stated to be rejected. A long series of cases have established that when a plaintiff brings a suit for possession on the allegation that while in possession he was dispossessed by the defendant, he must show when exactly he was dispossessed and he must bring his suit within 12 years of the date of dispossession. But according to the lower Appellate Court all that the plaintiff need show is that some time or other he was in possession of the land in dispute. As soon as he has shown that sometime or other he was in possession of the land in dispute, the Court will presume in his favour that he continued to be in possession of the land in dispute until the date which he gives in his plaint as the date of dispossession. In my opinion the Record of Rights does not stand on any better footing than any other piece of evidence which may be accepted by the Court, and the acceptance of the proposition that has been urged before me by the learned Vakil appearing on behalf of the respondent will, in my opinion, inevitably do away with the distinction between Articles 142 and 144 of the Limitation Act. But I must confess that I cannot distinguish the case of *Barkat Ali* v. *Basant Nunia* (1) which has been relied on by the lower Appellate Court. I have the greatest respect for the learned Judges who decided that case and, sitting as a single Judge, I feel that I cannot dissent from that decision. I will, therefore, approach this case from the point of view that the defendant has to establish that he has acquired a title by adverse possession.

Now, the defendant undoubtedly did attempt to prove his title by adverse possession, and the Court of first instance found that the defendant has been in possession of the property for 18 or 19 years. The defendant first of all relied upon the sale-deed in favour of the plaintiff, which shows that the southern boundary of the land purchased by the plaintiff is the house of the defendant. Therefore, it appears from the plaintiff's sale-deed itself that the defendant had a house to the south of the land purchased by the plaintiff, at any rate on the 22nd January 1907, which is the date of the plaintiff's sale-deed. But the plaintiff's case is that the defendant had another house to the south of the land purchased by him on the 22nd January 1907 and that the defendant built this house, which stands on the land in dispute, in April 1912. Therefore, unless the plaintiff can establish that the defendant had some other house to the south of the land purchased by him, it must follow that the plaintiff's case that the defendant built this house in April 1912 must be untrue. The plaintiff did attempt to prove that the defendant had another house in April 1912 to the south of the land purchased by him, a case which was found to be false by the Court of first instance. It was, of course, open to the lower Appellate Court to disagree with the Court of first instance on this point, but as I read the judgment of the lower Appellate Court, it has not attempted to discuss this matter at all. I think it was essentially necessary for the lower Appellate Court to deal with this matter and the failure to do so, in my opinion, vitiates its judgment. The defendant says very distinctly: "I built this house on the land in dispute 18 or 19 years ago and I have been in possession of it ever since." The plaintiff's Kobala on the face of it shows that the defendant had a house to the south of the land purchased by the plaintiff. The plaintiff makes a case that the defendant had another house to the south of the land purchased by him and that the house which now stands on the land in dispute was built by the defendant in April 1912. Therefore, in my

(1) 39 Ind. Cas. 356; 21 C. W. N. 175.

opinion, the Court was bound to determine this point, especially as the Court of first instance had dealt with this point exhaustively.

The defendant next relies upon a Kobala of 1897. The lower Appellate Court dismissed this document entirely from its consideration, on the ground that the Record of Rights was prepared subsequently to the execution of this document. It was for the lower Appellate Court to attach whatever weight it thought proper to this Kobala, but, in my opinion, it was bound to take this document into consideration in considering whether the presumption afforded by the Record of Rights has or has not been rebutted. The lower Appellate Court erroneously thought that evidence of a date prior to that of the publication of the Record of Rights is inadmissible and cannot be taken into consideration by any Court, but it has been held that events or facts, both documentary and oral, of a date prior to that of the publication of the record are admissible and should be weighed in determining whether the presumption has been rebutted: see the case of *Sheonandan Persad Sukul* v. *Bacha Raut* (2), which has been followed in this Court in *Anand Ram Marwari* v. *Dhanpat Singh* (3). If the lower Appellate Court had considered this document, this Court could not have interfered with its estimate of that document, but the complaint of the appellant is that it has entirely dismissed this document from its consideration. I am of opinion that the lower Appellate Court erred in not taking this document into its consideration at all.

The appellant next relies upon certain Chaukidari receipts as showing that he has been in possession of this house for a number of years. The lower Appellate Court says that these receipts do not identify the house with the house built on the land in dispute. It is the defendant's case that these Chaukidari receipts are in respect of the house which he built on the land in dispute 18 or 19 years ago. It is apparently to meet this case that the plaintiff introduced the story that the defendant had another house to the south of the land purchased by him in 1907, a case which the Court of first instance disbelieved. As I have said before, it was open to the lower Appellate Court to disagree with the Court of first instance on this point but it has not done so, and in my view it was not open to the lower Appellate Court to dismiss these receipts from its consideration without first displacing the finding of the Court of first instance on this point.

Lastly the appellant relied upon oral evidence adduced by the appellant in the case. The Court of first instance discussed this evidence very fully and relied on it. It was, of course, open to the lower Appellate Court to say that it did not believe in that evidence, but it was at least incumbent on the lower Appellate Court to deal with this evidence, specially as the Court of first instance had relied on it and when the lower Appellate Court was setting aside the judgment and the decree of the Court of first instance.

In my view, therefore, the lower Appellate Court has erred both in law and in procedure: in law in that it thought that evidence of a date prior to that of the publication of the Record of Rights was not admissible in evidence and could not be taken into consideration by a Court dealing with the case and could not be weighed in determining whether the presumption of the Record of Rights has been rebutted; in procedure in that it failed to determine the critical question between the parties, namely, whether the defendant had a house to the south of the land purchased by the plaintiff other than the house which the defendant has erected on a portion of the land in dispute; also in that it failed to consider the oral evidence adduced on behalf of the appellant. The error of procedure, in my opinion, is a substantial one, for it is obvious that if the lower Appellate Court comes to the conclusion that the defendant had no other house but the house now standing on a portion of the land, the plaintiff's sale-deed as well as the Chaukidari receipts filed by the defendant may well turn the balance in favour of the defendant.

I would, therefore, allow this appeal, set aside the judgment and decree of the lower Appellate Court and remand the case to the lower Appellate Court for decision according to law. The appellant will be entitled to the costs of this appeal. The

(2) 4 Ind. Cas. 54; 9 C. L. J 284.
(3) 38 Ind. Cas. 37; 1 P. L. J. 563; 2 P. L. W. 341.

KISANLAL *v.* NATHU.

costs incurred in the Courts below will abide the result and will be disposed of by the lower Appellate Court.

Appeal allowed;
Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 585 OF 1918.
February 16, 1920.
Present.—Mr. Kotval, A. J. C.
Seth KISANLAL—PLAINTIFF—APPELLANT
versus
NATHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation by co-parcener in undivided family, validity of—Precedents, value and applicability of.

An alienation by a co-parcener in an undivided Hindu family in the Central Provinces is valid to the extent of the alienor's own interest in the property. [p. 44, col. 2; p. 46, col. 1.]

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. [p. 45, col. 2.]

A case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it. [p. 45, col. 2.]

Quinn v. *Leathem*, (1901) A. C. 495 at p. 506; 70 L. J, P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749, followed.

Appeal against the decree of the District Judge, Nagpur, in Civil Appeal No. 53 of 1918, decided on the 26th September 1918.

Mr. *M. Gupta*, for the Appellant.

Dr. *H. S. Gour* and Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—Kisansingh, the father of the defendants respondents, executed a mortgage by conditional sale in favour of Jagannath, the father of the plaintiff-appellant, on the 31st May 1904. Both the mortgagor and the mortgagee are dead. The plaintiff states that the debt was borrowed by Kisansingh as the manager of the joint family for the benefit of the family. He sues for Rs. 2,976-14 3 due on the mortgage after giving credit for certain payments and, in default of payment, for foreclosure.

The defendants pleaded that they did not know if their father had executed the mortgage and that the debt was not incurred for the benefit of the family.

The pleadings of the parties are very briefly recorded and the suit has proceeded upon the basis that the property is undivided ancestral property of which the father was the manager, although this is nowhere expressly so stated.

The first Court found that the mortgage deed was executed by Kisansingh and that the debt was borrowed for the benefit of the family. It decreed the plaintiff's claim.

The lower Appellate Court held that the debt was not proved to have been incurred for the benefit of the estate and that it was not binding on the defendants. It dismissed the plaintiff's claim.

In second appeal it is urged that the suit should not have been wholly dismissed but a foreclosure decree should have been passed in respect of Kisansingh's $\frac{1}{3}$rd share.

The respondents rely on *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Lachhman Prasad* v. *Sarnam Singh* (2) and contend that Kisansingh was not entitled to mortgage even his own share and that the plaintiff cannot claim a decree in respect of that share.

The view of the law as to the right of a co parcener to alienate his own interest in the undivided ancestral property accepted in these provinces is that an alienation by a co-parcener, whatever it may profess to convey, is valid to the extent of the alienor's own interest in the property. This view agrees with that of the High Courts of Madras and Bombay and differs from that of the High Courts of Allahabad and Bengal.

The case of *Sahu Ram Chandra* v. *Bhup Singh* (1) deals only with the question of what is an antecedent debt for which the son's share may be liable. The question now in dispute did

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 40 Ind. Cas. 284; 39 A. 500, 15 A. L J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 44 I. A. 163 (P. C.).

not arise in that case. Their Lordships were not dealing with the question whether if a debt is not antecedent or for legal necessity, the interest of the father in the joint family property will be bound or not.

In the case of *Lachhman Prasad* v. *Sarnam Singh* (2), however, this point is directly dealt with. Their Lordships held that it was not the general law that for every mortgage by the head of a joint family the property of the joint family could be made amenable to the extent of the interest of the mortgagor. They referred to the following passage in the judgment of Lord Watson in the case of *Madho Parshad* v. *Mehrban Singh* (3):—

"Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes; but as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution."

They distinguished the case of *Mahabeer Pershad* v. *Ramyad Singh* (4), on the strength of which the appellant pressed for a decree against the father's share, on the ground that the judgment in that case was based upon an implied representation or undertaking given by the mortgagors that they had power to charge the joint family property, and would make good the representation by partition or otherwise. They found that in the case they were dealing with there were no such special circumstances as were found in the above case and held that the mortgage was void.

(3) 18 C. 157; 17 I. A. 194 (P. C.); 5 Sar. P. C. J. 586; Rafique & Jackson's P. C. No. 121; 9 Ind. Dec. (N. S.) 105.

(4) 12 B. L. R. 90; 20 W. R. 192.

In *Quinn* v. *Leathem* (5) with reference to the application of precedents Earl of Halsbury says:

"There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Bearing in mind these observations and the fact that this case was like that of *Sahu Ram Chandra* v. *Bhup Singh* (1), one from Allahabad where the view of the law is different from that prevailing in these Provinces, it may fairly be said that their Lordships' ruling cannot be applied to similar cases arising in these Provinces. In the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (6) their Lordships recognised that the inrerpretation of the law in Madras and Bombay is different from that in Allahabad and Bengal and if the rule in *Lachhman Prasad* v. *Sarnam Singh* (2) was meant to be laid down as the general law applicable to the whole of India, the judgment in the latter case would have referred to and explained or distinguished the former. In the absence of any such reference, explantion or distinction, it must be held that the decision in *Lachhman Prasad* v. *Sarnam Singh* (2) was only with reference to the law as accepted in Allahabad, for that is the only way in which that decision and the ruling in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (6), which must both be accepted as final and correct, can be reconciled.

Their Lordships further seem to accept

(5) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

(6) 5 C. 148; 6 I. A. 88; 4 C. L. R. 226; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705.

that the rule as laid down in *Lachhman Prasad* v. *Sarnam Singh* (2) admits of an exception where an equity arises. The view current in these Provinces has prevailed for many years before the mortgage in dispute was executed; *vide Diwakar Janardhan* v. *Janardhan Chimnaji* (7), *Meghonath* v. *Malich* (8), and an exception is here admissible on the ground that the contract must be taken to have been made on the understanding that the father's share would in any event be liable and that it would be inequitable to defeat the just expectations of a contracting party based upon the prevailing law.

I hold that *Lachhman Prasad* v. *Sarnam Singh* (2) does not affect the view of the law prevailing in these Provinces. The appeal, therefore, succeeds. The decrees of the lower Courts are set aside. An account will now no taken of what will be due to the plaintiff for principal and interest on the mortgage and costs of the three Courts on the 15th August 1920, and a decree will be drawn up in terms of rule 2, Order XXXIV, First Schedule, Civil Procedure Code. In default of payment Kisansingh's 1-3rd share in the property mortgaged will be liable to be foreclosed. The plaintiff will pay 2-3rds of the costs of the defendants in the two lower Courts. The cross-objection filed by the respondents has not been pressed. It is dismissed with costs. Pleader's fee in cross-objection Rs 20. The defendants will bear their own costs in this Court.

Appeal dismissed.

(7) 3 C. P. L. R. 64.

(8) Appeal No. 420, dated the 30th August 1881 Digest Civil Rulings 1882, No. 60, Part 8.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 32 OF 1919 20.

March 11, 1920.

Present:—Mr. Hopkins, S. M. and Mr. Harrison, J. M.

Musammat HANIF UN-NISA—PLAINTIFF—APPELLANT

versus

RAM DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 47—Enhancement of rent provided for in lease, whether enlarges period of tenancy.

A lease for a term of years which provides for a rise in the rent in the last year of the lease confers no right on the tenant to continue in possession after the termination of the period of the lease. To such a case section 47 of the Agra Tenancy Act does not apply. [p. 46, col. 2; p. 47, col. 1.]

Second appeal from the order of the Commissioner, Meerut Division, dated the 16th October 1919, in the case of ejectment.

JUDGMENT.

HARRISON, J. M.—(*February* 11, 1920).—This is a Zemindar's second appeal in a case in which she had sued for the ejectment of the defendant tenants on the expiry of a registered lease for 7 years. In appeal before the Commissioner the point was taken that although the lease had expired, the tenants were entitled to hold for another 5 years because within the term the last enhancement had taken effect in the last year. The plea was based on section 47 of the Agra Tenancy Act. The lease seems to have been drawn with special care, for in addition to reciting that the rent was to be Rs. 70 for the first four years, Rs. 90 for the fifth year, Rs. 112 for the sixth year and Rs. 132 for the last year, it noted that the total rent for the 7 years was to be Rs. 614 with an average of Rs. 87-11-5 per annum. In Petition No. 26 decided by me on the 8th February 1920 from the Muzaffarnagar District, *Lekha Mal* v. *Ram Rikh**, I held that a lease in which pro-

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*The following is the judgment in Second Civil Appeal No. 26 of 1919-20, dated 12th March 1920, decided by Mr. Hopkins, S. M., and Mr. Harrison, J. M.:—

"HARRISON, J. M.—(*February* 8, 1920).—This is a second appeal by a landlord in a suit for ejectment of a tenant on the expiry of a registered lease.

The lease was unusual in its terms as to rent. It fixed the rent at Rs. 625 per annum from 1317 to 1323 F., but the rent was to be Rs. 800 in 1324 F., the full period of the lease being 8 years. No attempt was made to eject the lessee until 1326 F., by which time the rent had been paid at the rate of Rs. 800 for 1324, 1325 and the Kharif of 1326 F. The tenant contends that with reference to section 47 of the Agra Tenancy Act the rent having been enhanced by registered agreement in 1324 F., he is entitled to continue to hold at that rent for 5 years counting from that year. The Commissioner in appeal held that the rent was actually enhanced in 1324 F. and that the tenant is entitled to the benefit of section 47.

vision had been made for enhancement only in the last year of the term, did not give the tenant a right to hold on for 5 years at the rent as last enhanced. The present case is stronger than that one, for it may be read as giving the land for 7 years at a gross rent of Rs. 614 payable in certain unequal annual instalments. I, therefore, cannot agree with the Commissioner's view that the rise in rent in the last year of the term gave any right to continue in possession after the termination of the original lease. I would, therefore, allow the appeal with costs to the appellant in both the Appellate Courts.

HOPKINS, S. M.—For the reasons given by me to-day in a similar case, Petition No. 26 of 1919-20, *Lekha Mal* v. *Ram Rikh* (1), Muzaffarnagar District, I agree in the order proposed.

Appeal allowed.

(1) 56 Ind. Cas. 46*n*; 2 U. P. L. R. (B. R.) 31.

I cannot agree with the Commissioner. The section quoted seems to me to apply to the case of rent which comes into force at the time a registered agreement is executed. It does not seem to me possible to extend the time for which the enhanced rent shall not be liable to further enhancement beyond the period of 5 years from the date of the agreement. In this particular case the land was held at the rent agreed upon for 8 years, although it is true that by the terms of the agreement the rent was to be increased during the term from the beginning of the eighth year. The lease in fact is comparable to a lease which provides for gradually increasing rents and the whole intention of this section seems to me to secure a reasonable period of tenure for a non-occupancy tenant whose rent is fixed by registered agreement.

The case is not free from difficulties, but the section itself is somewhat difficult of interpretation and the Board has not given any decision, so far as I can ascertain, on facts precisely similar to this. The decision most in point is *Faizyab Khan* v. *Nizam-ud-Din* (1), in which Mr. Tweedy held that the section seemed to be directed against "hole and corner" enhancement. Here there is no question of a "hole and corner" enhancement. Everything was plainly set forth.

Holding this view I would allow the appeal and restore the decree of the Assistant Collector with costs to the appellant in both Appellate Courts.

HOPKINS, S. M. [*March* 12, 1920.]—I agree in the order proposed. The case is of some difficulty, but I think that section 47 of the Tenancy Act must be read in connection with section 33. Section 33 provides for the rent payable on an initial contract of tenancy; section 47 provides for an enhancement of the rent previously payable. I do not consider that progressive increases in rent payable under the initial contract can be considered enhancements within the meaning of section 47. They are a part of the original agreement. Agreements to pay progressive increases of rent are not unusual, especially in the case of newly cultivated land, and in my opinion they are not illegal, even if the stages are fixed at periods of less than 5 years. The substantive rent in such case is the amount ultimately reached and the sums previously payable represent abatements from the amount. The main object of section 47, as my colleague points out, is that agreements to pay enhanced rent should be open and above board."

(1) 6 Sel. Dec. 1911.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 644 OF 1918.

February 2, 1920.

Present:—Mr. Justice Sultan Ahmed.

SURAJ PAL PANDEY AND ANOTHER —DEFENDANTS—APPELLANTS

versus

UTIM PANDEY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 149—Time for paying Court-fees, extension of—Appeal—Order, whether can be interfered with—High Court, power of interference of.

An Appellate Court cannot question the propriety of an order under section 149 of the Civil Procedure Code for the payment of deficit Court-fees. If the order is not objected to when it is made, or in the Court which made it, it cannot be objected to in second appeal. [p. 48, cols. 1 & 2.]

Appeal from a decision of the District Judge, Chapra.

Mr. *Rajendra Prasad*, for the Appellants.

Messrs. *Harnarain Prasad* and *Sambhu Saran*, for the Respondents.

JUDGMENT.—The plaintiffs brought the suit as the nearest reversioners of the deceased son of defendant No. 1 and sought for a declaration that certain sale-deeds executed by defendant No. 1 in favour of the other defendants were without legal necessity and not operative against the plaintiffs. The trial Court held that the plaintiffs had established that they were reversioners, but held that the sale-deeds were executed for legal necessity and were

operative against the plaintiffs and dismissed the suit. The Appellate Court held that the sale-deeds in question were not genuine transactions and were not executed for legal necessity. They represented bogus transactions entered into with a view to enable the defendants Nos. 2, 3 and 4 to grab the widow's property from the plaintiffs.

A second appeal has been filed in this Court. The learned Vakil, appearing on behalf of the plaintiffs, has not challenged the findings of the lower Appellate Court, but he contends that the appeal filed before the learned District Judge was barred by limitation.

It appears that the Munsif decided the suit on the 16th of March 1917. The appeal was filed on the 2nd of April 1917 and allowing time for preparation of the decree and the certified copy of the judgment and decree, it is conceded that this appeal was filed in time. The last date on which the appeal could have been filed was the 14th of April 1917. But it has been pointed out that, though the appeal was filed on the 2nd April 1917, it was filed with insufficient Court-fee. The office, having found this, reported the matter to the District Judge who allowed time till the 17th of April, but as nobody appeared on that date the appeal was dismissed for default. The order sheet shows that, on the 24th of April, an application was filed by the appellant in the Court below for the restoration of the appeal, on which the appeal was admitted and the deficit Court-fee was paid by him on that date. No objection was taken at any time by the respondents in the Court below, *i. e.*, the appellants in this Court, on the ground that the appeal was filed after the period of limitation allowed by law. But it is contended before me that though this objection was not taken in the lower Appellate Court it could still be taken here and reliance has been placed on the case reported as *Chaturbhuj Sahay* v. *Muhammad Habib* (1). That case was, however, under section 5 of the Limitation Act and has no bearing on the present case. Assuming, however, that it could be raised here, I have to see whether the objection itself is sustainable. It is obvious that the District Judge acted under section 149, Civil Procedure Code, in giving time to the appellant for the payment of the deficit Court-fee till the 17th. True it is that there was no compliance with this order, but that the very fact that on the 24th April the learned Judge admitted the appeal implies that he acted under section 148 of the Civil Procedure Code and enlarged the time for the payment of deficit Court-fee. I am confirmed in the view that I take of this matter, by a decision of this Court in Second Appeal No. 2210 of 1914 referred to in *Gaya Loan Office Limited* v. *Awadh Behari Lal* (2), where the learned Chief Justice Chamier and Sharfuddin, J., held that the learned Judge, under similar circumstances, acted under section 148, Civil Procedure Code.

It has been held in the case of *Priya Nath Bachier* v. *Miajan Sardar* (3) that a Judge, passing order under section 149, Civil Procedure Code, for payment of deficit Court-fees must be taken, on the record as it stands, to have exercised his discretion as provided by the section, and an Appellate Court cannot go into the question as to whether he exercised his discretion in making the various orders of payment properly. Much less would, then, this Court go behind that order in second appeal when the point was not taken at any stage in the Court below.

The case reported as *Golab Chand* v. *Bahuria Ram Murat Koer* (4) shows that the order under section 148 enlarging the time for the payment of deficit Court-fee was made by the Registrar, who had no power under the law to admit such applications. But in the present case the order admitting the appeal was made by the District Judge himself. Under these circumstances, I think the point that has been raised is untenable and I would dismiss this appeal with costs.

Appeal dismissed.

(1) 54 Ind. Cas. 36.

(2) 37 Ind. Cas. 507; 1 P. L. J. 420; 3 P. L. W. 51.
(3) 29 Ind. Cas. 571; 24 C. L. J. 88.
(4) 10 Ind. Cas. 268; 13 C. L. J. 432.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 128 OF 1920.
March 3, 1920.
Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Walsh.
MANNA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 62, 302—Murder—Forfeiture of property, order of, when appropriate.

An order under section 62 of the Penal Code, directing the forfeiture of the property of a person sentenced to death for murder, is appropriate only when theft forms part of the motive for the murder. [p. 49, col. 2.]

Criminal appeal against the decision of the Sessions Judge, Farrukhabad, dated the 22nd January 1920.

Mr. *Shamnath Mushran*, for the Appellants.

The Government Advocate, for the Crown.

JUDGMENT.—In this case Manna Singh, caste Thakur, Sardar Singh, caste Thakur, and Lallu Singh, caste Thakur, appealed, the first from a conviction and sentence of death passed upon him, and the second and third from convictions and sentences of transportation for life. The facts are as clear as possible. The deceased man had given offence to Sardar Singh and Lallu Singh and they bore enmity against him, and on the night of the 5th of November three servants who were sleeping within a few feet of the deceased man heard his cry for help. These three men hurried to the next room, which was lighted by a lamp quite close to the bed and made bright by moonlight also. There they saw three men all of whom were previously known to them, and each witness has described what he saw. Sardar Singh and Lallu Singh were holding the deceased man down on to the bed with their *lathies*. Manna Singh was striking the deceased man's neck with an axe. The three men ran away into the open and in a few minutes other people arrived. From first to last there was no doubt expressed by the three servants that the attack was committed by the three men who stood their trial. A witness, Khagga, identified the axe with which the murder was committed, and swore to it having been put into his hands to sharpen on the same day preceding the night of the murder. Mr. Shamnath Mushran has had a difficult case to argue, but he has confined himself very properly to just the points which it was necessary to bring to our notice, and has said on behalf of these three men everything that the facts of the case permitted him to do, and in one respect we think that he has taken a good point in arguing that the forfeiture of property should not have been coupled with the sentences passed upon the accused men. In this we think he is right, and although the learned Judge under section 62 of the Indian Penal Code had power to do this, it was not an appropriate case in which such order should be made, because the murder was a murder due to feelings of revenge and was not a murder committed in the course of a dacoity, or which had theft as any part of its object. We think that in such cases where theft forms part of the motive forfeiture of property may very wisely be used as one of the deterrents. Now the question before us is whether the conviction against Manna Singh must be affirmed or rejected, or the nature of it altered. We are of opinion that Manna Singh has no ground whatever for this appeal. His was the hand that struck the blow that killed the deceased. Nor do we think that there can be any alteration of the sentences of transportation for life passed against Sardar Singh and Lallu Singh, and, therefore, we dismiss all three appeals. But we think it proper to say that accepting as we do the evidence against all three, it is difficult to see any logical reason why Sardar Singh and Lallu Singh should not have been sentenced to death. By common agreement these three men banded themselves together and went to that house with a newly sharpened axe, intended to kill, and there is no real difference between the man who struck the blow and the men who held the deceased in position so that the blow might be effective. However, as the matter stands we confirm the death sentence passed upon Manna Singh and order it to be carried out in accordance with law and we direct that Sardar Singh and Lallu Singh are to undergo the sentence of transportation for life. But in all three

cases in which the Judge has passed the order adjudging that their property, moveable and immoveable, be forfeited, as regards that portion of the judgment we rescind that order, such rescissions to operate as from the date of the convictions. From that it follows that if in fact any property has been attached, such attachment will at once be released and the property restored to the original owners. Otherwise the convictions will stand.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 677 OF 1919.

CRIMINAL REVISION PETITION No. 575 OF 1919.

February 20, 1920.

Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT., and Mr. Justice Coutts-Trotter.

YELUCHURI VENKATACHENNAYA AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 350 (1), proviso (a)—Proceedings under s. 107—Right of person proceeded against to re-call witnesses.

A person proceeded against under section 107 of the Criminal Procedure Code has the same right, under section 350 (1), proviso *a*), as an accused person in a summons or warrant case, to have the witnesses re-called and re-heard. [p. 56, col. 1; p. 58, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order, dated the 24th July 1919, of the District Magistrate, Kurnool, in Criminal Appeal No. 4 of 1919, preferred against the order, dated the 2nd May 1919, of the Court of the Deputy Magistrate, Markapur, in Miscellaneous Case No. 13 of 1918.

FACTS.—The question argued was whether proceedings taken under section 107, Criminal Procedure Code, constituted an 'inquiry' or a 'trial' so as to deprive the accused of a right to have a *de novo* trial or not under section 350.

This case coming on for hearing on the 17th and 18th December 1919, upon perusing the petition and the orders of the lower Courts and the records in the case and upon hearing the arguments of Mr. *A. S. Viswanatha Aiyar* for the Petitioners and of the Public Prosecutor on behalf of the Crown, the Court (Abdur Rahim and Spencer, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

ABDUR RAHIM, J.—In this case the question of law raised before us is whether proviso (*a*) to section 350 (1) of the Code of Criminal Procedure applies to a proceeding under section 107.

The petitioners were bound down to keep the peace by a Magistrate who did not hear the evidence, the evidence having been recorded by another Magistrate who has been subsequently transferred. An application was made for re-calling the witnesses and for the evidence being taken *de novo*. That application was refused. We are asked to consider whether the petitioners were not entitled under proviso (*a*) to section 350 (1) to have the witnesses resummoned and re-heard.

It is not disputed that the main part of section 350 does apply to this case. But what is contended is that its application to a proceeding under section 107 is by virtue of the word "inquiry" used in section 350 and that proviso (*a*) does not apply because it cannot be said that in a case like this any *accused* person is *tried*. The contention of the Public Prosecutor is that this is an inquiry and not a trial within the meaning of section 350.

There is no direct ruling on the point under section 350 of the present Code of Criminal Procedure, though under the old Code it was held that such a proceeding was a trial in the present connection. There are rulings to the effect that a person who is proceeded against under Chapter VIII is an accused person within the meaning of the Code of Criminal Procedure. For instance *Jhoja Singh* v. *Queen-Empress* (1) (Ghose and Rampini, JJ.), *Queen-Empress* v. *Mona Puna* (2), *Queen-Empress* v. *Mutasaddi* (3), *Hopcroft* v. *Emperor* (4). There is also

(1) 23 C. 493; 12 Ind. Dec. (N. S.) 328.
(2) 16 B. 661; 8 Ind. Dec. (N. S.) 919.
(3) 21 A. 107; A. W. N. (1898), 185; 9 Ind. Dec. (N. S.) 778.
(4) 1 Ind. Cas. 737; 36 C. 163; 13 C. W. N. 151; 8 C. L. J. 565; 9 Cr. L. J. 259.

a decision of this Court that the words "order in a criminal trial" in clause 15 of the Letters Patent comprehend an order passed by a single Judge of this Court in a proceeding under the provisions of Chapter VIII. See *Ramasamy Chetty, In the matter of* (5). There can be no doubt that in section 350 and other sections of that chapter and several of the succeeding chapters the words 'inquiry or trial,' when used in juxtaposition to each other, are intended to mean two different things. Nor can there be any doubt that the word 'inquiry' is often used in several places in the general popular sense of investigation into the truth of any matter; see, for instance, section 177, where it is said "Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." There are also many other sections in which the word 'inquiry' is used in that popular sense. 'Inquiry' is defined in section 4 (*k*) as including every inquiry other than a trial conducted under this Code by a Magistrate or Court; but 'a trial' is not defined. The question in this connection would be whether a proceeding under section 107 of the Code of Criminal Procedure cannot properly be called 'a trial' within the meaning of section 350 (*a*). This very definition shows that the word 'inquiry' has a wider significance, which would ordinarily include trials but when used in a technical sense it is to be taken to exclude "trials."

If we examine the scheme of the Code of Criminal Procedure, it seems to me to be apparent that wherever the words 'inquiry' and 'trial' are used in two distinct senses, by 'inquiry' the Legislature mostly refers to inquiry into cases triable by the Court of Session or the High Court and sometimes also inquiries such as under Chapter XII (inquiry into disputes as to immoveable properties) which cannot be called 'trials.' Chapter XVIII is the chapter which deals with 'inquiries' into cases triable by a Court of Session or High Court. Chapter XIX deals with the form of charges, Chapter XX with the trial of summons cases by Magistrate, and XXI with the trial of warrant cases. Chapter XXII deals with summary trials and XXIII deals with trials before High Courts and Courts of Session. Then we come to Chapter XXIV, which contains section 350. That chapter is headed "General provisions as to enquiries and trials." Chapter XXV deals with the mode of taking and recording evidence in inquiries and trials. We find in section 353 that 'all evidence taken down under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his Pleader." That does not go beyond Chapter XVIII, which deals with inquiries in cases triable by the Court of Session or High Court. Section 356 throws considerable light on the question. It says that 'in all *other trials*' before Courts of Session and Magistrates, other than Presidency Magistrates, and in all *inquiries* under Chapters XII (disputes as to immoveable properties) and XVIII (cases triable by the Court of Session or High Court) the evidence of witnesses shall be recorded in a particular manner. If this section applies to proceedings under Chapter VIII—and there can be no doubt that it does—then a proceeding under section 107 is a trial within the meaning of the Code. Chapter XXVI deals with judgments. As regards Chapter VIII, it is in part IV which deals with prevention of offences: and I do not find that in that chapter the word 'inquiry' is used in any technical sense as contradistinguished from trial. In fact, as I have already pointed out, it is in Chapter XVIII that the word "inquiry" is used in a strictly technical sense as distinguished from trial, that is to say, the Magistrate is to enquire into the cases dealt with there but is not empowered to dispose of them finally; he has to record the evidence and if he thinks there is a *prima facie* case, he is to commit it to the Court of Session or High Court for trial. It seems to me, therefore, that there is no warrant for holding that the word 'trial' as used in section 350 (*a*) is not intended to cover cases under section 107.

But even apart from that, I think that section 117 makes it quite clear that section 350 including proviso (*a*)—I am somewhat doubtful about proviso (*b*) because of the use of the word 'conviction' there—is made applicable to a proceeding under section 107. Section 117 says that an inquiry as to the

(5) 27 M. 510; 1 Weir 787; 14 M. L. J. 394.

truth of the information—it is evident that the word 'inquiry' here is used in the popular sense—"shall be made as nearly as practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed." It is argued by the learned Public Prosecutor that section 117, clause (2), refers only to Chapters XX and XXI which are headed, "Trial of Summons Cases by Magistrates" and "Trial of Warrant Cases by Magistrates," and that none of the other succeeding chapters are referred to in section 117. The argument in support of this contention is, I take it, that those chapters specifically refer to trials of summons and warrant cases. But I am unable to accept this argument. Those two chapters deal only with certain limited and special questions of procedure relating to summons and warrant cases. There can be no doubt that many of the general provisions of Chapter XXIV would apply to proceedings under section 107 and similar other proceedings under Chapter VIII. But it is said that this is so because both the words 'inquiry' and "trial" are used and according to the contention for the prosecution a proceeding under Chapter VIII is an enquiry and, therefore, the provisions of Chapter XXIV are made applicable by force of that word. But it is difficult to see any force in this argument in the face of the express and clear language of section 117.

Chapter XXIV contains many provisions which must necessarily apply to proceedings under Chapter VIII. For instance section 344 which gives power to the Court to postpone or adjourn proceedings, section 340 which says that "Every person accused before any Criminal Court may of right be defended by a Pleader" and section 341 which lays down the procedure to be observed in cases where the accused does not understand the proceedings. The Code of Criminal Procedure must be taken to be exhaustive, so far as the procedure to be observed by the Magistrates and other Criminal Courts in the various proceedings under that Code is concerned, and must be expected to provide for all cases in the proceedings under the Code where the evidence was heard and recorded by a Magistrate and that Magistrate is subsequently transferred. That is provided by section 350 and there is the other provision for such contingencies.

Section 117 says that where a matter is inquired into under Chapter VIII, the inquiry shall be made as nearly as may be practicable in the manner hereinafter prescribed for conducting *trials* (*and not inquiries*) and recording evidence in summons cases. Section 350, proviso (*a*), lays down what is to happen when the Magistrate who recorded the evidence is no longer exercising jurisdiction in cases where an accused is under trial. That obviously applies both to summons and warrant cases. Section 117 thus by explicit language embodies the proviso of section 350, proviso (*a*).

It was suggested that the provision that an inquiry shall be made in the manner hereinafter prescribed, etc., does not refer to a rule of procedure to be observed but to something else. I must say that I do not quite understand this contention but so far as I could follow it, it seems to be utterly untenable. Section 117 clarly refers to the procedure to be observed in cases under section 107 and other similar sections of Chapter VIII. Therefore, even if it were granted—I have shown that this contention is not correct—that a proceeding under this chapter is an enquiry as contradistinguished from a trial, I should still hold without any hesitation that the procedure prescribed in section 350 (*a*) is expressly adopted by the Legislature for the purposes of proceedings under Chapter VIII, as section 117 says that the inquiry shall be made in the manner prescribed for conducting trials.

If we look at the provisions of Chapter XXV which refers to the mode of taking and recording evidence in inquiries and trials, the position seems to be equally clear. Similarly the chapter relating to "judgment" shows that all the general provisions, as far as practicable, have to be applied in cases under Chapter VIII. I have, therefore, upon an examination of the Code arrived at the conclusion that section 350, proviso (*a*), applies to a proceeding under section 107.

YELUCHURI VENKATACHENNAYA *v.* EMPEROR.

A ruling of the Calcutta High Court was brought to our notice, in which it was held with reference to section 350 that a proceeding under section 145 of the Code of Criminal Procedure is an enquiry and, therefore, section 350 would apply. That is the case of *Anu Sheikh* v. *Jitu Sheikh* (6). Then it must be pointed out that in that case no question arose of the application of clause (*a*) of section 145, and it could hardly be contended that in such a proceeding there is any person who can be called "accused", nor is there any provision like that of section 117 in Chapter XII. I might also point out that section 340 of the Code of Criminal Procedure has been applied to a proceeding under Chapter VIII [see *Jhoja Singh* v. *Queen-Empress* (1)]. Section 443 has been applied to such a proceeding in *Hopcroft* v. *Emperor* (4) and section 437 in *Queen-Empress* v. *Mutasaddi* (3). I would hold, therefore, that the petitioners were entitled to ask in this case that the witnesses should be re-summoned and re-heard and I would direct that the order of the Magistrate be set aside and the case be remitted to him for further inquiry, the petitoners being given an opportunity to have the witnesses re-summoned and re-heard before the trying Magistrate.

But my learned brother takes a different view. The question of law involved is, however, one of some importance and should be setted by a Full Bench. The question is whether section 350 (1), proviso (*a*), Criminal Procedure Code, applies to a case under section 107, Criminal Procedure Code.

SPENCER, J.—This petition is to set aside an order made by the District Magistrate of Kurnool refusing to cancel the bonds taken from the petitioners by the Deputy Magistrate, Markapur, for security for keeping the peace. The Deputy Magistrate who held an enquiry under Chapter VIII of the Criminal Procedure Code passed an order requiring the petitioners to execute bonds to keep the peace upon evidence partly recorded by his predecessor. The question which has been argued before us is whether section 350 of the Criminal Procedure Code gives a person, against whom such proceedings are being taken, a right to demand that the witnesses already examined should be re-summoned and re-heard, when the Magistrate who first enquired into the case is transferred before the conclusion of the inquiry. Chapter XXIV of the Criminal Procedure Code deals with general provisions as to enquiries and trials and section 350, which occurs in this chapter, undoubtedly applies to proceedings for taking security to keep the peace as it in terms refers to 'inquiries' or trials. But proviso (*a*) runs thus: "In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard." If it was intended that this provision should apply to inquiries also, one would expect that the words used would be 'In any inquiry or trial,' as those are the words used in the body of the section. It was held in *Anu Sheikh* v. *Jitu Sheikh* (6) that section 350 would apply to inquiries under section 145. But there is no authority for saying that the person called upon to show cause against giving security has an inherent right to insist under proviso (*a*) to that section on re-calling witnesses, except the case of *Buroda Kant Roy* v. *Korimuddi Moonshee* (7) which is under the Code of 1872. The learned Judges therein observe that an order directing a person to give security is in substance a conviction. With great respect I am unable to agree with that proposition. According to the strict letter of the proviso to section 350 it is only in trials that the accused can demand a re-hearing of witnesses. Although a trial is not defined in the Code, there is a definition of an inquiry in section 4 (*k*), which is said to include every inquiry other than a trial conducted under this Code. Wherever the word 'trial' occurs in the Code of Criminal Procedure, it appears to refer to proceedings in which an accused person stands before a Judge or Magistrate who is empowered to convict him upon a charge of an offence committed by him and to sentence him to one of the punishments described in Chapter III of the Indian Penal Code. Schedule II of the Code of Criminal Procedure provides by what Magistrates offences may be tried and Schedule III empowers certain Magistrates to try offenders. But when the schedule speaks of inquiries under the preventive

(6) 7 Ind. Cas. 54; 37 C. 812; 11 Cr. L. J. 440.

(7) 4 C. L. R. 452.

sections of the Code, it refers to them as powers to require security for good behaviour or for keeping the peace. I, therefore, consider that the word 'trial' in proviso (*a*) to section 350 does not include an inquiry with a view to requiring security to keep the peace. There is a decision of this High Court in *Palaniandy Goundan* v. *Emperor* (8) which I am prepared to follow, that proviso (*a*) to section 350 applies only to trials and not to inquiries. The learned Judges were dealing there with a preliminary inquiry prior to commitment and not to an inquiry under any other chapter than Chapter XXIII. But 'inquiry' in the body of section 350 is not limited to inquiries preliminary to commitment, but also includes inquiries in miscellaneous matters under Chapters VIII, X, XI and XII, that is, to proceedings regarding security to keep the peace or for good behaviour, to suppress public nuisances, to determine disputes regarding immoveable property likely to cause a breach of the peace, as well as to a preliminary inquiry under section 476 before sending a case for inquiry or trial to a 1st Class Magistrate for an offence against the administration of justice. For this we have the high authority of Mr. Prinsep (see his commentary on the Code of Criminal Procedure). If it was intended that the provision should only apply to certain inquiries, and not to others, it would have been easy to specify the kind of inquiries intended to be covered by the words of the provision. On the other hand in proviso (*a*) the word 'trial' seems to be used in clear contradistinction to the words 'an inquiry or a trial' in the body of the section.

A suggestion has been made by my learned brother that by section 117 of the Code of Criminal Procedure, which directs that inquiries relating to security for keeping the peace should be made in the manner prescribed for conducting trials in summons cases and proceedings in cases of requiring security for good behaviour should be conducted in the manner prescribed for conducting trials in warrant cases, all other provisions in the Code which apply to trials, wherever they occur, will be attracted to and will govern inquiries regarding security for keeping the peace or for good behaviour, as if they were trials. In my opinion the provision in section 117 (2) refers only to the procedure laid down in Chapters XX and XXI respectively for the trial of summons and warrant cases. The general provisions in Chapters XXIV and XXV no doubt apply to proceedings under Chapter VIII, but they do so of their own force and not because they contain rules of procedure for the trial of summons and warrant cases by virtue of section 117, clause (2). This very section 117 refers to proceedings for requiring security as inquiries, and thus observes the distinction between an inquiry and a trial. In *Adur Desikachari* v. *Emperor* (9) it has been observed that proceedings under this chapter fall within the scope of an inquiry rather than a trial. We held in that case that for the purpose of the Madras Letters Patent they would come under the description of a criminal trial. But that decision was independent of the words of definition in the Criminal Procedure Code and had only to do with the words that occur in the Madras Letters Patent.

I am, therefore, of opinion that the District Magistrate was right in holding that the petitioners had no inherent right to require a re-trial of the case. I also think that we have no power to order a re-trial under proviso (*b*) to section 350, as there has been no conviction of an accused within the meaning of that proviso.

In my opinion, apart from the merits of the application into which we have not entered, the criminal revision petition should be dismissed. I agree that the question of law may be referred to a Full Bench.

This case came on for hearing before a Full Bench on 5th February 1920.

Mr. *A. S. Viswantha Aiyar*, for the Petitioner.

—A proceeding under section 107, Criminal Procedure Code, is a 'trial' and the person against whom it is taken is an 'accused' person. *Buroda Kant Roy* v. *Korimuddi Moonshee* (7). The order passed against him is in substance tantamount to a 'conviction.' See also *Ramasamy Chetty, In the matter of*

(8) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146.

(9) 28 Ind. Cas. 527; 28 M. L. J. 307; (1915) M. W. N. 224; 16 Cr. L. J. 303; 39 M. 589.

(5), where such a proceeding is held to be a 'criminal trial' within the purview of clause 15 of the Letters Patent. See also section 117 (2), which prescribes the procedure as being the same as for 'trials.' Failure to furnish the security ordered will result in imprisonment. Section 123. See also *Queen-Empress* v. *Mutasaddi* (3), *Jhoja Singh* v. *Queen-Empress* (1), *Emperor* v. *Girand* (10), *Hopcroft* v. *Emperor* (4).

Proviso (*a*) to section 350, therefore, applies and non-compliance therewith is an illegality not cured by section 537. See *Gomer Sirda* v. *Queen-Empress* (11), *Subh Nath Singh* v. *Emperor* (12).

The Public Prosecutor, for the Crown.—The proceeding is only an 'inquiry', and the proviso (*a*) to section 350 cannot, therefore, apply. See section 4 (*k*) and section 117 (2). The procedure is only to be the same as for 'trials'. The distinction between an 'inquiry' and a 'trial' is kept throughout the Code. The enquiry includes all proceedings of the kind such as under section 145. See *Anu Sheikh* v. *Jitu Sheikh* (6).

Mr. *Viswanatha Aiyar* in reply.

OPINION.

WALLIS, C. J.—I agree with the opinion of Ayling and Coutts Trotter, JJ., which I have had the advantage of reading, as to the effect of the proviso to section 350 read with section 117, and will only add that in my opinion trial generally means the determination of the issues arising in the particular case. As pointed out in History of English Law, Pollock and Maitland, Volume II, page 598, the word trial comes from the French *trier*, Latin *tritare*, and was first used of the testing or trial of challenges to jurors. Triers of challenges are still appointed when necessary in English criminal trials. Though we talk of the trial of persons what are really tried both in civil and criminal cases are issues. An ordinary criminal trial in England is, in the language of the common law, a trial of the general issue joined between the Crown and the accused on the latter's plea of 'not guilty' of the charge preferred against him. See Archbold's Criminal Pleading, clause 4, section 5, "The general issue", page 161, 25th Edition. On the other hand, the preliminary Magisterial inquiry, which is of comparatively modern origin, forms no part of the trial. I think the framers of the Code had this distinction in mind when they framed the definition of 'inquiry' so as to exclude 'trial,' In the present case an issue undoubtedly arises between the Crown and the accused as to whether he should be dealt with under the sections, and I see no sufficient reason why the determination of that issue should not be regarded as a trial.

AYLING, J.—The question referred to us is as follows:—"Whether section 350 (1), proviso (*a*), Criminal Procedure Code, applies to a case under section 107, Criminal Procedure Code."

The proviso in question refers only to a "trial", while the principal clause refers to "an inquiry or a trial." The difference is significant, and points irresistibly to the conclusion that the Legislature intended to distinguish between an inquiry and a trial, and to direct that, while the principal clause should apply to both, the proviso should only apply to a "trial." What, then, is a "trial"? It is curious that the phrase is not defined in the Code, although it is explained in section 4 that the term "inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court. It looks as if the framers of the Code regarded the word "trial" as of such obvious significance as to require no definition. At the same time it is noticeable that in many sections of the Code the words "inquiry" and "trial" are used in close juxtaposition and apparently intended to signify two different things. I can find nothing to support the idea that either is ever used in any general or popular sense; for instance, the words "inquired into" in section 177, which has been referred to, seem to me intended to direct that not only the trial of a Sessions case, but the preliminary inquiry under Chapter XVIII, shall ordinarily take place before a Court having territorial jurisdiction. In the absence of express definition we can only look at the various sections of the Code in which the word "trial" is used; and I can find none in which it is not used in connection with proceedings in which a person stands before a Court empowered to convict him of some

(10) 25 A. 375; A. W. N. (1903) 79.

(11) 25 C. 863; 2 C. W. N. 465; 13 Ind. Dec. (N. S.) 563.

(12) 12 C. W. N. 138; 6 Cr. L. J. 431.

"offence" alleged against him. The word "trial," as used in the Criminal Procedure Code, seems to presuppose the idea of an offence—a word defined in section 4. No "offence" is involved in an inquiry under Chap'er VIII of the Code; and in my opinion, inquiries under that chapter are not trials. It follows that the proviso to section 350 (1) does not apply "*suo vigore*" to such proceedings.

There remains, however, the argument that it nevertheless applies by virtue of the provisions of the second clause of section 117, Criminal Procedure Code, which runs thus:—

"Section 117. (1) When an order under section 112 has been read or explained under section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases and, where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed."

It is argued on behalf of the Crown that the effect of clause (2) is merely to render applicable the provisions of Chapters XX and XXI of the Code which deal with the procedure in summons and warrant cases respectively and those of Chapter XXV in so far as they deal with the mode of taking and recording evidence in such cases. On behalf of petitioner it is contended that the clause attracts the provisions of all sections of the Code, wherever found, which are applicable to summons and warrant cases and, in fact, places a person called on to show cause why he should not furnish security in exactly the same position, except as regards the framing of a charge, as a person tried in a summons or warrant case as regards the procedure to be followed and the privileges to be enjoyed by him in connection with the proceedings.

I must confess to great difficulty in the interpretation of this clause. It is certainly true that if the intention of the Legislature has been that ascribed to it on petitioner's behalf, other language might have been employed; and the specific reference to the mode of recording evidence is somewhat significant of a limitation of the attractive power of the section. On the other hand, it would have been perfectly easy to specify Chapters XX, XXI and XXV, if the framers of the Act had only these in mind. I am not much impressed with the argument based on the fact that certain other sections of the Code have been held applicable to inquiries under section 117, *e. g*, sections 340, 341, 344, 443 and 437. Sections 341 and 344 apply "*proprio vigore*" to inquiries as well as trials. Sections 340, 443 and 437 have been held applicable in *Jhoja Singh* v. *Queen-Empress* (1), *Hopcroft* v. *Emperor* (4) and *Queen-Empress* v. *Mutasaddi Lal* (3), but on a totally different ground—the true meaning to be attached to the word "accused"—not by any reference to section 117.

It seems to me that the words of the clause may be held to cover anything which has to do with the procedure in the Magistrate's Court, and that the right to have the witnesses re summoned and re-heard conferred by section 350 is as much a matter of procedure as the right to have prosecution witnesses re-called and cross-examined conferred by section 256. On the other hand, if they are to be given the narrow interpretation contended for by the Crown, such provisions as those in Chapter XXVI regarding judgments will not apply to security cases. That is to say the Magistrate in ordering security under section 118 either for good behaviour or keeping the peace would be under no legal obligation, *inter alia*, to record a judgment setting forth his reasons (section 367) or to give accused a copy of it without delay (section 371). So far as I can see, apart from the operation of section 117 the Magistrate might simply record an order requiring the execution of a bond, without recording any reasons or discussing the evidence. I do not think this could have been intended, especially as care has been taken to provide for an appeal against an order for security for good behaviour (*vide*

section 406) and for the interference of the Chief Presidency or District Magistrate in either class of cases (section 125), for reasons to be recorded. The sections in Chapter XXVI certainly apply "*proprio vigore*" only to trials but the words "offence (if any)" in clause (2) of section 367 are very curious, and suggest that the framers of the section may have had in mind the fact that they were indirectly applicable to inquiries under Chapter VIII by reason of the clause under consideration.

After the best consideration I can give the matter, I am inclined to think that section 117 (2), Criminal Procedure Code, does attract proviso (*a*), section 350 (1); and would answer the reference in the affirmative.

COUTTS TROTTER, J.—The question referred to us is whether section 350 (1), proviso (*a*), Criminal Procedure Code, applies to a case under section 107, Criminal Procedure Code.

The petitioners in the case were bound over to keep the peace under section 107, Criminal Procedure Code, by a Magistrate who did not hear the evidence which had been heard and recorded by his predecessor, who was transferred before its final determination. The petitioners claimed under the proviso to section 350 to have the witnesses re summoned and re heard by the Magistrate who passed the final orders, and their application was refused. They applied in revision to the High Court and the learned Judges Abdur Rahim and Spencer, JJ., differed. They referred the question to this Full Bench.

Section 350 provides for a Magistrate who takes up a part-heard case acting on the evidence when wholly or in part recorded by his predecessor, and the general part of the section enables him to do so in an 'inquiry' or 'trial' but the proviso only enacts that in any 'trial' the accused may have the witnesses re called. The contention on behalf of the Crown is that the scheme of the Code is to divide magisterial proceedings into 'inquiries' and 'trials' and the latitude given to the accused is confined designedly to 'trials' and that 'inquiries' are excluded from its application. The next step in the argument is to show that proceedings under section 107 and the following sections are inquiries and not trials. The sections undoubtedly speak of an 'inquiry'—See sections 117, 118 and 119.

The first contention of the petitioners is that the word 'inquiry' is used in the Code in two senses, a narrower and technical sense and a more general one. The narrower one is defined in section 4 (*k*) as follows:—"'Inquiry' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court". A typical instance of such an inquiry is the preliminary inquiry held by a Magistrate previous to committal for trial by a higher Court. It can hardly be contended that the right conferred by the proviso to section 350 could be successfully claimed in that case. It is said that 'inquiry' is used in a more general sense—investigation into the truth of any matter—in section 177 and the following sections, where the language used is "Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." But those sections are not incapable of meaning that the preliminary inquiry before trial and the subsequent trial after committal should both be within the limits of the jurisdiction of each Court in respect of it. It is further urged that the word 'trial' should be regarded as being used where the context requires it in a general and popular sense. It is quite true that the word 'trial' is not defined in the Code, but it may not unreasonably be urged that the definition of 'inquiry' impliedly defines 'trial' as every proceeding which is not an inquiry.

The question is whether we are bound to confine ourselves to the four walls of the Code taking the nearest approach we can get to a definition, express or implied, and apply it rigidly, or whether we are at liberty to supplement the Code by an application of the principles that lie at the root of the administration of the criminal law. In interpreting an English criminal Statute there would be no difficulty: it is always subject to the general principles of the common law unless they are excluded by the plain words of the Statute. The history of the doctrine of *mens rea* and its application to various Statutes is a familiar example. If we adopt such a procedure here, there could hardly be any doubt that the proceedings under section 107 and the cognate sections have all the features of a trial. A person against whom

they are taken has repeatedly been held to be an accused within the meaning of the Code, though he is not expressly so described. He has been held to have the right to be professionally represented and if he cannot be said to be 'charged' with an offence, it is at least sought to be proved against him that he is a person with criminal or undesirable propensities. Finally the consequences to him, if he neglects or is unable to furnish security, are so serious as to entail loss of liberty for a very considerable period. On the other hand, the history of the various codes and the circumstances of those codes unquestionably show that the framers of them intended them to be complete in themselves.

Besides these general considerations it may be argued that the contrast between the body of section 350 which expressly mentions both inquiry and trial and the proviso which speaks exclusively of trial, is indicative of the intention to use trial as excluding inquiry which can properly be or is described as an inquiry within the meaning of the Code. This comes back to the original argument that inquiry must be construed as used in a non-technical and popular sense in section 107 following, because if "inquiry" there is used in the technical sense by section 4, it excludes *ex vi termini* the idea of its being also a trial, since an inquiry is in effect defined as that which is not a trial. No doubt if manifest absurdity or injustice ensued from treating 'inquiry' in any particular context as being used in the technical sense, the Court would feel itself at liberty to assume that the word is used in a looser and more popular sense. For reasons presently to be stated, I am of opinion that it is not necessary to decide this question or to determine whether to deprive the accused of the right of having the evidence re-heard by the Magistrate who is to determine his fate is so flagrantly oppressive as to call for the construction of the word 'inquiry' in the material sections in a different sense from that defined in the Code. For by section 117 it is enacted that "such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and, where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed." It is argued that this only incorporates Chapters XX and XXI of the Code, which contain specific provisions applicable only to summons and warrant cases respectively. But the Code contains many general provisions to be found outside these two chapters which regulate matters of procedure in summons and warrant cases alike, such as the directions as to the manner in which evidence shall be received and recorded, the right of the accused persons to be legally represented and the like. I think the true interpretation of section 117 is that it requires the whole of the procedure in a summons or warrant case respectively to be adopted by the tribunal which inquires into a security case. It is an essential part of that procedure to make provision for the contingency, common to all, of a case coming in the first instance before one Magistrate and afterwards before its conclusion before another. I am of opinion, therefore, that the accused has the same right to have the witnesses re-called in a security as in a summons or warrant case; for that is not a substantive right but a right relating to the procedure to be adopted. Accordingly I answer the reference in the affirmative.

M. C. P.

Answered in the affirmative.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 1287 OF 1919.

March 18, 1920.

Present :—Justice Sir George Knox, KT.

JAGDEO PARSHAD—PLAINTIFF—APPELLANT

versus

EMPEROR—DEFENDANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 236

JAGDEO PARSHAD v. EMPEROR.

271, 537—*Sessions case—Charge, absence of, from record, explanation of—Irregularity—Penal Code (Act XLV of 1860), ss. 467, 471—Charge under s. 467—Conviction under s. 471, whether legal.*

On the record of a trial by a Court of Session there should be the charge, which under section 271 of the Criminal Procedure Code has been read over and explained to the accused, and where this is not so, the record should contain an explanation of its absence. The fact that this is an omission covered by section 537 of the Code is not a sufficient answer. [p. 59, col. 2.]

Where an accused person was charged under section 467, Indian Penal Code, but it appeared in evidence that he had committed an offence under section 471, Indian Penal Code, for which he might have been charged under section 236 of the Criminal Procedure Code:

Held, that although the accused was not charged with it, he could be convicted of an offence under section 471, Indian Penal Code. [p. 60, col. 2.]

Criminal appeal against the order of the Sessions Judge, Jhansi, dated the 23rd September 1919.

Mr. *J. M. Misra*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—Jagdeo Prasad was committed by Mr. Sathe for having, on the 1st day of December 1918 at Rajapur, forged a money order (Exhibit B) for Rs. 375 and tried to obtain payment of the amount relating to the same—an offence punishable under section 467 of the Indian Penal Code. He was also charged by the same Magistrate for having, on the 6th day of December 1918 at Rajapur, forged a money order (Exhibit M) and obtained payment of Rs. 299 12 on the basis of that money order, an offence punishable under section 467, Indian Penal Code. He was also charged by the same Magistrate for having, on the 2nd day of December 1918 at Rajapur, forged a money order (Exhibit N) and obtained payment of Rs. 5?5, an offence punishable under section 467, Indian Penal Code. He was committed to the Court of Session on these charges. I refer to these charges in order to show that in the course of his trial the attention of the accused was called to these charges which were made against him. On these charges he was tried and convicted. That conviction was quashed by this Court on the ground that the trial had been upon three separate charges of three separate offences. In the order by which the conviction was set aside an order was passed that the accused be committed for trial to the Court of the Sessions Judge of Jhansi. The Sessions Judge of Jhansi took up the case and apparently did not amend the charges. From the record that has been placed before me it is absolutely impossible to say with certainty what was the charge that was read over to the accused under section 271 of the Code of Criminal Procedure. For years past I have been pointing out this error and apparently without any hope of its being rectified. When a record is prepared for appeal in this Court, the trial clerk should see whether there is on the record a charge which has been read over and explained to the accused. If he cannot find it, he should call the attention of the Registrar to its absence and ascertain to what cause that absence is due. The mere fact that section 537 covers an error, omission or irregularity of this kind is not a sufficient answer. The Committing Magistrate, as I have shown above, did commit the accused upon three separate charges. Under section 226 of the Code the Court was empowered either to frame a charge or to add to or otherwise alter the charge, but every alteration or addition has to be read and explained to the accused. In the three charges to which I have already alluded certain alterations were made, but it is impossible to say who made those alterations. The word "section" in the first two cases was altered to "sections," the figures 471 and 420/511 were added to figures 467 and in the body of the three charge sheets matter was cut out and fresh matter inserted. Against these alterations there are initials which appear to be the initials of the Court of Session, but those initials are in opposition to the sentence contained in the judgment that charges framed by the Magistrate were not amended by the Sessions Court. What the learned Judge should have done is to have framed separate charge sheets containing the matter that was read over to the accused, and not to have resorted to what appears to be very slovenly procedure on an important matter. But for the provisions of section 225 of the Code of Criminal Procedure I should probably have been compelled to quash this trial also, and whatever truth may exist regarding the

actual words of the charge sheets which were read over to the accused, this much is clear that he was charged with offences under section 467, Indian Penal Code. In a trial by a Court of Session the actual charge sheet to which the accused is called upon to plead is a very important document. It should be drawn up and considered with extreme care and caution, so that the accused may have no doubt whatever as to the offences to which he is called upon to answer and the Judge of the Appellate Court may have no doubt also upon the matter. The accused was defended in the Court of Session and he does not appear either himself or through his Pleader to have entered any objection to the charge sheet that was read over to him.

What are the facts which have been proved against the accused? It has been proved by the evidence put forward by the prosecution that in September 1918 permission was given to the accused to learn work in the post office of Rajapur, that he remained there until December of the same year, that he assisted generally in office work, that he wrote the mail list, parcel list, register list and daily accounts, that no money orders were sent after the 26th of October, that no money orders were despatched on the 1st of December 1918, and that the signature on Exhibit B, the money order which is the subject of the first charge, purporting to be that of the issuing postmaster, was not the postmaster's signature. All the above is proved by the evidence of Umanand, who was in charge of the Rajapur post office in December 1918. Khairat Husain, who had been in charge of the Manikpur post office for two years before he made his statement, namely, the 15th of September 1919, proves that he saw the accused on the 12th of December at Manikpur post office, that the accused told him that he was expecting a money order and asked the postmaster to keep it until his return, that he gave his name as Jageshar Prasad living at Rajapur in the Cawnpur District, that the accused told him that the money order would be for Rs. 375, that the accused on the 16th of December asked if the order had come and asked for the money, that the accused was told to come the next day as the office had not enough money, that the witness identified Exhibit B as being the money order in question, that on the 17th the accused returned at about 7 or 8 in the morning, wanted the money and was told to come in the evening and to bring two persons to identify him, and that the witness noted that the date of issue was November the 1st, which was a Sunday, a day on which the money orders are not issued. This and other matters caused him to suspect the order. He ascertained by wire from Rajapur post office that no money order of this kind had been issued and on the pretence of giving the money which was deposited at the Thana, he took the accused to the Thana, told the Police and handed the accused over to them. Upon the accused being asked under section 364 to explain certain matters which had been disclosed by the evidence against him, he replied that he did not attempt to get payment of this money order at Manikpur, and that he never went inside the post office at Rajapur, knows nothing about the money order, has nothing to say about it and cannot say why all the witnesses gave evidence against him. These were perfectly legitimate questions to put under section 342 of the Code of Criminal Procedure and the answers given by the accused according to that section can be taken into consideration in the trial. None of this evidence has been rebutted by any evidence for the defence and it is amply sufficient to establish an offence under section 471, Indian Penal Code. It is contended by the learned Counsel who appears for the appellant here that it cannot be considered whether an offence under section 471 was committed by the accused. The answer to this is contained in section 237 of the Code of Criminal Procedure. The accused was charged with an offence under section 467, Indian Penal Code. It appears in evidence that he committed an offence under section 471 for which he might have been charged under section 236 and that although he was not charged with it he may be convicted of that offence, namely, the offence under section 471. I cannot understand why the Court of Session did not at once frame a

charge under section 471 upon reading over the record and try the accused on that section. It was a simple, straightforward case but has been complicated apparently by discussions which took place between the Court and the Government Pleader. I might pursue the evidence further but I see no need for it. It was a very serious offence committed by a young man who had obtained entrance into a post office and had abused the concession granted to him by deliberately making use of a valuable security which he had reason to believe was forged. I have, however, to consider that he has been in custody for over a year and has already had to stand one trial for this very same offence. For these reasons and these only I reduce the sentence to a sentence of three years' rigorous imprisoment with effect from this date.

Sentence reduced.

CALCUTTA HIGH COURT.

CRIMINAL PETITION No. 54 OF 1920.

February 19, 1920.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

JASIR KHAN—ACCUSED—PETITIONER

versus

EMPEROR ON THE COMPLAINT OF HRISHIKESH GHORNI—OPPOSITE PARTY.

Appeal, criminal—Pleader appearing for accused without vakalatnama*—Procedure.*

Where an accused person is represented by a Pleader in an appeal, but the latter has no *vakalatnama*, the proper course is to adjourn the hearing of the appeal until one is forthcoming, and thus afford the accused an opportunity of being represented. [p. 61, col. 2; p. 62, col. 1.]

Rule against the order of the Additional Sessions Judge, Howrah.

FACTS appear from the judgment.

Babu *Atulya Charan Bose* (with him Babu *Girija Bhusan Mukerjee*), for the Petitioner.—I place the facts of the case first. The petitioner with several others was convicted by the Sub-Divisional Magistrate of Uluberia, who sentenced them to undergo various terms of imprisonment. The petitioners filed their appeal before the Sessions Judge of Howrah and the same was fixed for hearing on the 6th January 1920. A Vakil appeared on behalf of the other appellants before the learned Judge on the day of hearing without a Vakalatnama and the learned Judge refused to hear him on that ground only. The Vakalatnama was signed on the evening previous to the day of hearing, and the man who had the Vakalatnama with him came to the Court with the Vakalatnama at 12 o'clock immediately after the Public Prosecutor had finished his address and just when the learned Judge was remarking that he was not going to interfere in this matter. The Vakil for the petitioners wanted to make his submissions on behalf of the petitioners, but the learned Judge refused his prayer saying that he had heard the Public Prosecutor and was not prepared to upset the finding of the lower Court, and finally dismissed the appeal by his order dated 8th January 1920, which ran as follows:—

"On the date fixed for hearing a Vakil on behalf of some of the accused appeared but without any Vakalatnama. Under the circumstances I found myself unable to allow him to address the Court and after perusing the record and the grounds of appeal, I asked the Public Bresecutor to deal with each of the grounds urged in the petition of appeal."

My first submission is that reading section 423 with section 4, clause (*r*), of the Criminal Procedure Code the learned Sessions Judge ought to have heard the Vakil appearing for the appellant.

Under section 4, clause (*r*), Criminal Procedure Code, a Vakalatnama is not necessary for appearing on behalf of the petitioner.

No one appeared for the Crown to oppose the Rule.

JUDGMENT.—In this case we make the Rule absolute and direct that the appeal of Jasir Khan be re-heard. We are far from saying that the learned Additional Sessions Judge was wrong in refusing to hear the learned Pleader inasmuch as he had not got any Vakalatnama.

But having regard to the fact that the learned Pleader appeared on behalf of the appellant, we think that the learned Additional Sessions Judge might perhaps have

adjourned the case until the Vakalatnama was forthcoming. The result of what took place was that the learned Additional Sessions Judge heard the Public Prosecutor upon the evidence and the appellant had not the advantage of being represented by the learned Pleader to whom he had in fact given instructions.

Consequently, we think that this Rule must be made absolute and the appeal of Jasir Khan must be re-heard.

Rule made absolute.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLNANEOUS PETITION No. 26 OF 1919.

July 3, 1919.

Present:—Sir Henry Drake-Brockman, KT., J. C.

GANPAT AND ANOTHER—APPLICANTS

versus

BANI—NON-APPLICANT.

Evidence Act (I of 1872), s. 25—Confession to Police, admissibility of, to prove ownership of property—Criminal Procedure Code (Act V of 1898), s. 517—Property produced before Court—Power of Court to dispose of property.

A confession made to the Police by an accused person is admissible to prove the ownership of property in respect of which he is accused. [p. 63, col. 1.]

Under section 517 of the Criminal Procedure Code it is not necessary that the property to be disposed of should have been used for the commission of an offence or that some offence should appear to have been committed regarding it: the Court has power to make an order for the disposal of any property "produced before it or in its custody." [p. 63, col. 2.]

Application under section 520, Criminal Procedure Code, against the order in miscellaneous proceedings, dated the 17th April 1919, arising from Sessions Trial No. 5 of 1908, passed by the Sessions Judge, Nagpur, under section 517, Criminal Procedure Code.

Mr. *A. C. Roy*, for the Applicant.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

Mr. *R. B. Gadgil*, for the Non-Applicant.

JUDGMENT.—This application is a sequal to Miscellaneous Petition No. 58 of 1918 and arises out of the case in which the applicants, Ganpat, and Gulab, were acquitted of murder in Criminal Appeal No. 73 of 1918 on the 15th July 1918 by one of us and Batter, A. J. C. Part of the evidence against the applicants consisted in the finding of Rs. 4,901 divided between two earthen vessels and a brass pot in a garden adjoining the house which the applicants occupy. This money the prosecution alleged to have belonged to the murdered man Bibia Mahar of Saoner. The applicants live in Gujikhedi, about a mile from Saoner, and the prosecution endeavoured to establish that on Thursday the 13th December 1917, the day before Bibia died, a large sum of money was brought to their house by the applicants and one Mahadeo who would have been tried with them had he not absconded. In the judgment disposing of the appeal it was held that, though the circumstances justified a strong suspicion that the money found buried was part of Bibia's money, yet the identity was not proved beyond reasonable doubt.

At the trial the Sessions Judge passed no order for the disposal of the sum of Rs. 4,901 and the judgment of this Court also left the point undealt with. By the time Miscellaneous Petition No. 58 of 1918 was preferred, certain creditors of Bibia who had obtained decrees against him had attached the money and the applicants had objected to the attachments. This Court's order in Miscellaneous Petition No. 58 of 1918 directed that the result of the objections should be awaited and that the applicants should then move the Sessions Judge for an order under section 517, Criminal Procedure Code. The objections were dealt with by the Munsif, Saoner, and resulted in their being allowed on the ground that Bibia was not shown by any convincing evidence to have deposited any ascertainable amount with the objectors who should, therefore, be given the benefit of their ostensible possession of the money. The objectors then moved the Sessions Judge, who has held, on the strength of the evidence given in the murder trial and an assumption, that Bibia did not pay his creditors from the sum of Rs. 5,954, which he received from Messrs. Ralli Brothers on Wednesday the 12 December 1917, that the money in question belonged to Bibia, and ordered its delivery to Bibia's widow *Musammat* Bani.

GANPAT v. BANI.

The applicants now contend that no additional evidence having been adduced before the Sessions Judge, the finding of this Court that the money in question is not proved to have belonged to Bibia should have been acted upon. It is also urged that by virtue of their possession of the land in which the buried rupees were found, the applicants are absolutely entitled to receive the money. *Saon Gond* v. *Sheonandan Lal* (1), *Baloram Gogai* v. *Chintaram* (2) and *Hagu Biswas* v. *Manmatha Nath Mitra* (3) are cited in support of this contention.

On behalf of *Musammat* Bani it is urged that this Court did not in the murder appeal find that the money belonged to the applicants and that Ganpat was altogether unable at the trial to account satisfactorily for the fact that there were among the rupees unearthed as many as 1070 of the year 1917.

For the Crown the learned Standing Counsel contended that the order is in substance just, as there is at least strong suspicion that the buried money was part of what Bibia received from Messrs. Ralli Brothers and that in any view there are strong reasons for not making the money over to the applicants.

We have given the arguments of the Counsel our careful consideration and also perused the special diary in the murder case, the evidence given at the murder trial and also that taken by the Munsif, Saoner, in connection with the applicants' objections aforesaid. The conclusion we have come to is that the money in question should not be delivered either to *Musammat* Bani or to the applicants until a special inquiry has been held by the District Magistrate or such Sub Divisional Magistrate as he may depute for the purpose. In the special diary we find it recorded that on the brass pot of money being discovered, the applicant Ganpat made a confessional statement which on the authority of *Queen-Empress* v. *Tribhovan Manekchand* (4) we hold to be admissible against him for the purpose of showing that the money belonged to Bibia. The evidence recorded by the Munsif, Saoner, includes the statements of Gumani (D. H. 12) and Rewa (D. H. 13), creditors of Bibia, who deposed that they accompanied Bibia and the applicants from Saoner to Ganpat's house in Gujikhedi and were paid the amount due to them by Bibia from money which he had brought in a cart. We consider it essential for the proper disposal of the matter before us that the evidence regarding Ganpat's confession, which the Standing Counsel assures us will be forthcoming, should be taken and that Gumani and Rewa along with any other creditors of Bibia who may have received payment from him on the 12th or 13th December 1917 should be examined. It is also desirable that all creditors who deny satisfaction of their claims should be formally examined on the point: the Sessions Judge should not, in our opinion, have made any assumption on this important point.

Of the cases relied upon for the applicants the first is not in point, it being evident from the authorities cited, all of which are prior to 1898, that the law applied was that contained in section 517, Criminal Procedure Code of 1882. The first part of that section ran as follows:—

"When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

It is no longer necessary that the property to be disposed of should have been used for the commission of an offence or that some offence should appear to have been committed regarding it: the Court now has power to make an order for the dispcsal of any property "produced before it or in its custody." In *Baloram Gogai* v. *Chintaram* (2) it seems to have been clear that the accused who were discharged had been guilty of no dishonesty in keeping the elephant in dispute and in any view as to the ownership of the animal had a claim to compensation for their expenses in capturing and maintaining it. In the third case the accused had been acquitted of housebreaking by the High Court in revision, and it was laid down generally that after an acquittal of theft or burglary the property said to have been stolen should be restored to the accused, the complainant being [illegible]

(1) 14 C. P. L. R. 60.
(2) 9 C. W. N. 549; 2 Cr. L. J. 269.
(3) 22 Ind. Cas. 760; 18 C. W. N. 959; 15 Cr. L. J. 184.
(4) 9 B. 131; 5 Ind. Dec. (N. s.) 88.

to go to the Civil Court, file a suit and secure an injunction. In that case there does not appear to have been any indication that the acquitted person had made a confession of guilt, and we are unable to think that if such a confession could be proved the general rule laid down would be properly applicable. The report, moreover, does not show why the acquittal was ordered or on what ground the accused claimed to retain the property, and we gather from the meagre statement of facts furnished that there was room for doubt as to the ownership. However that may be, we are satisfied that there is good ground in the evidence already recorded, and in that which is likely to be forthcoming if a further inquiry is held, for declining to deliver the money in dispute to the applicants. We are also satisfied that the evidence already on record does not justify delivery of the money to *Musammat* Bani.

We set aside the Sessions Judge's order that the money be delivered to *Musammat* Bani and in lieu of deciding ourselves as to the final disposal of the property direct under section 517, Criminal Procedure Code, that the money be delivered to the District Magistrate, who will deal with it as if it had been seized by the Police and the seizure had been reported to him under section 523 of the Code. It will be open to the District Magistrate if he think fit, to depute a Sub Divisional Magistrate to take the necessary action.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 98 OF 1920.

April 14, 1920.

Present:—Mr. Justice Tudball.

MEWA LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 203, 476—Penal Code (Act XLV of 1860), s. 211—Complaint against Police Officer—Investigation by another Police Officer, propriety of—Complaint dismissed without complainant's evidence—Complainant, order for prosecution of, whether justified.

Where a complaint is made against an Officer of Police, it is improper to direct another Police Officer to conduct the investigation, the investigation should be conducted by the Magistrate receiving the complaint or by some other Magistrate.

When a complaint is dismissed upon the report of the Investigating Officer without taking the complainant's evidence, it is improper to direct the prosecution of the complainant under section 211, Penal Code.

Criminal revision from an order of the Sessions Judge, Benares, dated the 3rd of January 1920.

Mr. *Pearey Lal*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The facts of this case are simple. A Police Officer searched the house of Mewa Lal. The latter made a complaint that this Police Officer had searched his house without reason and that in the course of the search he used threatening and abusive language towards him and his wife. The Magistrate sent the complaint for enquiry to another Police Officer, who reported it to be groundless. The Magistrate dismissed the complaint on the 22nd of November and on the same date called upon Mewa Lal to show cause why he should not be prosecuted under section 211 of the Code. Mewa Lal did show cause, and one ground that he put forward was that it was improper to direct his prosecution without the Court hearing his evidence. In spite of this the Court directed his prosecution under section 211 of the Code. I am far from saying that in every case the Magistrate is bound to take the evidence and cannot act upon the report of the Investigating Officer, but in the present case the accused person was a Police Officer. The investigation had been made by another Police Officer and the offence was not a cognizable one, and I do not think the Magistrate has acted wisely in directing an investigation by a Police Officer in such a case. The enquiry ought, in my opinion, to have been made either by the Magistrate himself or by some other Magistrate on his behalf. In the circumstances I do not think that the order directing the prosecution of Mewa Lal should be allowed to stand and I, therefore, set it aside.

Order set aside.

JIWRAJ *v.* SHEOKUWARBAI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 58 OF 1916.

April 5, 1917.

Present:—Mr. Mittra, A. J. C., and Mr. Prideaux, A. J. C.

JIWRAJ—DEFENDANT—APPELLANT

versus

Musammat SHEOKUWARBAI—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Jains—*Possession of child, delivery of, when complete—Grown up man, delivery of, mode of*—Jain *widow, adoption by—Consent of husband, whether necessary.*

In matters of adoption the Jains are governed by Hindu Law to the extent that giving and taking are sufficient to constitute a valid adoption. [p 66, col. 2.]

In the case of Jains all that is necessary under the law to effect an adoption is that the possession of the child to be given in adoption must be made over to the adoptive parent. [p 65, col. 2]

In the case of a grown up man who is adopted, his being placed near his adoptive parent would be sufficient in point of law to constitute a valid delivery of possession. The ceremony of actually placing him in the lap of his adoptive parent is not essential. [p. 65, col 2.]

The permission of the husband is not necessary in the case of a Jain widow adopting a son. [p. 65, col. 2.]

Appeal against the decree of the District Judge, Nimar, in Civil Suit No. 15 of 1915, decided on the 28th April 1916.

Sir *B. K. Bose* and Mr. *M. B. Kinkhede*, for the Appellant.

Messrs. *H. Mittra*, *M. V. Joshi* and *J. C. Ghose*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the District Judge, Nimar, declaring that the defendant has not been validly adopted by the plaintiff. The plaintiff in her plaint admits that she was desirous of adopting the defendant and executed a registered deed of adoption on the 28th June 1909. Certain ceremonies were performed on that occasion, but there was no giving and taking. The defendant pleaded that the District Judge of Nimar had no jurisdiction to try the suit. This point was decided against him by the lower Court and has not been raised before us in appeal. On the merits the defendant pleaded that he was duly adopted by the plaintiff on the 28th of June 1909 and that he was given by his natural mother in adoption to the plaintiff by placing him on her lap. The Pleader for the defendant, however, made an oral statement to the effect that adoption is valid among the Jains even without the boy being placed on the lap of the adoptive mother. The case of the plaintiff was that there must be some physical act of giving and taking. The District Judge in decreeing the plaintiff's suit has laid great stress upon that part of the defendant's statement which says that he was placed on the lap of his adoptive mother. He finds that there was no giving and taking in the manner pleaded by the defendant and hence with reference to the subsequent conduct of the parties that the adoption was not completed

The question for consideration is whether there was such giving and taking as the law contemplates. It is admitted that in this respect the Jains are governed by Hindu Law to the extent that giving and taking would be sufficient to constitute a valid adoption. It was already conceded in the pleadings that the permission of the husband is not necessary in the case of a Jain widow adopting a son. It seems also to have been tacitly admitted that a married man, such as the defendant was, can be validly adopted. That all is necessary under the law is that the possession of the child to be given in adoption must be made over to the adoptive mother. If the defendant has in addition to this stated in his pleadings and in his evidence that he was placed on the lap of the plaintiff, he has somewhat overstated his case. The defendant was about 25 or 26 years of age at the time of the adoption and as pointed out by the plaintiff's witness No. 1 (Ram Shastri) who officiated at the adoption ceremony, the defendant was somewhat grown up and as he could not be placed exactly on the lap of the adoptive mother, he was placed near her. We are clearly of opinion that the defendant's story is not to be entirely disbelieved merely because he has failed to prove that he was lifted up and placed on the lap of his mother in a perfectly literal sense. If he was really placed near her, that would be sufficient in point of law, and a person in the position of the defendant would be apt to describe it in the terms of the vernacular word for adoption '*gol menlena*' 'to take one on the lap'.

Now the lower Court does not disbelieve

the evidence of the plaintiff's witness Ram Shastri (P. W. No. 1), nor does it disbelieve the evidence of the Pleader Ramchandra (D. W. No. 10). Their statements leave no doubt in our mind that the giving and taking was completed and that they both understood that the adoption ceremonies constituted the defendant the adopted son of the plaintiff.

The deed of adoption was executed by the plaintiff on the same day and an agreement was executed by the defendant stipulating that during the lifetime of the plaintiff she was to be the owner of the estate. The deed of adoption was presented for registration on the 9th July by the plaintiff and the document was registered in her house by the Sub-Registrar. Now if for some reason or other the adoption was not completed, there would be no reason for having the deed of adoption registered. If, as suggested before us, the intention of the plaintiff was to complete the ceremonies of adoption at Burhanpur, no explanation is forthcoming as to why she would present for registration the deed of adoption on the 9th July.

Now the argument on behalf of the plaintiff respondent that there has been material variance between members and pleading has no force. Any statement made with regard to the details as to how the acceptance was made, was a surplusage and unnecessary for the purposes of the case, especially as the defendant's Pleader had stated that it was unnecessary to place the boy on the lap of the mother. The discrepancies to which our attention has been drawn are very minor matters, and cannot make us disbelieve either the plaintiff's witness No. 1 or defendant's witness No. 10, who are both described as respectable and reliable witnesses by the lower Court. The learned Advocate for the respondent asks us to read the previous statement made by Ram Shastri contained in Exhibit P-18. Reading two statements together we are of opinion that when the question arose as to whether Homa was to be performed or not, the Shastri was asked to perform the ceremonies as they are performed amongst Hindus. These were, as a matter of fact, performed. It may be that the plaintiff intended to go through the Jain ceremonies, if they were in any way different, at Burhanpur where there are many Jains living. But there is no reason to suppose that the ceremonies considered essential amongst Hindus were not gone through. The evidence on the point is clear to our mind and we see no reason to doubt that the ceremony of giving and taking was gone through, and this view is further strengthened when we take into consideration the registration of the deed of adoption shortly after the date fixed for the adoption. There is no doubt that a large number of people were invited to witness the ceremony of adoption. There is also no doubt that a learned Shastri, that is Ram Shastri (plaintiff's witness No. 1), was requested to officiate as a priest on the occasion. There is also no doubt that the documents were executed after consultation with Pleaders. Under these circumstances we are unable to accept the view that giving and taking did not take place on the 28th June 1909.

If we had entertained any doubt with regard to the completion of the ceremony, we would have certainly attached great weight to the fact that the defendant has described himself as the son of Punamchand and not as the son of his adoptive father. But the evidence on the point of adoption appears to us to be very clear and does not admit of any doubt whatever.

It must be admitted that the defendant himself in the witness-box has been unable to give an adequate explanation of how he came to be described and how he described himself as the son of Punamchand, notwithstanding this adoption. One explanation suggested before us is that as the Khata in the account books stood originally in the name of the defendant as the son of Punamchand, the same Khata was continued. It is also suggested before us that possibly as the adoption was somewhat peculiar in so far that the widow was to enjoy the estate during her lifetime, the defendant may have considered himself justified in continuing to describe himself as the son of Punamchand, as he got no benefit from the estate. Whatever reason may be for the defendant calling himself the son of Punamchand after the adoption, we are unable to hold that the evidence regarding the actual adoption admits of any doubt as to whether it

was completed or not. It may be that the parties contemplated further ceremony according to the Jain custom of Burhanpur which was not performed. Although the defendant continued for about 10 months to live with the plaintiff, they were apparently not on the best of terms and that may be a reason why the plaintiff never carried out her original intention of performing in the presence of the Jain community a further ceremony according to Jain rites. This may have to a certain extent misled the defendant in believing that his adoption was not completed according to the Jain custom. But if we are right in our opinion that mere giving and taking would be sufficient to constitute the defendant the adopted son, any mistake of law under which he may have been labouring by reason of this ceremony not having been gone through cannot affect his legal rights.

There is some reliance placed by the lower Court upon Exhibit P-10, under which the defendant as well as the plaintiff's *munim* Chatrusa desire that the *likha padhi*, that is the deeds, should be kept secret at Burhanpur. The motive for this secrecy seems somewhat obscure so far as the present record is concerned. It is suggested that there was some person at Burhanpur who might be raising objection as a reversioner to the adoption. But we confess that the explanation on this point is far from satisfactory. But the law, however, does not justify us in drawing an inference that no adoption and no giving and taking had taken place.

The learned District Judge has argued that the defendant has not shown whether he was observing mourning for the members of his natural family. Although the plaintiff in her deposition says Jiwraj and his brothers had observed mourning for the death of their mother, there is nothing to show that it was really not observed by the defendant for a period shorter than the usual period by reason of the adoption. Moreover, no question was put to the defendant on the subject in cross examination. Kesrichand, who was examined on commission in Bombay, stated that he observed *sutak* (mourning) for three days only on account of the death of the defendant's wife. He proceeds to add that if the defendant had remained in his family, he would have observed mourning for ten days. There is no evidence contradicting this evidence regarding the practice amongst the Jains after an adoption, nor is there any evidence to contradict the fact deposed to. On the whole we have come to the conclusion that the defendant's adoption was duly celebrated and completed by the giving and taking.

The result is that the decree of the lower Court is set aside and the plaintiff's suit is dismissed with costs. We fix Rs. 350 as Pleader's fee.

Appeal allowed.

MADRAS HIGH COURT.

S. R. No. 18328 of 1919.

February 10, 1920.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Krishnan.

DONOPUDI SUBRAMANYAN—

APPELLANT

versus

NUNE NARASIMHAM AND OTHERS—

—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Time requisite for obtaining copy—Judgment pronounced on first day of vacation—Copy applied for several days after re-opening of Court—Period of vacation, whether can be excluded from time for appealing.

Where a judgment is pronounced on the first day of the Court's vacation, and an application for a copy is not made till several days after the re-opening of the Court, the applicant is not entitled to deduct the period of the vacation, as time requisite for obtaining a copy under section 12 of the Limitation Act, from the period prescribed for presenting an appeal. [p. 68, col. 2]

Second appeal sought to be preferred against the decree of the District Court, Kistna, in Appeal Suit No. 33 of 1918, preferred against the decree of the Court of the Subordinate Judge, Bezwada, in Original Suit No. 23 of 1916.

Mr. *B. Somayya*, for the Appellant.

Mr. *P. Venkatarama Rao*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—The judgment of the lower

Appellate Court in this case was pronounced on 21st December 1918, the 1st day of the Christmas Vacation, and under section 12 (2) of the Limitation Act time began to run from the following day. The fact that the judgment was pronounced in the vacation made no difference in this respect as the only provision with regard to the vacation is that under section 4; if the prescribed period expires on a day when the Court is closed, the appeal may be preferred on the day when the Court re opens.

The appellant applied for copies of the decree and judgment on the 7th January 1919, which he duly obtained, but even excluding the time taken in obtaining them, he is admittedly out of time, unless he is entitled to add the days when the Court was closed for the Christmas Vacation and to treat them as a part of the time requisite for obtaining copies of the decree and judgment within the meaning of section 12. It has been held by Sankaran Nair and Ayling, JJ., in *Tanjore Palace Estate* v. *Andi Kamiah Chetty* (1) that he is not entitled to do this, and we entirely agree with that decision. It was no doubt held in *Saminatha Ayyar* v. *Venkatasubba Ayyar* (2), where the judgment under appeal was delivered later on the day before the Christmas Vacation and an application was made for copies on the 17th January, the day the Court re opened, that the appellant was entitled to exclude, not only the time actually taken in obtaining the copies, but also the whole of Christmas Vacation during which the Court was closed, when he could not have applied for copies even if he had wished to do so. That case may be distinguished on the ground that there the copies were applied for on the re opening day, in this case not until some days later, otherwise we should have to consider whether we ought to follow it. What we have to see in all these cases is what was the time requisite for obtaining copies within the meaning of the section, and by "requisite" I understand reasonably requisite. It was observed by Wilson and Beverley, JJ., in *Gunga Dass Dey* v. *Ramjoy Dey* (3) that no hard and fast rule can be laid down to meet all cases that occur under this provision, but I think it may be said that generally if not invariably, as held in *Bechi* v. *Ashan-ullah Khan* (4), the time requisite for obtaining copies cannot include any period antecedent to the appellant's asking for copies in the usual way. The appellant is under no duty to make an early application, he may apply at any time, even on the last day of the prescribed period if he so chooses; and even if the period expires on a day when the Court is closed, he may apply for copies on the re-opening day and still be within time, as held in *Siyadat-unnissa* v. *Muhammad Mahmud* (5), *Tukaram Gopal* v. *Pandurang Sadaram* (6) and *Pandhari nath* v. *Shankar* (7). In the present case the appellant had some eighty days between the re-opening of the Court and the expiry of the prescribed period in which he could have applied for copies and he did in fact apply for them a few days after the re-opening. In these circumstances I fail to see how the Christmas Vacation can be included in the time reasonably requisite for obtaining them, unless we are prepared to go so far as to say that all days on which the Court was closed during the prescribed period before the appellant applied for the copies must be included in the time requisite for obtaining copies, on the ground that the appellant could not have applied for copies on those days even if he had desired to do. This would defeat the intention of the Legislature that time should run on days when the Court is closed and would be a very strained interpretation of the words "time requisite," as used in the section which, in my opinion, mean time reasonably requisite on the facts of the case.

The appeal is barred and is dismissed with costs.

KRISHNAN, J.—I agree and have nothing to add.

M.C.P.

Appeal dismissed.

(1) 11 Ind. Cas. 389; (1911) 1 M. W. N. 364.
(2) 27 M. 21; 13 M. L. J. 300.
(3) 12 C. 30; 6 Ind. Dec. (N. S.) 20.
(4) 12 A. 461 at p. 471 (F. B.); A. W. N. (1890) 149; 6 Ind Dec (N. S.) 1039.
(5) 19 A. 342; A. W. N. (1897) 76; 9 Ind. Dec. (N. S.) 225.
(6) 25 B. 584; 3 Bom. L. R. 148.
(7) 25 B. 586; 3 Bom. L. R. 244.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 17 OF 1918.

January 4, 1919.

Present:—Mr. Kincaid, A. J. C, and Mr. Raymond, A. J. C.

GUL MAHOMED—APPLICANT

versus

FAIZ MAHOMED—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 60 (b)—Execution of decree—Attachment—Agriculturist—Cattle, whether can be attached—Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—High Court, power of interference of, when to be exercised.

The question whether cattle belonging to an agriculturist are necessary to enable him to earn his livelihood, arising out of an attachment in execution, is one for the executing Court to decide.

The powers of interference vested in the High Court under section 25 of the Provincial Small Cause Courts Act should only be exercised to remedy injustice.

Application from the order of the Judge, Small Causes Court, Karachi.

Mr. *Rewachand Vasanmal*, for the Applicant.

Mr. *Tahilram Maniram*, for the Opponent.

JUDGMENT.—The facts of this revision application are shortly as follows:—

It appears that the judgment-debtor who is an agriculturist had three pairs of bullocks. One is used for the field work and two are used to carry both his own produce and that of his Zemindar in the market for sale. One pair of these bullocks was attached by the judgment creditor and the judgment-debtor applied to have the attachment raised. The application was heard by the learned Judge of the Small Cause Court, Karachi, and he on the 14th March 1918 dismissed it. Against this order an application has been made to this Court.

The ground of the learned Judge was that two pairs of the cattle were sufficient to enable the judgment-debtor to earn his livelihood as an agriculturist. It has been urged by the learned Counsel who represented the applicant that it was nowhere said in the section that the livelihood should be minimum livelihood. Had the learned Small Cause Court Judge interpreted the phrase "livelihood" to mean adequate livelihood, he would have held that the three pairs of bullocks were necessary to the applicant and would have allowed the application. In my view, however, this is not a question in which this Court can interfere. Section 60, clause (*b*), of the Civil Procedure Code lays down that the test is whether the cattle are or are not necessary to enable an agriculturist to earn his livelihood in the opinion of the Court.

In the case of *Bakhir Mohammed* v. *Doorga Churn Shaha* (1) it was laid down that the Court which should decide that point is the Court which issued the execution. As this point has been decided against the applicant by the Small Cause Court Judge, it is not for us to interfere with the decision. It was also observed in the case of *Rupchand* v. *Minhomal* (2) that the powers of interference vested in a High Court under section 25 of the Provincial Small Cause Courts Act should be exercised only to remedy injustice. Here no injustice whatever has been committed and this alone is a sufficient ground for dismissing the application.

The application is dismissed with costs.

Application dismissed.

(1) 10 C. 39; 13 C. L. R. 200; 5 Ind. Dec. (N. S.) 27.

(2) 27 Ind. Cas. 366; 8 S. L. R. 164.

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 311 OF 1920.

February 17, 1920 and March 2, 1920.

Present:—Mr. Justice Scott Smith and Mr Justice Wilberforce.

DEVI DITTA MAL AND ANOTHER—CONTRIBUTORIES—APPELLANTS

versus

THE OFFICIAL LIQUIDATOR OF THE AMRITSAR BANK, LIMITED, LAHORE, IN LIQUIDATION, AND *Lala* CHHAJU RAM FOR THE CREDITORS—RESPONDENTS.

Companies Act (VI of 1882), ss. 147, 169—Company in liquidation, when becomes solvent—Bankruptcy rules, applicability of—Separate cases decided by one

DEVI DITTA MAL v. OFFICIAL LIQUIDATOR, AMRITSAR BANK LTD.

judgment—Appeals, separate, whether necessary—Procedure.

A company in liquidation becomes solvent as soon as it has paid off its liabilities existing at the date of the winding up order. [p. 71, col. 2.]

Ordinary bankruptcy rules are applicable to companies in liquidation and when the liabilities existing at the date of the winding-up order have been discharged, creditors, when debts carry interest, are entitled to subsequent interest. [p. 71, col. 2.]

Where two separate cases are finally decided and disposed of in one judgment, two separate appeals should be filed. [p. 70, col. 2.]

Miscellaneous appeal from the order of Mr. Justice Broadway, dated the 28th October 1919, holding that the contributories are not entitled to be paid anything out of the surplus assets in these two Banks so long as the creditors whose debts carried interest have not been paid their interest up to the 4th and 16th of April 1919 in the Amritsar and People's Banks respectively, on which date the last dividends were declared.

Mr. *Santanam*, for the Appellants.

Lala *Palwant Rai*, for Lala Chhaju Ram, Lala *Ragunath Sahai*, for Lala Harkishen Lal, Respondents.

JUDGMENT.—The facts of this case are simple. Briefly, in the matter of the liquidation of the People's and Amritsar Banks the Official Liquidator has been able to pay off the creditors in full. Considerable assets, however, remain, the amount in the case of the People's Bank being stated to be about 16 lakhs. The surpluses have been claimed by the creditors, whose debts were carrying interest on one side, and by the contributories on the other. Mr. Justice Broadway, after referring to English and Indian authorities, has decided that the contributories are entitled to nothing as long as creditors, whose debts carried interest, have not been paid up in full. The result of this order, it is said, will be in the case of the People's Bank that the creditors will receive some three annas in the rupee interest, while nothing will be left for the contributories. Against this decision Mr. Santanam on behalf of the contributories preferred an appeal which he presented on the 3th November and after an objection regarding Court-fee, presented again on the 14th November. The judgment of Mr. Justice Broadway was dated the 28th October.

Mr. Moti Sagar, on behalf of the creditors, raises two preliminary objections. In the first place, he objects that as Mr. Justice Broadway's order dealt with two separate cases, two appeals were necessary, while only one had been presented. To this Mr. Santanam replies that he appeared in the trial Court and received one fee for the two cases which he, therefore, considered to have been consolidated. We are not impressed by this argument and consider that separate appeals should certainly have been presented. As, however, all the parties concerned in both cases were served with notices in respect of the one appeal and as the mistake was merely one of form, we decided to allow Mr. Santanam to rectify his error by putting in a properly stamped appeal to deal with the second case. The second objection taken by Mr. Moti Sagar was that the provisions of section 169 of the Companies Act of 1882 had not been complied with, inasmuch as the respondents did not receive notice of the appeal within the three weeks provided for in that section. They applied for extension of the period on the 19th November to a Judge of this Bench and this was granted subject to just exceptions. Mr. Moti Sagar, however, urges that in view of the inexcusable delay and laches of the appellant no indulgence should be granted. He points out that there was in the beginning much delay in applying for copies of Mr. Justice Broadway's judgment and that for no reason the appellants wasted the period from the 6th to 12th November in waiting for these copies after they had been prepared. He next points out that, although process-fees were put in on the 21st November, proper addresses were not supplied till the 28th November with the result that Lala Hargopal was not served till the 10th December, Chhaju Ram till the 11th December and the Official Liquidator till the 8th January. He refers to *Daulat Ram* v. *Woollen Mills Company Limited* (1), *Tara Chand* v. *Official Liquidators of the People's Bank of India Limited* (2), *Hira Lal* v. *Himalaya Glass Works Co.* (3) and *Bishen D.s* v.

(1) 95 P. R. 1908; 165 P. W. R. 1908.
(2) 29 Ind. Cas. 265; 46 P. R. 1915; 90 P. L. R. 1915; 71 P. W. R. 1915.
(3) 10 Ind. Cas. 438; 176 P. L. R. 1911; 100 P. W. R. 1911.

Liquidator of the Doaba Bank Limited (4) as authorities that no concession should be allowed to the appellants who have shown such want of diligence. To these objections Mr. Santanam replies that the three weeks' period laid down in section 169 has been omitted from the present Act of 1913, an indication that the Legislature considered this period unduly short for the circumstances of this country, and he also urges that he was not to blame for some of the delay. He points out, for instance, with justice that no elaborate addresses were necessary for such well known persons as Lala Hargopal and Lala Chhaju Ram, and that the office, therefore, was not justified in keeping back the issue of notices for further particulars. He also states that his clients did not take the leading part in the proceeding before Mr. Justice Broadway in which the contributories were represented by Mr. Rustomji and that his clients, therefore, expected Mr. Rustomji to appeal. He finally contends that the circumstances in the authorities relied on by Mr. Moti Sagar were totally different from those in the present case. In *Daulat Ram* v. *Woollen Mills Company Limited* (1), for instance, the order of the District Judge was passed on the 26th February and the appeal was not instituted till the 17th May and notice of appeal was not issued till the 31st July. In *Bishen Das* v. *Liquidator of the Doaba Bank Limited* (4) no extension of time was even applied for. In *Tara Chand* v. *Official Liquidators of the People's Bank of India, Limited* (2) the order of the District Judge was passed on the 21st August 1914 and the appeal was not filed till the 5th October and process-fees for issue of the necessary notices were not paid till the 5th January. We agree with Mr. Santanam that the present case does not show any marked want of diligence and we, therefore, overrule his objection and hold that the appeal is properly instituted.

As for the merits of the appeal, Mr. Justice Broadway's decision was largely based upon the assumption that the Banks in question have now become solvent companies as their creditors have been paid off in full. He referred to many authorities that in such a case such creditors could claim interest accruing after the date of the winding-up order. Mr. Santanam opened his arguments by strongly contesting the view that the Banks in question were now solvent companies. Solvency meant a power to discharge all liabilities. He contended that in this view neither Bank was yet in a position to discharge all its liabilities and pointed out that they have only arrived at their present position owing to the delay in liquidation and from interest accrued on moneys received and from calls on shares realised from contributories. We are not impressed by this argument and have no difficulty in agreeing with Mr. Justice Broadway that the Banks in question, having paid off their liabilities which existed at the date of the winding-up order, have become solvent. This is the criterion of solvency which has been accepted in all English authorities and Mr. Santanam is unable to refer to any authority to the contrary.

Mr. Santanam next urged that under section 147 of the Indian Companies Act of 1882 the assets of a company could only be applied in discharge of its liabilities existing at the date of the said order, *i. e.*, the winding-up order. He laid much stress upon the words existing at the date of the said order, and pointed out that these words did not appear in the English Companies Acts and had been omitted from the Indian Act VII of 1913. He further contested the view taken by Mr. Justice Broadway that any of the ordinary bankruptcy rules could be applied to companies in liquidation. He pointed out that a special provision had now been made in the Act of 1913 in section 229 and that in the same way in English law bankruptcy rules had been made applicable to companies by the Judicature Act of 1875. On this point again we have no difficulty in agreeing with the decision of Mr. Justice Broadway. Even before the passing of the Judicature Act of 875 English Courts applied certain rules of bankruptcy to the case of companies in liquidation. The leading case on this point is in *Humber Ironworks and Shipbuilding Company, In re*; *Warrant Finance Company, Ex parte*, (5), in which it was held

(4) 31 Ind. Cas. 725; 42 P. L. R. 1916; 5 P. W. R. 1916.

(5) (1869) 4 Ch. Ap. 643; 38 L. J. Ch. 712; 20 L. T. 859; 17 W. R. 780.

that in the case of there being a surplus creditors could claim subsequent interest. This decision in no way conflicted with previous English decisions and the Judicature Act of 1875 was not rendered necessary by this judgment. The same rule has been followed in other judgments. There are two recent decisions, *Duncan & Co., In re* (6) and *Whitaker, In re, Whitaker* v. *Palmer* (7), is also the unanimous opinion to the same effect of all the leading authorities on Company Law, see for instance Volume V, "Halsbury's Laws of England," page 512, "Lindley on Companies," page 1009, "Buckley on Company Law," page 474, 9th Edition, "Stirbel on Company Law," page 122?, and others. Indian Courts also have followed the same rule and applied insolvency law to such cases in judgments quoted by Mr. Justice Broadway. The judgments [*Ram Saran Das* v. *Hasheshar Nath* (8), *Thomas Pereira, In re* (9) and *Mohammad Mahmud Shah, In re* (10)] are specially applicable. We consider, therefore, that the trial Court was undoubtedly correct in applying ordinary insolvency rules to this case. The words "existing at the date of the said order" from which Mr. Santanam has attempted to derive advantage appear, as a matter of fact, to have been hardly necessary. They did not exist in the English Act of 1862, but it was always taken for granted that the liabilities to be discharged were those existing at the time when the winding-up order was made, see for instance *General Rolling Stock Company, In re*; *Joint Stock Discount Company's Claim, Ex parte* (11). There is no force in our opinion in the argument that the inclusion of these words in the Indian Act in any way detracts from the value of English decisions.

For the above reasons we agree with the judgment of the trial Court and dismiss the appeal.

Mr. Ragunath Sahai on behalf of Lala Harkishen Lal as a creditor of the Bank complained that the order of the trial Court was defective, inasmuch as it did not fix the rate of interest to be paid to the creditors. This matter, however, as we understand the judgment appealed against, has not yet been considered by the trial Court and we are not, therefore, in a position to deal with the question involved. The prayer for a uniform rate of interest can be made to Mr. Justice Broadway. We dismiss the cross-objection. Appellants will receive no costs for this appeal. Respondent will receive their costs. Rs. 300 Pleader's fee to be paid out of the assets.

Addendum to our judgments in Civil Appeal No. 2252 of 1919 and 311 of 1920.

It has been brought to our notice by Counsel for the respondent creditors that in fixing their fees at Rs. 300 and 100 respectively, we overlooked the facts that the representatives of the creditors had taken formal orders of the Court to engage Counsel and to pay their fees from the assets of the Bank. It has also been brought to our notice that the liquidation Court allowed Mr. Moti Sagar Rs. 750 before it and similarly allowed Mr. Balwant Rai Rs. 150. Further there is a clerical error in our judgments by which Counsel in the Amritsar Bank case has been allowed Rs. 300 while Counsel in the far more important People's Bank case has been allowed only Rs. 100. These being the circumstances, we think it right to amend our order with regard to costs and allow Counsel the same fees as they received before Mr. Justice Broadway. In making this amendment to our judgments we did not think it necessary to call upon the opposite party, the contributories, as they are in no way interested. These costs will be paid out of the assets.

Appeal dismissed.

(6) (1905) 1 Ch. D. 307; 74 L. J. Ch. 188; 92 L. T. 108; 53 W. R. 299; 12 Manson 38.
(7) (1904) 1 Ch. D. 299; 73 L. J. Ch. 166; 90 L. T. 277.
(8) 55 P. W. R 1907.
(9) 1 M. H C R 217.
(10) 18 C. 66; 6 Ind. Dec. (N s) 541.
(11) (1872) 7 Ch. Ap. 646 at p. 649; 41 L. J. Ch. 732; 27 L. T. 88; 20 W. R. 762.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 68 OF 1919.

April 9, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

RADHA KISHEN—DEFENDANT—APPELLANT

versus

GULZARI LAL—PLAINTIFF—RESPONDENT.

Custom—Pre-emption—Village confiscated by Government and held for 21 years—Grant to other persons—Wajib-ul-arz, *entry in, not stating facts, value of.*

In 1857, at the time of the Mutiny, a village was confiscated by Government, who held it for twenty-one years and then gave it in grant to persons other than the original proprietors; one year after this, a *wajib-ul-arz* was prepared but it did not state the actual facts. In a suit for pre-emption an entry in the *wajib-ul-arz* was relied on to prove the existence of a custom of pre-emption:

Held, that inasmuch as the *wajib-ul-arz* did not state the actual facts, the entry was no proof of the existence of the custom of pre-emption, but that it was merely a record of the wishes of the Zemindars.

Appeal against the order of the Subordinate Judge, Badaun, dated the 28th March 1919.

Mr. *Lakshmi Narain*, for the Appellant.

The Hon'ble Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for pre emption. The Court of first instance dismissed the suit on the ground that the custom did not exist. The lower Appellate Court set aside that decision and held that the custom was established and remanded the suit for decision on the other points. To prove the custom the plaintiff produced a *wajib ul arz* for 1272 Fasli. To rebut the evidence contained therein the defendant produced a copy of the *halat dehi*. The Court of first instance held that the circumstances set forth in the *halat dehi* showed clearly that no custom of pre emption could possibly have existed in this village. The lower Appellate Court thinks that these circumstances are insufficient to rebut the entry in the *wajib-ul arz* of 1272. Apparently the lower Appellate Court overlooked one of the facts clearly set forth in the *halat dehi*. That is that in the year 1250 Fasli, *i.e.*, at the time of the Mutiny, this village was confiscated and it was held at least for twenty one years by Government before it gave it in grant to certain other persons. It was only one year after this that the *wajib-ul-arz* of 1272 Fasli was drawn up. This circumstance alone is sufficient to show that no custom could possibly have existed, for there was no proprietary body in existence at all for at least twenty-one years. This is another of those instances in which clearly the wishes of the Zamindar have been set forth and not the actual facts. No custom could possibly have been in existence in 1272 Fasli. We think that the Court below was in error. We set aside the order of the Court below and restore the decree of the Court of first instance. The appellant will have his costs in all Courts.

Order set aside.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 187 OF 1920.

January 28, 1920.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Krishnan.

T. AMINUDEEN SAHIB—RESPONDENT No. 6 IN A. No. 176 OF 1919—PETITIONER

versus

PYARI BI AND ANOTHER, MINORS, BY GUARDIAN MAHOMED ABDUL AZIZ BATCHA SAHIB—APPELLANTS IN A. No. 176 OF 1919—RESPONDENTS.

Limitation Act (IX of 1908), s. 12—Time requisite for obtaining copy—Application for copy dismissed for default—Copy of decree obtained by party other than appellant—Appellant, whether entitled to deduction of time for obtaining copy.

Inasmuch as the law does not require that the copy of a decree accompanying a memorandum of appeal should have been obtained by the appellant himself, the provisions of section 12 of the Limitation Act would apply where a copy of the decree appealed against was obtained by another person. [p. 74, col. 2.]

Where, therefore, an appellant applied for a copy of a decree, but his application was dismissed in default of paying the necessary fees, and he presented an appeal accompanied by a copy of the decree obtained by another person:

RAM DAS v. ABBAS.

Held, that, under section 12 of the Limitation Act, he was entitled to an exclusion of the time occupied in obtaining the copy in computing the period prescribed for the appeal.

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to dismiss with costs Appeal No. 176 of 1919, preferred to the High Court against the decree of the Court of the Temporary Subordinate Judge, Vellore, in Original Suit No. 18 of 1917 (Original Suit No. 45 of 1916 on the file of the Sub-Court of North Arcot).

FACTS appear from the judgment.

Mr. *L. A. Govindaraghava Aiyar*, for the Petitioners, raised the objection that the Appeal No. 176 of 1919 was barred. The appellant's application for copy of the decree appealed against was dismissed for default of payment of copying charges. He filed the appeal with a copy of the decree obtained by another party. He is not entitled to a deduction of time taken by that party in obtaining the copy. See *Ramamurthi Aiyar* v. *Subramania Aiyar* (1). If that period is not taken into account, the appeal is out of time.

Mr. *G. Krishnasami Aiyar*, for the Respondent.—The view taken in *Ramamurthi Aiyar* v. *Subramania Aiyar* (1) is wrong and is not warranted by the provisions of Order XLI, rule 1, Civil Procedure Code, which must be read with section 12 of the Limitation Act. There is no restriction on the copy of the decree which should accompany the appeal memorandum in the Code. There is no express provision that the decree should have been obtained on the appellant's application. And no such restriction need be imported into section 12 of the Limitation Act. The view of the Allahabad High Court in *Ram Kishan Shastri* v. *Kashi Bai* (2) is sounder.

ORDER.—This case raises a question as to the meaning of the words "time requisite for obtaining a copy of the decree appealed from" in section 12 (2) of the Limitation Act, which provides for the exclusion of such time in computing the period of limitation prescribed for the appeal. The appellant in this case applied within the prescribed period for a copy of the decree but allowed the application to be dismissed for non-payment of the copying charges. He subsequently filed the appeal together with a copy of the decree which had been obtained by another party, and claimed a deduction under the section of the time taken in obtaining such a copy. It was held in *Ramamurthi Aiyar* v. *Subramania Aiyar* (1) that he was not entitled to the deduction, but the Allahabad High Court in *Ram Kishan Shastri* v. *Kashi Bai* (2) dissented from this ruling for which no reasons are given, and we are unable to follow it. As has often been pointed out, this and other sections of the Limitation Act must be read together with the corresponding provisions of the Civil Procedure Code. If we so read them, it is clear that the copy of the decree appealed from which is mentioned in the section is the copy of the decree appealed from which has to accompany the memorandum of appeal under Order XLI, rule 1 (formerly section 541), Civil Procedure Code. The Code does not require that the copy of the decree accompanying the memorandum should have been obtained on the application of the appellant himself, and there are no grounds for importing this restriction into section 12 of the Limitation Act. The appellant was in order when he presented a copy obtained by another party with his memorandum and was entitled under the section to the deduction claimed. We must, therefore, overrule the objection that the appeal is out of time.

Petition dismissed.

M. C. P.

(1) 12 M. L. J. 385.
(2) 29 A. 264; A. W. N. (1907) 67; 4 A. L. J. 152.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 189 OF 1917.
April 16, 1920.
Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

RAM DAS—PLAINTIFF—APPELLANT
versus
ABBAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 16—Undue influence

RAM DAS v. ABBAS.

—*Burden of proof—Unconscionable bargain—Test—Compound interest, agreement to pay, effect of.*

An agreement to pay interest at a stipulated rate does not become unconscionable merely because there is a stipulation to pay compound interest at the same rate in the event of there being a default in the payment of the simple interest agreed upon. [p. 76, col. 1.]

There is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt or the interest accruing due upon it which he has contracted to pay. It is the state of affairs at the time when the bargain was struck that has to be considered, and not the ultimate claim made. [p. 76, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Attock at Campbellpur, dated the 19th October 1916.

Mr. *B. R. Puri*, for the Appellant.

Mr. *Feroze-ud-Din Ahmad*, for the Respondents.

JUDGMENT.—The suit giving rise to this appeal was instituted by Ram Das, son of Sona Shah, under the following circumstances:— On the 12th June 1899 Abbas and Ghulam Husain, two Awans of Mauza Saghar in the Tallagang Tahsil, executed a mortgage deed in favour of Ram Das under which they mortgaged a fourth share in certain lands belonging to them in lieu of Rs. 500. The mortgagors retained possession and could redeem at any time within 12 years. The interest payable was fixed at Rs. 1-1 per cent. per mensem to be paid yearly and in default of the due payment of this interest compound interest was payable thereon at the same rate.

A few months later, on the 24th February 1900, the same mortgagors executed a second mortgage deed of the same property in lieu of Rs. 200. The conditions as to interest were the same, the rate, however, being Rs. 2-1 per cent. per mensem instead of Rs. 1-1. The mortgagors having failed to redeem the property within the prescribed period of 12 years, Ram Das sued for possession and was granted a decree which, however, has not been executed.

On the 16th August 1915 the said mortgagors filed an application under section 4 of Act XI of 1913 in the Court of the Assistant Collector, Pindigheb, claiming to be entitled to redeem the property on payment of Rs. 500, the principal sum due on the two mortgage-deeds. The Assistant Collector came to the conclusion that the mortgagors should not be made to pay the interest stipulated for in the said deeds, but directed that they were entitled to redeem both mortgagees on payment of Rs. 500 plus Rs. 665-5, or a total of Rs. 1,165-5, to be paid within a month. Ram Das, therefore, brought this suit for a declaration that the mortgagors, Abbas and Ghulam Husain, were not entitled to redeem the land in question without payment of the interest and compound interest due under the said mortgages. He claimed a sum of Rs. 8,559-7-3 in addition to the Rs. 1,165-5 mentioned above.

The mortgagors defendants pleaded (1) that the interest was not a charge on the property and (2) that the stipulation to pay compound interest was penal and had been made through undue influence. The learned Subordinate Judge held that the interest was a charge on the property and that the stipulation as to compound interest was not penal but that "the rate was induced by undue influence," and accordingly granted the plaintiff a decree declaring him "entitled to the principal sum due on the two deeds of hypothecation dated the 12th June 1899 and the 24th February 1900, and simple interest at Rs. 1-1 per cent per mensem from the date of the execution of the deeds until redemption or until the date when plaintiff takes over possession under the decree in his favour, whichever date is earlier". Against this decree Ram Das has preferred this appeal through Mr. B.R. Puri, and the only point for determination is whether the agreed rate of interest (Rs. 1-1 per cent.) was induced by undue influence. It should be noted that the plaintiff is claiming interest at the rate of Rs. 1-1 per cent. per mensem in respect of both the mortgages, though in the second mortgage the rate agreed on was Rs. 2 1 per cent. per mensem. Now, the mortgagors have not gone into the witness box and there is no statement as to the nature of the influence that was brought to bear and induced them to agree to pay interest at the rate fixed, and also to pay compound interest in default. The learned Subordinate Judge has based his decision on the fact that the plaintiff had other dealings with the mortgagors and that the consideration for the two mortgages was in part previous indebtedness. He conceded that the initial *onus* lay on the mortgagors to prove undue influence, but he held that having regard to illustra-

tion (*c*) to section 16 of the Indian Contract Act the *onus* had shifted to the plaintiff-appellant (1) because of the previous dealing and (2) because of the unconscionable nature of the bargain. The evidence on the record consists of the statements of the plaintiff himself and Kirpa Ram, a petition-writer, who drew up the two mortgages. They agree in stating that no undue influence was used. As has been stated above, neither of the mortgagors has stated what the nature of that "influence" was either in their pleas or in the witness box. The fact that the mortgagee had other dealings with the mortgagors is one that undoubtedly had a bearing on the question, as is clear from illustration (*c*) to section 16 of the Indian Contract Act, but in order to bring this case within the purview of that illustration it must also be found that the bargain " appear to be unconscionable." This matter was considered by their Lordships of the Privy Council in a case reported as *Balla Mul* v. *Ahad Shah* (1), where it was held that there was nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower had for a considerable time neglected to pay the debt he owed or the interest accruing due upon it which he had contracted to pay. It is the state of affairs at the time when the bargain was struck that has to be considered, and not the ultimate claim made. In the present case, the rate of interest in the first mortgage, *viz*, Rs. 12-12 0 per cent. per annum, was not extortionate. The interest agreed upon in the second mortgage was, of course, double but even then it was about six per cent. less than the interest claimed in *Balla Mal* v. *Ahad Shah* (1) and, as pointed out above, the plaintiff in his plaint is only claiming the lesser rate under both the mortgages. We are unable to see that an agreement to pay interest at the rate of Rs. 12-12 0 per cent. per annum is unconscionable nor can such an agreement became so merely because there is a stipulation to pay compound interest at the same rate in the event of there being a default in the payment of the simple interest agreed upon. This being the case, we are of opinion that the plaintiff was entitled to the declaration prayed for by him and that the defendants-respondents are liable to pay the whole of the interest due as a condition precedent to the redemption of the land mortgaged.

We accordingly accept this appeal and give the plaintiff a decree declaring that the two mortgages are redeemable only on payment of Rs. 1,165-5-0 plus Rs. 8,559 7-3 in all The appellant will be entitled to his costs throughout.

Appeal accepted.

(1) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C).

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 35 OF 1918.

December 23, 1918.

Present:—Mr. Fawcett, J. C., and Mr. Kincaid, A. J. C.

Haji ABDULLAH HAROON—APPELLANT

versus

MESSRS. E. D. SASSOON AND CO.—RESPONDENTS.

Arbitration Act (IX of 1899), s. 19—Agreement to refer dispute to arbitration—Suit, institution of—Stay of suit—Duty of Court—Onus—Questions of law and fact, competency of arbitrators to decide—"Merchant," meaning of—Broker, whether merchant.

Where there is an agreement to refer matters in dispute to arbitration, and one of the parties institutes a suit relating to those matters, it is the *prima facie* duty of the Court, on receiving an application under section 19 of the Arbitration Act, to stay the suit, the onus being on the plaintiff to show why he should not be bound by his agreement to refer to arbitration. [p. 77, col. 1; p. 79, col. 2; p. 80, col. 1.]

Arbitrators are competent to decide questions of law and fact; the fact that a difficult question of law is involved is not ordinarily a good ground for refusing to stay a suit. [p. 77, col. 2.]

The term "merchant" according to Karachi mercantile usage is synonymous with a member of the mercantile community of Karachi and covers the case of brokers as well as those dealing in the actual sale and purchase of goods. [p. 79, col. 1.]

Appeal from the order of Mr. Kemp, Additional Judicial Commissioner, Sind.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Dipchand Chandumal*, for the Respondents.

JUDGMENT.

FAWCETT, J. C.—This is an appeal from an order under section 19 of the Indian Arbitration Act, staying a suit which had been brought by the appellant Haji Abdullah

Haroon against the respondents Messrs. E. D. Sassoon and Co. On the 22nd of June 1917 the parties entered into a contract by which the appellant agreed to purchase from the respondents some 1300 tons of Java sugar of various shipments between the months of July and December 1917. The sugar (except a small quantity) had not as a matter of fact arrived at Karachi in January 1918, and a dispute then arose between the parties as to whether the respondents had committed a breach of contract in failing to deliver this sugar or whether on the other hand the appellant was bound to wait till the expected arrival of the sugar in February or later. The communications between the parties about this dispute did not result in any settlement of it, and on the 31st of January 1918 the respondents wrote to the appellant saying that as no useful purpose would be served by carrying on the discussion any further, they named Mr. Ellinger of Messrs. Ellinger Mohatta and Co. as arbitrator on their behalf and called upon the appellant to name a European merchant as arbitrator on his behalf within seven days from receipt of their letter. This was in accordance with the arbitration clause in the contract, by which disputes of whatever nature arising out of the contract were to be referred to the arbitration of two European merchants in Karachi one to be chosen by each party, with a proviso that such European merchants should either be themselves personally members of the Karachi Chamber of Commerce or else be representatives or assistants of firms which are members of the Karachi Chamber of Commerce. The appellant did not, however, nominate an arbitrator and on the 7th of February 1918 instituted his suit against the respondents claiming damages for breach of contract.

I take it as now settled law, so far as this Province is concerned, that in view of this agreement to refer to arbitration there was a *prima facie* duty of the Court below to stay the suit and that the onus is on the plaintiff to show why he should not be bound by his agreement to refer to arbitration. *Cf. Kodumal* v. *Volkart Bros.* (1). The objections, he has raised, have all been considered in the judgment of the Court below and rejected, and we have now to determine whether the view taken by the learned Judge is sustainable or not.

The first objection that I shall consider is the one that the matters in suit involve difficult questions of law which should more properly be decided by Courts of law than by two arbitrators of the kind who are to be appointed under the arbitration clause. In considering this objection the Court must necessarily treat with great respect the decision of another Bench in the case of *Kodumal* v. *Volkart Bros.* (1), which has already been referred to, where the subject-matter of the suit was of a similar nature to the subject-matter of the suit now under discussion. In that decision it was held that the arbitrators are competent to decide questions of law and fact and the fact that a difficult question of law is involved is not ordinarily a good ground for refusing stay. It was also held in that judgment that the questions of law arising in that case were not such as the arbitrators would be incompetent to decide. I understand that the contract in that case was similar to the contract in this case, and it follows that the ruling is one which must press heavily on this Court in deciding this particular case.

Mr. Rupchand for the appellant has, however, disputed the correctness of that decision and I must, therefore, notice the arguments he has addressed to us. I think his main point is the one which is stated in paragraph 10 of the memorandum of appeal. There it is said that the learned Judge has erred in holding that because under the Indian Arbitration Act an arbitrator cannot be compelled to state a case, the Courts in India would not stay a case where stay on similar grounds would be granted in England, and it is urged that in the absence of such a safeguard there is a greater obligation on Indian Courts to exercise their discretion in favour of refusing stay in India than there is in England. Mr. Rupchand, in my opinion, has considerably weakened the force of his contention by going on to argue that the Court could interfere with an award on the ground that the arbitrator had come to an erroneous decision on a point of law. I think he is very bold in putting forward such a contention in the face of the Privy Council decision in *Ghulam Khan* v.

(1) 48 Ind. Cas. 434; 12 S. L. R. 34.

Muhammad Hassan (2), where it was laid down that arbitrators are judges of law as well as judges of fact and an error in law certainly does not vitiate an award. It was also stated that the time had long gone by since the English Courts showed any disposition to sit as Courts of Appeal on awards in respect of matters of fact or matters of law. Inspite of this Mr. Rupchand attempted to support his argument by reference to various decisions in the English Courts. I do not, however, propose to go into a detailed consideration of these cases, because the point raised is not one which we have to decide in this case. I will content myself with referring to the recent decision in *Madepalli Venkataswami* v. *Madepalli Suramma* (3), where Mr. Justice Seshagiri Aiyar reviewed most of these particular decisions and came to the conclusion that there is only one case which supports the contention, *viz.*, *Landauer* v. *Asser* (4), and which stands by itself. It is also pointed out that the case of *British Westinghouse Electric & Manufacturing Company, Limited* v. *Underground Electric Railways Company of London, Limited* (5), on which Mr. Rupchand strongly relied, is quite distinguishable. In my opinion the most that can be said is that the Court may interfere with an award in cases of the kind specified in paragraph 14 of Schedule II of the Civil Procedure Code, namely, where an objection as to the illegality of the award is apparent on the face of it. It was by holding that there was such an objection that the Court interfered in the case last cited. It is also to be remarked that paragraph 12 of the Code does not authorise the Court to set aside an award on such a ground but merely to remit the award for reconsideration. It would be absurd to say that an arbitrator any more than a Judge is guilty of misconduct because he had erroneously decided a point of law. But coming back to the original point under discussion, I am not prepared to accept the view that a dispute merely because it raises difficult or complicated questions of law is one that should necessarily be taken out of the hands of arbitrators and preferentially decided by the Court. As I have already mentioned, that contention has been overruled in *Kodumal* v. *Volkart Bros.* (1) and I see no sufficient reason to differ. I think that having regard to the whole object of arbitration very much more weight must be attached to the desirability of obtaining a speedy and final decision in trade disputes than to that of obtaining a nice adjudication of any question of law that may be raised in the dispute. In mercantile disputes common sense and business experience may enable a merchant to decide such questions just as well as a lawyer; and arbitrators have the power to invoke the assistance of the Court for a decision of a question of law, if they so desire. In the present case the contract contains specific provisions which at any rate *prima facie* cover the main point in dispute and I can see no sufficient reason why the two arbitrators should not be able to decide correctly whether those provisions do or do not justify the respondents' failure to deliver in terms of the contract. Some cases have been cited by Mr. Rupchand where different judicial opinions have been given on somewhat similar disputes, but in the latest one of these, *viz.*, *Blackburn Bobbin Co., Ltd.* v. *Allen & Sons Ltd.* (6) it appears that there was no *force majeure* clause such as is contained in this contract.

The next objection that has been urged is that when the contract was signed, it was never in the contemplation of the parties that the existing state of affairs would arise so that all the European sugar importing firms are interested on one side and all the Indian purchasers of sugar are interested on the other. I do not myself think that there is any real force in the objection. The contract was entered into in June 1917 after the war had been going on for nearly three years, and I think it is absurd to say that the parties could not have contemplated that difficulties might arise from the requisition of ships or other causes of a similar kind con-

(2) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(3) 45 Ind. Cas. 644; 41 M. 1022; 34 M. L. J. 323; 24 M. L. T. 60; 8 L. W. 202; (1918) M. W. N. 482.

(4) (1905) 2 K. B. 184; 74 L. J. K. B. 659; 93 L. T. 20; 53 W. R. 534; 10 Com. Cas. 265; 21 T. L. R. 429.

(5) (1912) A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 25; 56 S. J. 734.

(6) (1918) 1 K. B. 540; 118 L. T. 222; 87 L. J. K. B. 1085.

nected with the war. I also do not think that there is any substance in the contention that the parties could not have contemplated the interest of sellers and purchasers of Java sugar being on different sides. I think I am correct in saying that there have been trade disputes in which there have been such divided interests, for instance, in regard to the question of the liability of war risk insurance. We have in this connection to bear in mind the fact that the arbitration clause is expressed in the widest terms and requires disputes of whatever nature arising out of the contract to be referred to arbitration.

The third objection which has been raised is that for one reason or another there are no sufficient European merchants members of the Karachi Chamber of Commerce available to the appellant for selection of his arbitrator. This is a point which has been gone into fully in the lower Court's judgment, and I am satisfied that there are no sufficient objections in the case of the six firms which are specifically mentioned as available in that judgment as well as in the case of the firm of Samuel Fitz and Company. Nor do I think that there is any real substance in the objection of the appellant to the representatives of Messrs. Anderson and Company and Messrs. Cooper and Company on the ground that they are brokers and not merchants. The word 'merchant' has varied in meaning very considerably from time to time, for instance, in former days it used to be restricted to persons trading beyond the sea, and it is a term the meaning of which in a contract depends a good deal on the particular usage of the place of contract. Thus Bouvier's Law Dictionary shows that it has been held in America to include a hotel keeper, a banker, a saloon keeper, a commercial traveller, a theatrical manager and a speculator in stocks. It seems to me clear that in this particular contract the word 'merchant' is meant to be synonymous with a member of the mercantile community of Karachi which would cover the case of brokers as well as those dealing in the actual sale and purchase of goods. This is in accordance with past practice, under which the representatives of those firms have been frequent arbitrators and this is, I think, a case where such usage can be legitimately referred to (*cf.* Halsbury's Laws of England, Volume 10, Article 486 at page 264 and Article 791 at page 450). Also I can see no sufficient reason for saying that a firm like Messrs. Mackinon Mackenzie and Co., who are agents of a shipping line, are not merchants. In support of this I can cite Bouvier's Law Dictionary, which shows that in America the superintendent and treasurer of a steam boat corporation has been held to be a merchant.

I think, therefore, there are no sufficient grounds for interfering with the discretion of the lower Court and would accordingly dismiss this appeal with costs.

KINCAID, A. J. C.—I have little to add to the judgment of the learned Judicial Commissioner. The parties in this case entered into an agreement that they would refer "disputes of whatever nature arising out of the contract to the arbitration of two European merchants in Karachi, one to be chosen by each party, whose decision shall be final and binding on the parties," but should the two arbitrators be unable to agree, they shall refer the case to an umpire whose decision should be final. There was a further provision that the European merchants who would be appointed to act as arbitrators should either be themselves personally members of the Karachi Chamber of Commerce or else be representatives or assistants of firms who were members of the Karachi Chamber of Commerce. Disputes have now arisen which have been given in detail in the judgment of the learned Judicial Commissioner, and the question before the Court is whether the suit should be stayed so that the parties should be able to submit their disputes to the arbitration of two European merchants as laid down in their contract of the 22nd of June 1917. The lower Court held that the matters in dispute should be referred to arbitration. Against this decision the present appeal has been lodged by Haji Abdullah Haroon to this Court.

In my opinion it is of the utmost importance that when two parties agree to refer their disputes to arbitration, they should be held bound by their agreement. In this view I am supported by the case of *Kodumal* v. *Volkart Bros.* (1), where Pratt, J. C., observed: "It is a *prima facie* duty of the Court to stay a suit and the onus is on the plaintiff to show why he

should not be bound by his agreement to refer to arbitration." The reason why such contracts are entered into by the parties is that members of the mercantile community have learnt by bitter experience to avoid the waste of time and money often incurred by litigation; and Mr. A. Sassoon, Manager of Messrs. Sassoon and Co., Ld., in his affidavit (page 2 of the typed book) says: "to the best of my information and belief no European firm in Karachi undertakes or would undertake import business in Karachi on the terms contained in the indent forms which they use, unless the indent form contained a binding submission that all the disputes would be referred to the arbitration of two European merchants of Karachi. If the indent did not contain a submission of all disputes to arbitration my firm and I believe all other European firms would only do this import (including sugar) business on very much stricter terms than those contained in the indents now in use, the indents would have to be much more elaborate and detailed and would bind the buyers much more closely." In other words, lightly to set aside agreements to refer disputes to arbitration would cramp commerce. The learned Pleader for the appellant, however, has urged that in this case it is impossible for his client to refer the dispute between him and Messrs. Sassoon and Co. to arbitrators, as they are not available either because they are interested or refuse to arbitrate and do not come within the terms "European merchant." I shall shortly examine this point.

The appellant has first of all mentioned 12 firms who are sugar men and are interested in sugar disputes. But the 12th, Messrs. Mackinon Mackenzie and Co., do no business in sugar. Another, Messrs. Fleming Shaw and Co., have not imported any sugar since 1917. There is no reason why the representatives of these firms should not be appointed as arbitrators. The learned Judicial Commissioner has shown that Messrs. Mackinon Mackenzie should be considered as merchants. I do not wish to recapitulate his reasons but I agree that Messrs. Mackinon Mackenzie and Co. do come within the terms of "European merchant." I see no reason why the manager of that firm should not be nominated as an arbitrator.

The next class mentioned by the appellants consists of 8 firms. These, I admit, do not come within the definition of the word 'European' firms, for they are Indian firms. I need not refer to them in my remarks. The next class contains 10 more members. Of these the Bombay Steam Navigation Co., Ltd, who are shipping agents, might certainly be included within the category of "European merchants." The next class consists of five banks. They do come within the category of merchants, but I understand that by the rules of the Banks the staff are not allowed to act as arbitrators. Then comes a class of two brokers. The other side contends that they do not fall within the category of merchants, I, however, entirely agree with the learned Judicial Commissioner that a broker is a merchant. I see no reason why the appellant should not nominate an arbitrator out of this class. The two firms contain two gentlemen Mr. Nicholas and Mr. Price, who admittedly are gentlemen of great experience and probity. The next class includes 17 firms. Of these, it is said that No. 3 has been nominated by the respondents as their arbitrator and Nos. 2, 7, 8, 10, 11, 13 to 17 have refused to be arbitrators. No. 5 Messrs. Gaddum and Co. and No. 6 have not replied to the letter of appellants. No. 5 it is said to have ceased to exist. It is not, however, correct to say that Nos. 2, 7, 8, 10, 11, 13 to 17 are unwilling to act as arbitrators. Messrs. Gaddum and Co. (who are now called Messrs. Gill and Co.), the Bombay Co., Messrs. Lyon Lord and Co., Messrs. Steiners and Co., Ltd., have declared by their managers that they are willing.

As regards Messrs. Samuel Fite and Co., the learned Pleader for the appellant says that this firm are wine merchants. But I see no reason why the manager of such a firm should not be appointed as arbitrator to decide a sugar dispute.

It is thus clear that there are no less than 9 or 10 persons from whom the appellants are able to choose an arbitrator. In these circumstances the appellant's contention that it is impossible for his client to nominate an arbitrator falls to the ground. I, therefore, agree with the learned Judicial Commissioner in dismissing this appeal with costs.

Appeal dismissed.

JAMUNABAI *v.* JUHARMAL.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 33 OF 1918.

November 25, 1919.

Present:—Sir Henry Drake-Brockman, Kt., J. C.

Musammat JAMUNABAI—APPELLANT

versus

JUHARMAL—RESPONDENT.

Hindu Law—Adoption—Jains—Adoption of married man, validity of—Religious ceremony, whether necessary—Giving and taking, whether essential.

Among Jains a married man can lawfully be adopted, adoption amongst Jains being a purely secular matter. [p. 83, col. 1.]

Manohar Lal v. *Benarsi Das*, 29 A. 495; 4 A. L. J. 407; A. W. N. (1907) 121, *Asharfi Kunwar* v. *Rup Chand*, 30 A. 197; 5 A. L. J. 200; A. W. N. 1908) 79, *Rup Chand* v. *Jambu Parshad*, 6 Ind. Cas. 272; 32 A. 247; 14 C. W. N. 545; 7 A. L. J. 312; 12 Bom. L. R. 402; 11 C. L. J. 454; 18 M. L. T. 3; 20 M. L. J 433; (1910) M. W. N. 432; 37 I. A. 93 (P. C.), followed.

No religious ceremonies are essential to the validity of an adoption among Jains, inasmuch as they do not believe in the Hindu doctrine of the spiritual efficacy of sons. But the secular ceremony of giving and taking cannot be dispensed with. [p. 83, cols. 1 & 2.]

Appeal against the decree of the Additional District Judge, Narsinghpur, in Civil Suit No. 53 of 1916, dated the 20th December 1917.

Dr. *H. S. Gour*, for the Appellant.

Messrs. *M. Gupta* and *J. C. Ghosh*, for the Respondents.

JUDGMENT.—The parties to this litigation are Oswal Jains of the Sitambari sect and the relationship between them is indicated by the following table:—

KASTURCHAND

- Juharmal (defendant No. 1)
  - Bachhraj (defendant No. 2.)
  - Mohanlal (defendant No. 3)
  - Hirchand (defendant No. 4.)
- Hazarimal
  - Hansraj
  - Hamirmal
  - Tikaram (adopted by Khubchand.)
  - Motilal
  - Chunilal.
- Tulsiram.
- Pirthiraj
  - Jamna Bai (plaintiff.)
- Khubchand
  - Tikaram.

Bachhraj died shortly before the case was closed, leaving no representative except his co-defendants. It is common ground that the five sons of Kasturchand were separate from each other, that Pirthiraj's wife predeceased him and that Pirthiraj himself died on the 11th August 1916.

The plaint was filed on the 16th October 1916 by Jograj, the husband of the plaintiff, Jamna Bai, as her next friend, she being aged 12 years only. The suit was brought to recover the property listed in two schedules annexed to the plaint, schedule A relating to property left by Pirthiraj of which the plaintiff claimed to be his sole heir, and schedule B including only gold and silver ornaments said to be the plaintiff's own property which had been placed by Pirthiraj in the iron safe figuring in schedule A shortly after her marriage in 1914.

The defendants Juharmal, Bachhraj and Mohanlal filed one written statement and the defendant Hirchand another, but the two are identical in terms although drawn up by different Pleaders. The main contention in both is that Hirchand was adopted by Pirthiraj on the 25th June 1915, the wording employed being as follows:—

"On Jeth Sudhi 13 Sambat 1972=25th June 1915 Hirchand, defendant No. 4, was duly adopted by Pirthiraj and the necessary ceremonies were performed, but subsequently some of the relatives of the parties having objected to sign the entry in the *panchayat bahi* regarding the adoption, they and the other people who were present left the place. In order that there might be no hitch about the adoption, Pirthiraj executed a deed on the 2nd July 1915 with the advice of Mr. Maniklal Pleader and got it registered. Juharmal, defendant No. 1, father of Hirchand, attested the document as a token of his consent to the adoption. On Bhadon Sudhi 10 Sambat

1973=7th September 1916 after the death of Pirthiraj the caste ceremony of putting on the turban on the head of the adopted son Hirchand was performed and Jograj, plaintiff's husband and guardian, performed the *arti* ceremony of Hirchand and he thereby recognised that Hirchand was the adopted son of Pirthiraj."

It was admitted that Pirthiraj had an iron safe which is now deposited in the defendants' shop known as Juharmal Bachhraj, but it was denied that Pirthiraj kept any jewellery therein or that the defendants are in possession of any of the ornaments mentioned in the plaint's schedule B. Certain contentions regarding other items of the claim were raised which will be sufficiently apparent from the issues framed.

The plaintiff in an oral statement denied the alleged adoption. The genuineness of the document (Exhibit D-1) purporting to have been signed by Pirthiraj on the 2nd July 1915 was admitted, but it was said to do no more than lay down the terms under which Pirthiraj desired to adopt the defendant Hirchand. The ceremonies necessary to the validity of an adoption were said to be (1) giving and taking (2), putting a turban on the head of the adopted boy, (3) distribution of cocoanuts or sweets, and (4) giving a present to a Jain temple, and it was alleged that none of these were ever performed.

With regard to the adoption the following rejoinder was made for all the defendants jointly:—

"Gift and acceptance are the only necessary ceremonies in case of adoption. The other ceremonies are merely done to give publicity to the adoption. The giving and taking as also the ceremonies for publicity were performed."

The following issues were framed:—

"1 (*a*) Was Hirchand (defendant No. 4) adopted as a son by Pirthiraj?

(*b*) Was the adoption valid?

(*c*) What is the nature of the deed dated the 2nd July 1915 produced by the defendants?

2. (*a*) Was the deed dated the 2nd July 1915 executed by Pirthiraj intended to be his Will and does it operate as a Will?

(*b*) Is defendant No. 4 entitled to the estate left by Pirthiraj under the deed?

3. Was the rate of interest on the deposit of Rs. 1,800 enhanced to 10 annas per cent. per mensem from Kartik Sudhi 1 Sambat 1972=8th November 1915?

4. Was the rent of the portion of Pirthiraj's house leased to defendants enhanced to Rs. 90 a year from the same date?

5. Are the defendants or any of them in possession of the moveable properties, other than those admitted, included in list A; if so of what value?

6. Is plaintiff the owner of jewellery mentioned in list B and are defendants or any of them in possession of the same? What is the value of the jewellery so in possession of the defendants?

7. Did Pirthiraj withdraw Rs. 154-2-3 out of the deposit of Rs. 1,800 with defendants?

8. Did defendants spend Rs. 440-1-6 for the medical treatment and funeral expenses of Pirthiraj; and are they not liable for the sum so spent?

9. Are defendants liable to be ejected from the portion leased out to them by Pirthiraj?

10. What reliefs plaintiffs are entitled to and against whom?

The trial Judge held that Pirthiraj adopted Hirchand and that the adoption is valid according to Jain custom, giving and taking being the only essential ceremony. In view of the fact that Hirchand was about 20 years old and that Pirthiraj was suffering from leprosy, the omission to place Hirchand in Pirthiraj's lap was held to be immaterial, the symbolical, delivery consisting in the admission made by Pirthiraj and Juharmal in the presence of the *panchas* being regarded as sufficient. Exhibit D-1 was held to be a deed of adoption, not a Will, and Hirchand was declared to be entitled to take all Pirthiraj's property, that property, however, not including the ornaments mentioned in schedule A as these had been given by Pirthiraj to Jamna Bai. The plaintiff's allegations, that the rate of interest on Pirthiraj's deposit of Rs. 1,800 and the rent of so much of his house as had been leased to the defendants were increased with effect from Kartik Sudhi 1 Sambat 1972=8th November 1915, were found not proved. On the fifth issue the defendants were held not to be in possession of the utensils included in schedule A but of certain ornaments mentioned in the

plaintiff's deposition taken on commission, and it was further held that she was the owner of those ornaments included in schedule B which she spoke of in that deposition. The total value of the ornaments to which the plaintiff was thus found entitled was put at Rs. 1,500. The Court also allowed as proper deductions from Pirthiraj's deposit (*a*) Rs. 154-2-3 withdrawn by Pirthiraj himself and (*b*) Rs. 440-1-6 spent in treating him during his last illness and in performing his obsequies. On the ninth issue the plaintiff's claim to eject the defendants from the premises mentioned in her schedule A was disallowed, the title to them being in the defendant Hirchand. The plaintiff thus obtained a decree for Rs. 1,500 with proportionate costs of the suit against the defendants Juharmal and Hirchand only, the rest of the claim being dismissed. The decree includes the following directions:—

"The defendants shall get from the plaintiff costs in proportion to that part of the claim which fails. The sum of Rs. 660 should be paid by the defendants to the plaintiff on account of costs of this suit and the plaintiff shall pay to the defendants costs amounting to Rs. 465-8-0."

The plaintiff has preferred this appeal and the defendants have filed cross-objections.

The fourth ground of appeal embodies the contention that Hirchand could not have been legally adopted, inasmuch as he was 25 years old, married and the father of a child when the alleged adoption took place. This, however, was not pressed at the hearing, It may now be taken as settled law that among Jains a married man can lawfully be adopted, adoption being amongst the Jains a purely secular institution. See *Manohar Lal* v. *Benarsi Das* (1), *Asharfi Kunwar* v. *Rup Chand* (2) and *Rup Chand* v. *Jambu Parhsad* (3), the last authority being the decision of the Privy Council on appeal in the second case.

That no religious ceremonies are essential to the validity of an adoption among Jains, inasmuch as they do not believe in the Hindu doctrine of the spiritual efficacy of sons, was laid down by Ismay, A. J. C., in Second Appeal No. 330 of 1895, where the following propositions were taken as admitting of no doubt:

"(1) The customs of the Jains, where they are relied upon, must be proved by evidence just as other special customs and usages varying the general law should be proved, and

(2) In the absence of proof the ordinary law must prevail."

The last proposition was based on the Privy Council decision in *Chotay Lall* v. *Chunnoo Lall* (4). That personal law of the Jains is the ordinary Hindu Law of the place where they are settled was laid down in *Ambabai* v. *Govind* (5), which is also authority for treating Oswal Jains as Vaishyas. It may, therefore, be safely said that the secular ceremony of giving and taking cannot be dispensed with.

The appellant's contentions include one to the effect that a physical gift and acceptance is essential and has not been proved. It is also contended that the tying of a turban on the head of the adopted boy is shown to be indispensable, but not to have been effected, and that the other ceremonies mentioned in her oral pleadings, namely, the distribution of cocoanuts and sweets and offering a gift to a Jain temple, are equally indispensable and are not proved.

The point that there was no actual corporal gift and acceptance of Hirchand does not, in my opinion, call for serious consideration. The actual placing of the adopted son in the lap of one of his adoptive parents cannot reasonably be regarded as essential to an actual gift of him. In *Shoshinath Ghose* v. *Krishnasunderi Dasi* (6) their Lordships of the Privy Council expressed the opinion that according to Hindu usage the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption. In that case a widow

(1) 29 A. 495; 4 A. L. J. 407; A. W. N. (1907) 121.
(2) 30 A. 197; 5 A. L. J. 200; A. W. N. (1908) 79.
(3) 6 Ind. Cas. 272; 32 A. 247; 14 C. W. N. 545; 7 A. L. J. 349; 12 Bom. L. R. 402; 11 C. L J. 454; 8 M. L. T. 3; 20 M. L. J. 439; (1910) M. W N. 432; 37 I. A. 93 (P. C.).

(4) 4 C. 744; 3 C. L. R. 465; 6 I. A. 15; 3 Sar. P. C. J. 880; 3 Suth. P. C. J. 572; 3 Ind. Jur. 175; 2 Ind. Dec. (N. S.) 473.
(5) 23 B. 257; 12 Ind. Dec (N. S) 171.
(6) 6 C. 381; 7 I. A. 250; 7 C. L. R. 313; 4 Sar. P. C. J. 191; 3 Shome L. R. 231; 3 Suth. P. C. J. 812; 4 Ind. Jur. 589; 2 Ind. Dec. (N. S.) 248.

was said to be the adoptive parent. In *Bireswar Mukerji* v. *Ardha Chander Roy* (7) the Judicial Committee accepted the necessity for giving and taking but gave no indication of the precise way in which these acts would be performed, and it appears that the latest adoption set up was treated as invalid because there was no giver, the natural mother having been mentally incapable when the ceremony relied upon was performed. Sir Thomas Strange in his Elements of Hindu Law at page 83 of the first edition lays down that there must be gift and acceptance manifested by some overt act, but no examples of adequately overt acts are given. In the Dattaka Mimansa, section 5, paragraph 15, (page 590 of Stokes' Hindu Law Books, 1865) taking the boy by both hands, kissing him on the forehead and adorning him with clothes are mentioned, and in paragraph 21 the boy is required to be seated in the middle of the house. The same acts are mentioned in paragraphs 7 and 9, section 2, of the Dattaka Chandrika (page 638 of Stokes' Hindu Law Books). Pirthiraj was a leper and it seems clear that Pirthiraj's wife was already dead, for she is not mentioned in the *bahi* of the *panchayat* which records what happened on the 25th June 1915 in connection with Hirchand's adoption, while Exhibit D 2, bearing date a week later, expressly refers to her as no longer alive. The account in the *bahi* leaves no room for doubt that the express assent of Juharmal and his wife to give and that of Pirthiraj to take Hirchand as also Hirchand's assent to being adopted were taken and that cocoa-nuts were then distributed in accordance with the caste custom. There is also evidence which I see no reason to disbelieve that after the aforesaid declarations Hirchand was made to sit on a wooden stool (*pata*) evidently as a recognition of a change in his status. The witnesses who mentioned this sitting upon the stool are the defendant Juharmal (D. W. No. 1), Punamchand (D. W. No. 12), Budhmal (D. W. No. 13), Bindraban (D. W. No. 14) and the defendant Hirchand himself (D. W. No. 16). There is certainly some evidence for the plaintiff which indicates that the boy to be adopted, no matter how old, should sit in the lap of the person who adopts him: see for instance the depositions of Kaniram (P. W. No. 2), Juharmal (P. W. No. 3), Chhitarmal (P. W. No. 5), Bahadarmal (P. W. No. 6), Nanhuram (P. W. No. 7), Hansraj (P. W. No. 8) and Chhogmal (P. W. No. 11). The last mentioned person is the head of one section of the local Jains, while the defendants belong to another, and most of the witnesses just mentioned belong to Chhogmal's faction. But of the 12 witnesses examined for the plaintiff on commission not one asserts the placing of the adopted son in the lap of the adoptive parent to be essential, nor was any such act expressly mentioned in the plaintiff's pleadings. On the other hand Chhogmal himself (P. W. No. 11) his relative and Gumashta Magniram and Rupchand, who reside respectively in Bombay and a village in that Presidency, mention that after the declaration of giving and taking and willingness to adopt have been taken, the adopted son is made to sit on a wooden stool. It is also important to observe that the entry in the *panchayat's bahi* (Exhibit P-2), which records the admittedly complete adoption of Hazarimal's son Tikaram by Khubchand, makes no mention of placing Tikaram in the lap of either adoptive parents. I would add that the translation of the Bhadrabahu Sanhita, a sacred book of the Jains, which was published by J. L. Jaini, a Jain Judge at Indore, and is much relied on by the appellant, gives a detailed list of essential ceremonies as making up giving and taking, but does not include in them the sitting of the adopted son in his new parent's lap. In *Jiwraj* v. *Sheokuvar Bai* (8) it was held by Mittra and Prideaux, A. J. Cs., that the adopted person, being 25 or 26 years old, could not be placed on his adoptive mother's lap and that in the circumstances his being placed near her constituted a sufficient delivery of possession, and this view entirely coincides with my own. The parties to that case were Jains of Nimar, and it was admitted that giving and taking alone would constitute a valid adoption. My conclusion then is that such overt act of giving and taking as the law applicable to Jains requires was performed.

I turn now to the second ground of appeal in connection with which the plaint-

(7) 19 C. 452; 19 I. A. 101; 6 Sar. P. C. J. 171; 9 d. Dec. (N. s) 746.

(8) 56 Ind. Cas. 65.

iff-appellant's case is that all the ceremonies mentioned in her pleadings are essential but were not performed. As already mentioned, those ceremonies in addition to giving and taking are (1) putting a turban on the head of the adopted boy, (2) distribution of cocoanuts and sweets, and (3) giving a present to a Jain temple. The extract from Exhibit P-2 regarding Hirchand's adoption suffices to dispose of the plea that cocoanuts were not distributed, as this distribution is expressly mentioned therein. The same extract is strongly indicative of an opinion on the part of the *panchas* that Hirchand's adoption was really completed, for after mentioning the express assent of the four persons immediately concerned the document as translated proceeds thus:—

"From this day Pirthiraj shall be considered to be the father of Hirchand and Hirchand to be the owner of Pirthiraj's moveable and immoveable property."

The document next mentions the distribution of cocoanuts and proceeds thus:—

"One writing was given to Pirthiraj and one to Juharmal on obtaining signature. The customary dues amounting to ...* may be sent to the temple at Kandali and Narsinghpur."

Then follow the signatures of the defendant Juharmal, Pirthiraj and four *panchas* namely, Punamchand, Chhogmal, Maniklal and Gulji. A hitch then occurred, the nature of which appears from the evidence of Kaniram (P. W. No. 2) and Nanhuram (P. W. No. 7) who were both present on the occasion. Their account is that Pirthiraj's brother Tulsiram objected to sign the *bahi* on the ground that Hirchand had been promised to him, and this story is corroborated by the defendant Juharmal himself and by Punamchand (D. W. No. 12), Budhmal (D. W. No. 13), Bindraban (D. W. No. 14), Nandram (D. W. No. 15) and the defendant Hirchand (D. W. No. 16). Tulsiram refused to sign the entry in the *bahi* and his nephew Hansraj (P. W. No. 8) also declined. Tulsiram was not examined as a witness and Hansraj in cross-examination professed not to know why Tulsiram raised a dispute. The entry in the *bahi* was then completed as follows:—

"Tulsiram and Hansraj refused to sign hence the ceremony of tying a turban and adoption did not take place. The adoption was cancelled."

This postscript is signed by all the four *panchas* who signed the first entry and 10 others, but not by the defendant Juharmal or Pirthiraj. One additional signature, that of Lachmichand, was added on the 26th March 1917. This man was not examined and we are without an explanation of his signature being taken nearly two years after the occasion.

The contemporary writing then appears to support the theory of the defence that there was a completed adoption. The statement in the postscript that the adoption had not taken place because a turban had not been tied on the boy's head, is incompatible with the further decision that the adoption was cancelled and the conclusion I come to after carefully perusing all the evidence is that the Jains of these Provinces are themselves in doubt as to what ceremonies should be regarded as legally indispensable. Had the tying on of a turban been really regarded as essential by the *panchas*, it is difficult to understand why a declaration that Hirchand had already become the son of Pirthiraj was ever entered in the *bahi*. The extract relating to Tikaram's adoption indicates that the procedure is by no means settled, for there the turban was tied before the announcement of the adoption was made and there is no mention of any distribution of cocoanuts or sweets. The offering to a temple is evidently a mere trifle and in view of the Jain theory of adoption very strong evidence is required to establish its essentiality.

I am not at all impressed by the appellant's argument that Tulsiram's objection would necessarily be put forward before the adoption was complete. It seems to me quite possible that Tulsiram's real objection was to signing an entry which might be used against him if he should subsequently endeavour to assert his own right to take Hirchand in adoption. As already remarked, Hansraj was unable to say why Tulsiram raised a dispute and Tulsiram himself was not put into the witness-box to explain his attitude.

The appellant's learned Counsel places much reliance upon the wording of the adoption deed (Exhibit D-1) executed by

*No amount is mentioned.

Pirthiraj on the 2nd July 1915, *i.e.*, exactly a week after the incident recorded in the *bahi*. This point is embodied in the third ground of appeal. It appears from the evidence of the defendants Juharmal and Hirchand and Punamchand (D. W. No. 12) and Nandram (D. W. No. 15) that when the *panchayat* broke up on Tulsiram's objection, Pirthiraj expressed his intention of placing the adoption beyond dispute by executing and registering a document. Exhibit D-1 was the outcome of this determination, and it is urged for the appellant that its wording is inconsistent with an adoption having already taken place. This document certainly makes no mention of what happened a week previously, but this point is not really important, inasmuch as what happened on the earlier occasion is undisputed and indisputable. The portion of Exhibit D-1, which is material for the present purposes has been translated as follows:—

"Therefore by virtue of this deed I today adopt Hirchand, son of Juharmal my elder brother, and make him my son. Juharmal and his wife agree to this deed and they give Hirchand to me in adoption willingly. And Hirchand, who is a major, is willing to be adopted. Hirchand is now my son, and he and his wife shall live with me in my house * * *

The ceremonies of adoption customary in our sect have not yet been performed. They will be performed on some auspicious day during this very year. I have, therefore, executed this adoption deed in the possession of my full senses and in the enjoyment of sound health so that it may stand as evidence."

The defendant Juharmal attested this deed as a witness along with three other persons who were not examined and appear from their descriptions not to be members of the Jain community. In her pleadings the appellant contended that Exhibit D-1 merely laid down the terms upon which Pirthiraj was willing to adopt Hirchand and that subsequently Juharmal declined to give Hirchand in adoption on those terms. This account of the document seems to me altogether unsatisfactory. Juharmal was not likely after what had occurred before the *panchayat* to give up the advantageous position which his son would occupy as prospective heir to a well to-do man like Pirthiraj who evidently could not live long, nor can I see how any useful purpose would be served by executing and registering a document declaratory of mere intention to adopt later. According to the defendant Juharmal Exhibit D-1 was drafted by the Pleader Maniklal, who signed both parts of the entry in the *panchayati bahi* regarding Hirchand's adoption. This Maniklal is a cousin of Chhogmal (P. W. No. 11) and the maternal uncle of the plaintiff's husband and is said by the plaintiff's witness Kaniram to belong to Chhogmal's faction, while the defendant Hirchand as D. W. No. 16 deposed that he is not on good terms with Chhogmal and Maniklal. Therefore, it may well be that Maniklal omitted reference to what had occurred previously on account of his own view of the position as indicated by the postscript announcing the adoption to have been cancelled. Moreover, if I am right in holding that giving and taking had already been effected, the legal position would not be altered by any misapprehension on Pirthiraj's or Juharmal's part as to the date from which Hirchand's adoption would operate. The fact that Pirthiraj did not perform any further ceremonies, although he undertook to do so and lived 13 months after executing Exhibit D-1, may be explained by the nature of his illness and in any view of Exhibit D-1 it cannot reasonably be concluded that Pirthiraj considered the further ceremonies as essential to the validity of the adoption. My view of Exhibit D-1 is that it does not really assist the plaintiff appellant's case.

The evidence as to the necessity for tying a turban on the adopted son's head on the occasion of his being given and taken in adoption has been analysed at considerable length by the lower Court, and after a careful perusal of it I am not satisfied that the plaintiff has established her plea. I concur with the learned Additional District Judge in attaching special weight to the evidence of Rai Bahadur Seth Lakshmichand (D. W. No. 19), an Honorary Magistrate of Balaghat, who is himself a Jain and was chosen by the parties as an arbitrator to settle this very dispute. This gentleman, who is now over 50 years old, was himself adopted but no turban was

tied on his head at the time of the adoption, this ceremony taking place after the death of his adoptive father. Two witnesses for the plaintiff, namely, Lakshmandas and Pemraj, both of whom belong to Jalgaon in the Bombay Presidency and appear to be quite impartial, mention putting on of a turban as a ceremony to be performed after the adoptive father's death. I understand both these witnesses to have expressly asserted that gift and acceptance of the boy constitute the only ceremony which is indispensable, the putting on of a turban and distribution of cocoanuts being merely methods of giving publicity to the transaction.

For the plaintiff-appellant much stress was laid on the list given by the defendant Juharmal as D. W. No. 1 of the ceremonies necessary for effecting a valid adoption. The list was given in cross examination and runs as follows:—

"According to the usage of my caste the following things are necessary for effecting a valid adoption. The *panchas* assemble and ask the giver and taker of the boy about the adoption. The giver says that he gives the boy and the taker says that he takes the boy in adoption. The turban is also tied and the cocoanuts are distributed and *tilak** is made and the presents are made by the adoptive boy and *arti*† is performed."

Juharmal immediately went on to say that at the time of Hirchand's adoption the turban was not tied and cocoanuts were not distributed. It is difficult to understand this statement, for Juharmal certainly meant to support the adoption and followed up the statement just quoted by adding that Hirchand's adoption was in fact complete on the 23rd June 1915. The lower Court remarked in paragraph V (1) of its judgment that this witness is an "aged person" and appears to have treated him as supporting the theory of a complete adoption and to have believed his story. This defendant was unable to explain the language of Exhibit D-1 which certainly describes the adoption as effected on the day (2nd July 1915) of its execution, and I can only regard his evidence as that of a somewhat stupid person who does not really know what his law requires and could not actually remember what had happened 18 months previously.

Chhomanlal (D. W. No. 2) had been present at two adoptions in his caste and deposed that at each a turban was tied round the head of the adopted boy, but could not say whether this was an essential part of the ceremony. Lachhmandas (D. W. No. 4) was not present at the adoption of Hirchand and admitted that it is usual to tie a turban on the adopted boy's head, though he added that he had heard of adoptions at which this had not been done, his own opinion is that giving and taking is the only essential ceremony and he corroborated Arjundas (D. W. No. 3), another witness from Balaghat, in deposing that Pirthiraj's turban was eventually tied on Hirchand's head at the funeral ceremony of Bhadon Sudi 10 Sambat 1973=7th September 1916.

Punamchand (D. W. No. 12) is another witness who admitted that in the ordinary course of things the adoptive boy has a turban tied on his head, but he also stated that this and other acts are simply done to make it clear that the adoption is complete. This witness was present at the adoption, and his evidence is important in that he explains that the tying of the turban was delayed firstly at his own suggestion that the ceremony should be put off till the marriage of Tikaram and secondly by the final illness of Pirthiraj which began in April or May 1916. He took a boy in adoption himself and did not have a turban tied till 12 months after the adoption. He was present at Pirthiraj's final funeral ceremony and while deposing that a turban was then tied on Hirchand's head, explained that this had no connection with the ceremony of adoption. This witness, as already stated, signed the *panchayati bahi* on the 29th June 1915: his age is 60 and he appears to be unbiassed.

Of the plaintiff's witnesses a number of those who professed to know the essential customs are members of Chhogmal's faction or specially interested in him. For example Kaniram (P. W. No. 2) who lives at Mansinghpur belongs to that faction, Juharmal (P. W. No. 3) is the father of Chhogmal's

*A mark on the forehead.

†Waving of a Candle.

son-in-law and Nanhuram (P. W. No. 7) is indebted to Chhogmal, while the son of Lakshmichand (P. W. No. 10) is married to Chhogmal's daughter. With regard to Hansraj (P. W. No. 8), one of Kasturchand's grandsons, who was present at the *panchayat* of the 25th June 1915 it is to be observed that his relations with the defendant Juharmal as described in his cross examination appear to be unfriendly.

It is urged on behalf of the plaintiff-appellant on the authority of *Sutroogun* v. *Sabitra Dye* (9) and *Diwakar* v. *Chandanlal* (10) that burden of proving an adoption lies very heavily on the person who puts it forward where there is a wife or a daughter to be supplanted. In both those cases an outsider was alleged to have been adopted and the position generally was far from being comparable to that of the defendant Hirchand, whom Pirthiraj is admitted to have at least endeavoured to adopt. The burden is doubtless on the defence to establish a valid adoption, but as already stated, I consider the evidence to justify a conclusion that the necessity of tying a turban on the adopted son's head is sufficiently shown not to be an essential ceremony. In this connection I would observe that none of the plaintiff's witnesses give a list of the essential ceremonies corresponding at all closely with the description of the correct procedure given in the Bhadrabahu Samhita. That description mentions acts not included in the category of essentials give in the plaintiff's pleadings, and the plaintiff's witnesses Juharmal (P. W. No. 3) and Chhitarmal (P. W. No. 5) declare to be essential such acts as making an *arti* and marking the forehead with a *tilak* which those pleadings do not mention at all.

I conclude with the lower Court that a simple giving and taking suffices to effect a valid adoption, that this act was duly done in the present case and that the defendant Hirchand must, therefore, be regarded as having been validly adopted by Pirthiraj. The appellant's appeal accordingly fails.

(9) 5 W. R. 109 (P. C.).

(10) 39 Ind. Cas. 6; 12 N. L. R. 164 at p. 169; 18 Bom. L. R. 992; 25 C. L. J. 17; 21 M. L. T. 6; 5 L. W. 103; (1917) M. W. N. 50; 21 C. W. N. 314; 44 C. 201; 32 M. L. J. 636 (P. C.).

It remains to deal with the objections preferred by the defendants to the findings of the lower Court regarding the ornaments for which two of them have been held responsible and to the order allowing the plaintiff proportionate costs against those defendants.

The plaintiff's claim for ornaments was divided into two parts, namely, (1) those which belonged to Pirthiraj and so were inherited by the plaintiff on his death and (2) some which belonged to the plaintiff and were deposited by her father in his iron safe in Aghan Sambat 1971 soon after her marriage. The first lot, described in schedule A annexed to the plaint, includes only a pair of gold earrings, some gold *phuls* (flowers) and a nose ring set with pearls valued respectively at Rs. 100, 50 and 60. Of the second lot details are given in schedule B, which comprises 11 kinds of gold ornaments valued at Rs. 1,359 and 5 kinds of silver ornaments valued at Rs. 174 5-0, the total claim under this head being valued at Rs. 1,533 5-0. The defendants admitted that Pirthiraj had an iron safe of his own which he kept in the shop of Juharmal, but made no allegation as to what ornaments, if any, belonged to Pirthiraj's estate, contenting themselves with the general plea that Pirthiraj's property belonged to his adopted son Hirchand who is in actual possession. It was denied that Pirthiraj placed any ornaments in his iron safe and that any of the defendants were in possession of any of the ornaments entered in schedule B. The fifth and sixth issues which have already been set out were framed in connection with ornaments. The findings of the lower Court on these issues are to be found in paragraphs XIII and XIV of its judgment which run as follows:—

"XIII. Finding of the lower Court on issue No. 5 is that the defendants Juharmal and Hirchand are in possession of ornaments referred to by the plaintiff in her deposition before the Commissioner and that it is not proved that the defendants are in possession of the utensils mentioned in list A. Plaintiff was the very best person to know all about her ornaments and the ornaments belonging to her mother and father and she has given a list of the said ornaments, and she also swears that her father got ornaments made for her and he

also gave his ornaments to her. This story given by the plaintiff is quite natural and the Court believes it, and the said story is also proved to be true by the evidence given by the other witnesses, *viz.*, Kaniram (P. W. No. 2) and Hansraj (P. W. No. 8.)

XIV. Finding of the Court on issue No. 6 is that the plaintiff is the owner of jewellery mentioned by her in the witness-box out of those included in list B and that Juharmal and Hirchand are in possession of the said jewellery. This finding is supported by the evidence given by the plaintiff's witnesses Nos. 2 and 8 and the plaintiff herself in the witness-box."

In order to understand these findings it is desirable to set out at length what the plaintiff's witnesses Kaniram and Hansraj and the plaintiff herself deposed on the subject. Kaniram, who was not cross-examined about ornaments, deposed in examination in-chief as follows:—

"Wife of Pirthiraj had ornaments. Pirthiraj had presented ornaments to plaintiff at the time of her marriage:—

One *ad* of gold worth more than or above Rs. 200, one *timania* of gold worth about Rs. 75 one necklace of *putli*, one nose-ring of gold, one pair of gold *jhumkas*, one pair of gold *todars*, two or three gold rings, one pair of silver *bichhori*, two *kardoras* of silver.

Pirthiraj said that the other ornaments belonging to him would also be owned by his daughter."

"Pirthiraj gave the following ornaments to Jamna Bai at the time of her marriage:—

One gold *nath* worth about Rs 40, one *ad* of gold worth about Rs. 200, one necklace of *putlis* worth about Rs, 125. Pirthiraj had promised to give one pair of *bazuband* worth Rs. 300 to his daughter. Pirthiraj had given one *gunj* to the son in-law. The ornaments were prepared through me. Pirthiraj had got accounts with me. I noted the ornaments in the accounts of Pirthiraj. Juharmalji has got the ornaments belonging to the plaintiff including the *bazu bands*. The ornaments were left in the iron safe of Pirthiraj which was in the house of Juharmalji. Juharmalji has got the key of the safe. Jamna Bai demanded the ornaments from Juharmalji and she complained to me that Juharmalji was not giving the ornaments to her. Pirthiraj used to have disputes with Juharmalji. I used to make arrangements for the meals of Pirthiraj during his illness. Pirthiraj has got his own ornaments worth about Rs. 700 and these ornaments included the ornaments of his wife also."

In cross-examination he added:—

"I had seen the other ornaments which were presented to Jamna Bai. The price of the ornaments was set off against the money due by me to Pirthiraj. Jamna Bai was married about one year before the death of Pirthiraj. I cannot specify all the ornaments which were given to Chhogmal's daughter at the time of her marriage. The marriage of Chhogmal's daughter was performed about one year ago. Pirthiraj had sent for his iron safe and from that the time it remained with Juharmal. Pirthiraj had sent for his iron safe at the time of the marriage of his daughter. After her marriage Jamna Bai went to the house of her father-in-law and she returned to the house of Pirthiraj twice. Jamna Bai also arrived 5 or 7 days aftar the death of Pirthiraj.

Pirthiraj was ill for about a month. When Jamna Bai returned at the time of the performance of *ausor* she complained that Juharmal was not returning her ornaments."

The plaintiff was examined on commission at Raipur on the 15th July 1917, her age being then put at 13. Her examination in chief was confined almost entirely to the subject of ornaments and may, therefore, be reproduced in *extenso*:—

"At the time of marriage my father gave me the following ornaments of gold:—

One armlet 12 *tolas*, one *ad* (next ornament) weight 8 *tolas*, 16 *putlis* (weight unknown), one *nath* (nose ring) valued at about Rs. 50, two rings (weight unknown), one *sankla* (weight unknown), one pair of *toti jhungra angni* (ear ornaments), one *long* and one gold *patri*.

The aforesaid were all gold ornaments. My father also gave me at my marriage the following silver ornaments:—

Ten *bichhoris* of foot fingers, *sic.* one silver *kardora* (waist ornament).

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The aforesaid ornaments were kept by my father in the iron safe previous to his death as I had also gone there during my father's illness. I stayed with my father for about three months, but had returned here some ten days previous to his death, I could not take the ornaments back from my father as I returned in a hurry owing to the serious illness of my mother-in-law. When I was married here three years ago I had seen the following ornaments with my father:—

One *phul* of gold weighing 1½ *tolas*, one pair of *murki sankaliya* and one *kardora* of silver.

My mother had the following ornaments with her during her lifetime and after her death my father had custody of them:—

One gold *timania*, one nose ring, one *long*, one *toti*, six *auganias*, one *bor*.

These were all of gold. One pair of *kadia*, one pair of *satis*, one pair of *newri*, one pair of *toda*, and one pair of *nakhalia* were all of silver. The aforesaid ornaments were kept in a metal box and deposited inside an iron safe. When I went back to Narsinghpur after my father's death, I saw the iron safe which contained these ornaments in the house of my uncle Juharmal. Hirchand is my uncle Juharmal's son. During his lifetime my father did not adopt anybody as his son. During his illness I and Hansraj, my uncle's son, used to attend upon my father. I used to cook food for him. During my father's lifetime my uncle Juharmal, Bachhraj, Mohanlal and Hirchand lived separate from my father. They had separate business and messed separately. When I went back to Narsinghpur after father's death and went to sit at his house, I saw Juharmal open the iron safe of my father which was then at his house."

In cross-examination she stated that all the ornaments belonging to her father, her mother and herself were put by her father in the iron safe in the presence of herself and the defendants Juharmal and Mohanlal about two years back and that Pirthiraj entrusted the key to the defendant Juharmal 12 months before his death in the presence of herself, the defendant Mohanlal and her cousins Hansraj and Hamirmal. All the ornaments were said to have been shown to those present on this occasion, but no list was prepared, though Pirthiraj said at the time that on his death those ornaments were to be given to the plaintiff and the defendant Juharmal agreed to comply with this direction. It appears clear from the following passage in the plaintiff's cross-examination that Hansraj was for some time siding with Pirthiraj against the defendants Juharmal and Bachhraj:—

"There was *takrar* and hence Bachhraj and Juharmal did not come to see my father during his illness for two years. I asked my father to get back the key from the defendants but he said that I was a minor. I did not ask my father to take the key back and make it over to Hansraj. There was no dispute between Hansraj and my father. There is *takrar* between Hansraj and defendants Juharmal and Bachhraj for the last two years. The dispute arose from the fact that my father did not like to take anybody in adoption and defendants Bachhraj and Juharmal wanted to give a boy in adoption."

It is certain that Pirthiraj must have given his daughter some ornaments at her marriage and I can see no reason to discredit so much of the evidence above set out as indicates that she got at least the following items:—

One gold *bazuband*,
" *ad*,
" nose-ring,
one necklace of gold *mohars*,
two sets (10) silver *bichhoris* (toe ornaments), one silver *kardora* (waist ornament).

In schedule B of the plaint the *ad* and *bazuband* were described as each weighing 11 *tolas* and I would accept this weight, which allowing Rs. 25 per *tola*, the rate claimed, gives a value of Rs. 275 for each of these ornaments. I would also accept the plaintiff's statement that there were 16 *mohars* on the gold necklace. As she could not give the weight of this ornament I would accept Hansraj's estimate of Rs. 125 as its value. The nose-ring may also be taken at Hansraj's valuation, which is Rs. 40. In schedule B Rs. 29-5-2 is entered as the value of the two sets of *bichhoris* (10 in all), their weight being put at 39 *totas*: I would accept this valuation as toe-rings are comparatively heavy articles. Rs. 25 may safely be taken as the value of one

silver *kardora*, *i. e.*, one-half of the value of the two ornaments of this class mentioned in schedule B. Kaniram mentions two or three gold rings as among the wedding presents while the plaintiff gives the number as two, neither witness mentioning the weight. I would allow two gold rings and put their combined value at Rs. 25. Kaniram must be wrong in including a pair of gold *todar*, for the plaintiff does not mention *todar* at all and schedule B includes only a pair of silver articles of this class. As to valuation it may generally be remarked that the defendants did not question any of the values entered in schedules A and B.

Reading together Kaniram's and the plaintiff's depositions it appears that Kaniram has treated as a wedding present one article (a gold *timania*) which used to be worn by the plaintiff's mother. It is also clear from a comparison of the plaintiff's deposition with schedule B that some of the ornaments worn by her mother have been included in that schedule. The plaintiff's pleadings do not explain the basis of her title to any of the ornaments, nor does her deposition suggest that the ornaments worn by her mother were her mother's *stridhan* and descended to her by operation of law. Her own evidence is rather directed to show that Pirthiraj ordered all the ornaments put in the safe to be given to her on his death. On the whole I think the only safe finding as to title will be that the plaintiff is the owner only of those which were given to her by Pirthiraj at her marriage, namely.

one gold *bazuband* worth	Rs.	275 0-0
" *ad*	"	275-0-0
" nose-ring	"	40-0-0
one necklace of gold *mohars* worth	"	125-0-0
two sets of silver *bichhoris* worth	"	29-5-9
ore silver *kardora* worth	"	25-0-0
two gold rings worth	"	25-0-0
TOTAL	Rs.	794-5-0

Any ornaments belonging to Pirthiraj's estate necessarily passed on his death to Hirchand as his adopted son, and I am not prepared to accept the plaintiff's uncorroborated statement that he gave any special directions regarding any ornaments other than her wedding presents.

It is contended for the objectors that the defendants Juharmal and Hirchand were wrongly found to have been in possession of any ornaments whatever belonging to the plaintiff. In this connection I notice as a curious feature in the conduct of the case that neither Juharmal nor Hirchand was asked any questions whatever about the plaintiff's ornaments or even about the delivery of the key of Pirthiraj's safe to Juharmal. The objectors also point out that Hansraj did not represent himself as being present at the handing over of the key. It is also urged that the omission to make a list at the time of the deposit throws suspicion on the plaintiff's story as the relations between Pirthiraj and Juharmal were on the plaintiff's own showing unfriendly. It is no doubt difficult to say which way the truth lies, but on the whole I think the lower Court was right in accepting the plaintiff's story about the deposit of the ornaments in the safe and the transfer of the key. She was too young then to stay permanently with her husband and returned home twice after first going to her husband at Raipur. Pirthiraj and Juharmal were at any rate on good terms in June and July 1915 when the adoption of Hirchand took place and if the plaintiff really took away the ornaments to her husband's house, it would have been an easy matter for the defence to establish this fact. Electing to believe the plaintiff, I hold that her wedding presents were left in Pirthiraj's safe and that the defendant Juharmal was entrusted with the key. The objections succeed to the extent of reducing the value of the ornaments which the plaintiff is entitled to recover from the defendant Juharmal from Rs. 1,500 to Rs. 794-5 0.

With regard to the plaintiff's costs in the lower Court it is urged on behalf of the objectors Juharmal and Hirchand that she should not have been allowed proportionate costs in respect of witnesses in view of the fact that none but Kaniram, Hansraj and the plaintiff herself gave evidence on the subject of ornaments. This contention appears to me to be reasonable. The lower Court's order regarding the plaintiff's costs will accordingly be modified so as to throw upon the defendants Juharmal and

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Hirohand the following items only of the plaintiff's costs.

	Rs.
Court-fee on a claim for Rs. 794-5 0	60-0-0
Vakalatnama	0-8-0
Pleader's fee on Rs. 794-5-0	39-11-2
Expenses of witnesses Kaniram and Hansraj ...	as actually paid
one-fifth of the fee paid to the Commissioners who examined the plaintiff and other witnesses at Raipur ...	15-0-0
Service of process ...	3-0-0

For the rest the lower Court's order as to costs is maintained.

It remains to deal with a representation made on behalf of the respondent Mohanlal that he should get separate costs for the hearing in this Court, inasmuch as he was unnecessarily joined as a respondent, no decree having been passed in the plaintiff's favour against him. No argument on the merits was addressed to this Court on behalf of this respondent and his defence in the lower Court was identical with that of his father Juharmal. Moreover, he has taken the opportunity afforded by his joinder as a respondent to prefer objections to the decree of the lower Court. In these circumstances I consider that it was quite unnecessary for Mohanlal to appear by a separate practitioner and I decline to allow him any separate costs.

The plaintiff will pay all the costs of the appeal to this Court and the costs of the objections will follow their result.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 859 OF 1918.

December 1, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

Sri GADADHARADOSS BAVAJI MAHANT OF BALAJI MUTT —DEFENDANT No. 3—APPELLANT

versus

SURYANARAYANA PATNAIK AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 3 (2), (5), (11)—Minor inamdar—*Grantee of lands in permanently settled estate, whether 'land-holder'—'Rents, in cl. (5), meaning of.*

Per *Wallis, C. J.*—An *inamdar* to whom lands were granted by the *zemindar* after the settlement out of the lands included in the permanently settled estate is not a 'land-holder' within the definition of clause (5) of section 3 of the Madras Estates Land Act. [p. 96, col. 1.]

Sivini Appalanarasimhulu v. *Murada Sanyasi*, 17 Ind. Cas. 120; 38 M. 33, not followed.

There is no sufficient reason for refusing to apply the definition of 'rent' in clause (11) to the word 'rents' in clause (5) of section 3 of the Madras Estates Land Act, and full effect can be given to that definition by reading the latter part of it as intended to include, as it says, persons entitled to collect the rents due to the owner of the estate, such as farmers or assignees of such rents by way of mortgage, etc. *Inams* and under-tenures in larger estates which do not consist of one or more villages but are of lesser extent are not within the operation of the Act. [p. 96, col. 1.]

Per *Sadasiva Aiyar, J*—'dissenting'.—An *inamdar* to whom lands were granted by the *zemindar* after the settlement out of lands included in the permanently settled estate is not a 'land-holder' within the the definition of clause (5) of section 3 of the Madras Estates Land Act. [p. 96, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge at Berhampore, in Appeal Suit No. 20 of 1918, preferred against the decree of the Court of the Additional District Munsif, Berhampore, in Original Suit No. 284 of 1916.

This second appeal coming on for hearing on the 21st February 1919 and on the 30th April 1919, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Mr. *M. S. Ramanuja Aiyangar*, for Mr. *C. S. Venkatachariar*, for the Appellant, and of Mr. *A. C. Sampath Aiyangar*, for the 1st Respondent. and the 2nd and 3rd respondents having been given up, the Court (Sadasiva Aiyar and Phillips, JJ.) made the following

ORDER.—The lower Appellate Court has not given findings on the following questions,

1. Whether the sadjan deed Exhibit A is genuine and whether on the right construction of that deed it was a grant also of the Kudivaram interest besides part of the Melvaram interest in the plaint lands ?

2. On the evidence taken as a whole, what is the correct conclusion on the

question whether the *inam* is a post-settlement *inam* or a pre settlement *inam*?

As we consider it desirable to have definite findings on these points, we remand the case to the lower Appellate Court for submission of such findings on the evidence on record within four weeks of the re-opening of this Court after recess. Ten days will be allowed for filing objections.

In compliance with the above order the Temporory Subordinate Judge at Berhampore submitted the following

FINDINGS—I am directed by the High Court to submit findings on the following issues, *viz.*

(1) Whether the cadjan deed, Exhibit A, is genuine and whether on the right construction of the deed it was a grant also of the Kudivaram interest besides part of the Melvaram interest in the plaint land?

(2) On the evidence taken as a whole, what is the correct conclusion on the question whether the *inam* is a post-settlement *inam* or a pre settlement *inam*?

My findings are as follows :—

2. 1*st Issue* :—As regards the first part of this issue, *viz.*, whether the cadjan deed Exhibit A is genuine, this deed is said to have been granted to plaintiff's great-grandfather, Sanyasi Patnaik, by a former Zamindar of Surangi in 1794. It is produced by plaintiff, but beyond producing it, plaintiff does not know anything personally about its execution. To prove that it is genuine, plaintiff relies on certain facts contained in the 3 documents Exhibits B, C and D. Exhibit B is a certified copy of Kyfiat given by plaintiff's father before the Inams Alienation Inspector of Surangi Estate on 23rd July 1895, when that estate was under the management of the Court of Wards and enquiry made regarding the resumability of certain *inams* including the *inam* now in question. In this Kyfiat plaintiff's father made a statement that the *inam* in question was granted to his grandfather Sanyasi Patnaik in 1794, and he also then produced the cadjan deed, Exhibit A. Exhibit C is a certified extract from the list of *inams*, the right to which is barred. The suit *inam* is therein shown as one of such *inams*. This list is dated 9th April 1896 and signed by the Collector. It was prepared after the abovesaid enquiry Exhibit D is a printed copy of the judgment in Original Suit No. 690 of 1909 on the file of the Sompeta District Munsif's Court. It was a suit brought by the present Zamindar of Surangi after he had attained majority and the Court of Wards ceased to manage the estate. Seeing that the Court of Wards did not take any action against the present plaintiff to resume the suit *inam*, the Zamindar brought that suit against the present plaintiff for its resumption on the ground that it is a subsequent *inam* granted to plaintiff's father for personal services. In that suit also the present plaintiff put forward the same contention which he has now put forward, *viz.*, that the *inam* was granted to his great-grandfather absolutely in 1794. But I do not attach any weight to these documents. Exhibit A is a cadjan document and can be easily brought into existence at any time. No one attested this document. It does not contain the name and signature of the writer. It does not contain the signature of even the grantor, or of the person authorized by him to execute it. The first time it was produced by plaintiff's father was only before the Inams Alienation Inspector in 1895, and had not seen the light of day before. As regards plaintiff's father's statement in Exhibit B it is a self-serving statement made after the Court of Wards wanted to resume the *inam*. With respect to Exhibit C, it does not contain any further information about the origin of the grant than what is contained in Exhibit B; and the Collector never expressed his opinion thereon. (The remark column 8 was left blank.) From the fact that the Collector included the *inam* in question in the list of those which cannot be resumed, it cannot be said that he believed the genuineness of Exhibit A and the plaintiff's father's statement in Exhibit B. He might have thought that the *inam* was granted to plaintiff's family absolutely subsequent to the Permanent Settlement and, therefore, inadvisable to sue for resumption. The judgment Exhibit D also does not help plaintiff. In that judgment the Court did not decide whether Exhibit A was genuine or when the *inam* was granted. The suit was dismissed merely on the ground that the Zamindar failed to prove his allegation that the *inam* was granted to plaintiff's

family on service tenure. For the above reasons I am not inclined to believe that Exhibit A is genuine.

3. As regards the second part of this issue, it is not necessary to express any opinion in view of my finding that Exhibit A is not genuine. I shall, however, express my opinion on the assumption that it is genuine. The deed Exhibit A recites as follows:—"The following lands, *viz*, Poithihita wet 30 Bharanams and Suro billo 30 Bharanams in Koitho Bati of Thandipur Kasba and 8 Bharanams of dry land in Thandipur and 4 Bharanams of dry land in Ambogam, thus 72 Bharanams of lands wet and dry have been granted. You shall be, therefore, from this day onwards enjoying the aforesaid lands as far as their boundary limits hereditarily and paying through the Kaji of our Kasba a Kattubadi of Rs. 15 on the wet lands at Re $\frac{1}{4}$ per Bharanam and obtaining receipts." From the language used, *viz*, that the lands have been granted and that the grantee shall be enjoying those lands, it is clear that the lands themselves, and not merely a part of the Melvaram interest, were granted as *inam*.

4. *2nd Issue*:—In support of his contention that the *inam* is a pre-settlement *inam* plaintiff relies on the cadjan deed, Exhibit A, and also [on the documents Exhibits B, C and D which are already referred to. But I have found that Exhibit A is not genuine. With respect to Exhibits C and D, there is nothing in those 2 documents which goes to show that the Collector or the District Munsif ever held the *inam* to be a pre-settlement *inam*. As regards the Kyfiat Exhibit B given by plaintiff's father, it is a self-serving statement made after disputes had arisen. Except these 4 documents there is no other evidence on the part of the plaintiff to prove his allegation. In my opinion plaintiff has failed to prove that the *inam* is a pre-settlement *inam*. It must, therefore, be considered as a subsequent *inam*.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—We accept the finding that the cadjan deed, Exhibit A, is not proved. There is, however, in this case nothing to rebut the presumption recently laid down by the Privy Council that the grant to the *inamdars* was a grant of the proprietary right in the suit land including the Kudivaram as well as the Melvaram interest. There is, also, no sufficient reason to interfere with the finding on the second additional issue, assuming it to be material, that the *inam* in question was created after the permanent settlement of the estate.

The suit lands are situated in the village of Thandipuram in the permanently settled Zamindari of Surangi and are held of the Zamindar by the *inamdar* at a Kattubadi or quit rent of Rs. 15 payable to the Zamindar. If the whole village had been granted, it would itself have constituted an estate within the meaning of the Madras Estates Land Act, as coming within the words "one or more villages" of a permanently settled estate in section 3 (2) (*e*), and the Act would have been applicable to Ryots holding under the *inamdar*. It has, however, been contended before us that although the lands, which are only part of a village, are not made an estate in themselves by virtue of this clause, the Act is rendered applicable because the *inamdar* is "a land holder" within the meaning of clause V. Before coming to the wording of this definition, it is desirable to examine the general scheme of the Act, in the light of which the definition in clause V of section 3 (2) must be interpreted, with a view of seeing if it was really the intention of the Legislature to apply the provisions of the Act as between the *inamdar* and his tenants, where the land is situated in a permanently settled estate and consists of any part of a village and the *inamdar* is the owner of the Kudivaram as well as the Melvaram. Now the Act is called the Madras Estates Land Act and its general scope is limited by the definition of estate in section 3 (2). That definition is reproduced, with one important modification, from Madras Acts XI of 1894 and IV of 1897 where it had been found convenient to answer the purposes of these Acts; but, whereas clause (*d*) in that Act ran "any village of which the grant was made or had been confirmed by the British Government," this appears in the present Act as "any village of which the land revenue alone has been granted in *inam* to a person not

owning the Kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government or any separated part of such village." Therefore, as regards *inams* outside the large estates coming under clauses (*a*), (*b*) and (*c*), it is clear that the Legislature did not wish the Act to apply between the *inamdar* and his tenants where the *inamdars* owned the Kudivaram as well as the Melvaram, or where land was only part of a village unless it had been separated from the rest of the village. This being the policy of the Act as regards *inams* outside large estates as defined in clauses (*a*), (*b*) and (*c*), the next question is whether it was the intention of the Legislature that the Act should apply to such *inams* when the lands were situated within these large estates. Looking at the matter as between the *inamdar* and his tenants, there seems no strong reason for making the Act inapplicable where the quit rent is payable directly to the Government, and applicable where it is payable to the Zemindar or Poligar as in clauses (*a*), (*b*) and (*c*). It is *prima facie* unlikely that the Legislature should have intended to apply a different rule in these two cases and if it did, it would have so provided expressly. In one class of cases it has so expressly provided, because clause (*e*) constitutes any portion of one of the larger estates dealt with in clauses (*a*), (*b*) and (*c*), an estate of itself within an estate for the purposes of the Act where it consists of one or more villages and is held on a permanent under-tenure, whether the tenure-holder or *inamdar* owns the Kudivaram or not. The Legislature having thus expressly made the Act apply as between the *inamdar* and his tenants in the case of certain *inams* in these large estates by virtue of the definition in clause (*e*), the next question is whether it intended to nullify that definition and render it altogether nugatory by adopting a few lines lower down a definition of "land-holder" wide enough in terms to include holders of *inams* and other under-tenures in the larger estates, where the *inam* in question did not consist of one or more villages, but as here of a lesser extent. The onus of showing that the definition of land-holder had this extraordinary result is strongly on those who affirm it.

To come now to the definition itself, 'land-holder' is defined in the first part of clause V as meaning "a person who owns an estate or part thereof". Stopping here, an *inamdar* who holds under a Zemindar subject to the payment of quit rent to him is not the owner of the *inam* land in the ordinary legal meaning of the word owner, as held in *Raja of Vizianagaram* v. *Collector of Vizagapatam* (1) where the authorities are cited. So long as a full owner in making a grant reserves an interest to himself, as by way of rent, he and his successors continue to be the owners, no matter how insignificant may be the interest he reserves for himself. There is no reason for attributing a different meaning to the term owning an estate in the present definition. No doubt where an *inam* is an estate within an estate by virtue of the definition in clauses (*c*), (*d*), section 3 (2), as the object of the inclusion is to apply the Act between the *inamdar* and his tenants, the *inamdar* must be held to be the land-holder for the purposes of the Act, but that is, not because he comes within the definition as owning an estate, but because it would be repugnant to the subject or context to apply the strict definition of "land-holder" to such a case.

The main contention, however, was that in a case such as the present the *inamdar* comes within the definition of land-holder, not because he is a person "owning an estate or part thereof," but because the clause proceeds to include in the term land-holder "every person entitled to collect the rents of the whole or a portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law." What are to be collected here are "the rents of the whole or any portion of the estate" and rent is defined in clause (*ii*) as meaning "whatever is lawfully payable in money or in kind or in both to a land-holder for the use or occupation of land *in his estate* for the purpose of agriculture." It is a payment to a land-holder for the use or occupation of land in his estate,

(1) 25 Ind. Cas. 780; 38 M. 1128; 27 M. L. J. [illegible] (1914) M. W. N. 610; 1 L. W. 635.

and cannot, therefore, include a payment by tenants to an *inamdar* for use and occupation of land in an estate which is not the *inamdar's* estate but in the estate of the superior land-holder. Not only then is the construction contended for opposed to the scheme of the Act, and the apparent intention of the Legislature as I have already endeavoured to show, but it cannot be arrived at without disregarding the definition of "rent" which itself has been framed to fit into the general scheme of the Act. There is, in my opinion, no sufficient reason for refusing to apply the definition of "rent" in clause (11) to the word "rents" in clause (5), and full effect can be given to that definition by reading the latter part of it as intended to include, as it says, persons entitled to collect the rents due to the owner of the estate, such as farmers or assignees of such rent by way of mortgage, etc. Whatever construction be put upon it, it affords, in my opinion, no justification for bringing *inams*, such as that with which we are dealing within the operation of the Act contrary to the intention of the Legislature as sufficiently indicated in the definitions of "estate," "rent" and "ryot" which are correlative and must be read together.

The contention now put forward is no doubt supported by the decision in *Sivini Appalanarasimhulu* v. *Murada Sanyasi* (2) which has been followed in several cases. In that and the subsequent decisions many of the considerations I have set out were not dealt with and were apparently overlooked. I am unable with great respect to follow them, as I am satisfied that it was not the intention of the Legislature to apply the Act to this class of cases, and it appears to me to be of great importance that an Act of this kind should not be extended by strained construction to cases not contemplated by the Legislature. If cases such as this are to be brought under the Act, it should be by an amendment of the existing Act. For these reasons I agree with the Subordinate Judge and would dismiss this second appeal with costs.

SADASIVA AIYAR, J.—I regret that I have the misfortune to differ from my Lord the Chief Justice in this case. I agree that, after the recent decisions of the Privy Council, we must hold that the post settlement grant made to the *inamdar* (the plaintiff's ancestor) was a grant of both Warams. It is also clear that the *inam* not being a whole village or part of a permanently settled estate separately registered, the lands themselves do not form an estate within the definition of section 3, clause 2 (*b*), (*d*) or (*e*) of the Estates Land Act.

The decision in this case, therefore, depends solely upon the answer to the question whether an *inamdar* to whom lands were granted by the Zamindar after the settlement and out of the lands included in the permanently settled estate is a land-holder within the definition of clause 5 of section 3. If an *inamdar* can be said to own part of an estate, he clearly comes under the definition of land-holder. If, again, he can be called a person "*entitled to collect the rents of any portion of an estate by virtue of*" the *inam* grant (which is clearly a transfer), then also he comes under the definition of land-holder and section 6 applies in favour of the ryots holding lands under him. Now, the *inamdar* of a *whole village* is admittedly a land-holder, because the whole village itself is an estate and he *owns it as an inamdar* even though he might be paying some Kattubadi or Jodi to the higher owner, the Zamindar. Thus the words "persons owning part of an estate" in clause 5 of section 3 admittedly include several classes at least of *inamdars* also, notwithstanding that their ownership is accompanied by the recognition of a higher owner, the Zamindar, through their payment of Jodi or Kattubadi to the Zamindar. Hence it seems to me that a minor *inamdar* also, though he may not own a whole village in an estate as part of an estate, does own in the very same sense his *inam* lands which are undoubtedly part of the permanently settled estate and hence he comes under the definition of land holder even within the first portion of the definition of land holder. If, again, "rents" in the second portion of the definition mean "rents and profits," he is included in the second portion of the definition also, where he usually lets the lands to tenants and obtains rents from his tenants. Some *inamdars* no doubt would still escape falling under the definition of "land-holder," that is, those *inamdars* to

(2) 17 Ind. Cas. 120; 33 M. 33.

whom *inams* had been granted before the Permanent Setttement *without reservation of Kattubadi or Jodi*. I, therefore, think that the construction placed by the uniform decisions of this Court on the definition of "land-holder" does not render altogether nugatory the definition of an "estate" in clause 2 (*e*) of section 3, as it does exclude some *inamdars* from the provisions of the Act, that is, many pre settlement *inamdars*. As regards all post-settlement *inams*, their grants were grants of land out of an estate and such grants cannot prevent those lands from continuing to be "part thereof," that is, part of the estate, whether that part forms a whole village (in which case the *inamdar* admittedly does own it) or only defined lands not forming a whole village.

Again the Madras Estates Land Act came into force in July 1908. It naturally took about 3 years for the question, whether a Dharmila minor *inamdar* is or is not a "land-holder", to arise before the High Court for direct decision after contest in a lower Court or Courts. The earliest direct decision on this point I have come across is the one in Civil Revision Petition No. 895 of 1910 dated 9th November 1911, where Abdur Rahim, J, held that a minor Dharmila *inamdar* is a "land-holder." For more than eight years now, that view has held the ground. Sundara Aiyar, J, and myself followed it in *Sivini Appalanarasimhulu* v. *Murada Sanyasi* (2) and I find that a majority of the Judges of this Court have followed the same opinion. I am, therefore, unwilling to depart from this catena of decisions, especially as it is very difficult to get at the real and final intention of the Legislature from the words of an Act whose language was added to and modified during its long progress through the Legislative Council in various ways, according as the party favourable to the land holder or the party favourable to the tenants got the upper hand in debates from time to time. I would, therefore, allow the appeal and dismiss the suit as the tenants had obtained full occupancy right under section 6, on the date of this suit. As regards costs, I would give costs in this second appeal to the appellant (3rd defendant), but as section 6 was not relied on in the Court of the District Munsif, I would order the parties to bear their respective costs in the lower Courts.

RESULT—the appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 151 OF 1917.

February 6, 1920.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

BEJOY SINGH HAZARI—PLAINTIFF—APPELLANT

versus

Srimati MATHURIYA DEBYA, WIDOW OF RAMDIN HAZARI, AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 4, 7—Next friend of minor having interest in conflict with that of minor, effect of—Compromise, when binding upon minor—Fraud and collusion, effect of—Hindu Law—Mitakshara—Adoption—Infant, whether can be adopted.

If in a suit the personal interest of the next friend of a minor conflicts with his duty towards the minor, then, unless the next friend shows *uberrima fides*, he is not competent to act as the minor's next friend. In such a case the minor is not properly represented and the decree in the suit would not be binding upon him. [p. 105, col. 2; p. 106, col. 1.]

Unnoda Dabee v. *Maria Louisa Stevenson*, 22 W. R. 290, followed.

It is no dereliction of duty on the part of a guardian to refuse to litigate on his ward's behalf a claim which he knows to be false and unfounded in fact. [p. 106, col. 1.]

In giving permission to compromise a suit on behalf of a minor, it is usual and desirable that the Court should record an order stating that it considers the compromise to be for the benefit of the minor, but such an order is not essential to the validity of the compromise. The addition of the words "expressly recorded in the proceedings" in Order XXXII, rule 7, of the Code of Civil Procedure has not changed the pre-existing practice under section 462 of the Code of 1882. [p. 107, col. 1.]

Manohar Lal v. *Jadu Nath Singh*, 33 I. A. 128; 8 Bom. L. R. 489; 10 C. W. N. 898; 4 C. L. J. 8; 16 M. L. J. 291; 3 A. L. J. 710; 28 A. 585; 9 C. C. 219; 1 M. L. T. 210 (P.C.), followed.

Under the Mitakshara the order of performing *sradh* ceremony has no necessary relation to the order of succession to property. [p. 109, col. 1.]

BEJOY SINGH v. MATHURIYA DEBYA.

It is not illegal to adopt an infant in arms, but it is very unusual for a child to be formally taken in adoption at the early age of thirteen days. [p. 109, col. 1.]

Apart from fraud or collusion or any vitiating circumstance, a question settled by a compromise cannot afterwards be revived in Court for judicial determination. [p. 112, col. 1.]

Miles v. *New Zealand Alford Estate Co.*, (1886) 32 Ch. D. 266; 55 L. J. Ch 801; 54 L. T. 582; 34 W. R. 669, *Rameswar Pershad Singh* v. *Ram Bahadur Singh*, 34 C. 70; 11 C. W. N. 178; 5 C. L. J. 175; 17 M. L. J. 59; 2 M. L. T. 165 (P. C.), followed.

The family to which the plaintiff belonged was governed by the Benares School of Mitakshara Law. One or other of its members acquired considerable properties in the Chittagong District which devolved on three brothers, Kamala Prasad, Kanta Prasad and Bhagirath. The only living representatives of Kamala Prasad's branch were defendants Nos. 4 and 5 who were the widows of his two sons. Ramdin and defendant No 2 were two sons of Bhagirath. Ramdin was taken in adoption by Kanta Prasad. Defendants Nos. 1 and 3 were the widows of Ramdin and Kanta Prasad respectively and the plaintiff was the son of defendant No. 2. In 1909 defendant No. 2 on behalf of himself and as next friend of his minor son, the present plaintiff, instituted a suit as members of a joint undivided Mitakshara family and prayed for a declaration of their title as such to the Chittagong properties and as against defendant No. 1 for recovery of possession. In this suit a compromise was arrived at by which the defendant No. 2 and his son, the present plaintiff, got a moiety of the properties in dispute, and the other moiety went to defendant No. 1. After attaining majority the present suit was brought by the plaintiff for a declaration that as the adopted son of Ramdin he was entitled to an 8-annas share of the Chittagong properties and that the consent decree in the previous suit was not binding on him:

Held, (1) that in order to determine whether the plaintiff was bound by the compromise, it was necessary first to ascertain whether he was or was not adopted in fact; [p. 105, col. 1.]

(2) that if the plaintiff was adopted by Ramdin and the adoption was sedulously kept from the knowledge of the Court, then the leave or consent of the Court to the previous suit being compromised would be no true consent and the minor would not be bound by the compromise; [p. 105, col. 2.]

(3) that if the plaintiff was not adopted by Ramdin, he was bound by the compromise decree. [p. 106, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 22nd of March 1917.

FACTS appear from the judgment.

Mr. *S. R. Das* (with him Babus *Chandra Sekhar Sen*, *Mukunda Behari Mullick* and *Narendra Kumar Das*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for declaration that the defendant No. 6 is not the adopted son of one Ramdin, that plaintiff is his adopted son and as such he is entitled to 8 annas of the Chittagong properties belonging to his adoptive father, Ramdin, and lastly plaintiff prayed for the setting aside of a deed of compromise in a previous suit in which he was represented by his father, he being a minor at that time. The learned Subordinate Judge dismissed the suit, holding that the plaintiff was not the adopted son of Ramdin, neither was defendant No. 6 the adopted son of Ramdin and that the plaintiff was bound by the compromise decree. My appeal is directed against the decision of the learned Subordinate, on the two main grounds that he ought to have held that the plaintiff was the adopted son of Ramdin and that he was not bound by the compromise decree. The defendants' appeal No. 145 of 19 7 need not be gone into if I succeed in this appeal. The properties originally belonged to Bhagaban Singh Hazari, who died leaving a son Anup Singh. Anup had four sons Ganga Prosad, Bhola Singh, Lachman Singh and Bahuri Prosad. Bhola Singh had a son Kamala who left three sons, Raghobar whose widow is defendant No. 4, Ramdas who died unmarried and Ramnath whose widow is defendant No. 5. Lachman Singh had one son Kanta Prosad, whose widow Chhatan Kumari is defendant No. 3. Bahuri Prosad, the fourth son of Anup, had one son Bhagirath who died leaving Ramdin whose widow is Mathuriya defendant No. 1; Sheodayal who is defendant No. 2 whose son is Gajaraj *alias* Bejoy Singh, the plaintiff in this suit; the third and fourth sons of Bhagirath are dead and we are not now concerned with them in this appeal.

The Hazari family belongs to the Banda District in the United Provinces and is governed by the Benaras School of Mitakshara Law. It is an undivided joint Hindu family. The properties which were at some time acquired by some of the members have been looked after and managed ever since by one of the most competent of the members. Our case is that Kanta Prosad had managed these properties and lived at Chittagong for that purpose.

My case is that Kanta Prosad adopted Ramdin. Plaintiff was born on November 18th, 1895, and was adopted on December

1st, 1895. On the day of his birth he was made over to defendant No. 4. At that time Sheogobin, the eldest son of Sheodyal, was alive. He died a few months after plaintiff's adoption. When plaintiff was 8 or 9 months old, he was brought to Chittagong and was taken back after 2 years. He came back to Chittagong when he was 6 or 7 years of age and was put in a school and was treated as the son of Ramdin. Kanta Prosad died on the 25th September 1904. Sheodyal all the while had been living at Banda while the plaintiff had been living at Chittagong under the care of Ramdin. The family consisted of Ramdin, Sheodayal and the plaintiff. Ramdin as the eldest male member took the management of the Zemindary in his hands. Kanta Prosad had no power to give away by Will the property which belonged to all the joint members of the family. Ramdin died on 5th November 1905. Sheodayal was then at Banda while the plaintiff was at Chittagong. The plaintiff performed the Sradh of Ramdin and the learned Subordinate Judge has found it to be true. I submit that if the plaintiff was not the adopted son of Ramdin as the other side contend, then Sheodayal as the nearest Sapinda should have performed Ramdin's Sradh which he did not do. After the Sradh defendant No. 1 got her name registered, the exact date of which is not known. However, it is in evidence that plaintiff, Sheodayal and defendant No. 1 continued to live jointly, Sheodayal's principal residence being at Banda. About the year 1908 defendant No. 2 came to Chittagong and went to his Zemindary and there he discovered that defendant No. 1 was registered as the owner of the Zemindary. That was about September or October 1908. In February 1909 defendant No. 2 instituted Suit No. 223 on behalf of himself and his son.

[SHAMSUL HUDA, J.—There was no mention of the adoption in that suit?]

Mr. *Das*.—No. The suit was compromised on the 6th July 1910. Sheodayal compromised because he had no sufficient funds to carry on the litigation. By the terms of the compromise the plaintiff and his father got half of the properties while the defendant No. 1 obtained the other half. Sheodayal consented to defendant No. 1's taking a son in adoption in the compromise. We challenge the compromise decree because it is not for the benefit of the minor. Then the partition was made according to the terms of the compromise decree and possession was given to the parties. In 1913 defendant No. 1 was trying to adopt defendant No. 6. Upon that the mother of the plaintiff attempted to prevent the adoption by applying for an injunction to restrain defendant No. 1 from adopting defendant No. 6. On 30th April 1913 the application was refused.

Now I will give your Lordships some important dates for the period subsequent to that. The defendant No. 6 was adopted on the 1st of May 1913. The plaintiff attained majority on the 19th of November 1913. The Suit No. 17 was withdrawn on the 19th of May 1914. The present suit was instituted on the 12th June 1914. (Reads the plaint.) My case is that the properties are joint family properties and that I am entitled to 8-annas share of them by virtue of my being an adopted son of Ramdin. Therefore, the first point for consideration is whether the family is a joint Hindu family. The next point is whether the family is governed by the Mitakshara School of Hindu Law. If the plaintiff be the adopted son he is legally entitled to 8 annas share of the properties. If he is not an adopted son, then even as a member of a joint Mitakshara family the plaintiff is entitled to one-third of the properties with defendant No. 2 and his son, the brother of the plaintiff. If the plaintiff is the adopted son, he is not bound by the compromise as it is not at all beneficial to his interests. If he is not an adopted son, then also he would not be bound as the terms of the compromise are unreasonable. The question whether the compromise was for the benefit of the plaintiff or not would involve another question, *viz*, whether the properties in dispute were properties of a joint Hindu family. But the learned Sub-Judge did not consider the question at all. His decision was mainly that the plaintiff was not an adopted son and that he was bound by the compromise decree. My point is that if there was no adoption, then the plaintiff would get an equal share with defendant No. 2. Defendant No. 1 would in that

case be entitled to maintenance only. By defendant No 1's adoption the plaintiff's share would be reduced to one-third. By the compromise defendant No. 1 has got 8 annas, which is against the benefit of the plaintiff.

If the compromise is not binding, then the following questions would arise for consideration, *viz.*, (1) whether the plaintiff is or is not an adopted son, (2) if not, whether the properties in dispute belong to the joint family or not. (Reads the judgment.)

The Subordinate Judge has found that the parties are governed by the Mitakshara School of Hindu Law. The natural presumption would be that the family was joint unless it be rebutted. The onus of proving that the family was not joint but separate would be on the other side and not on the plaintiff.

I shall now take up my first question, *viz.*, whether the plaintiff has or has not been adopted. From the judgment it seems as though the learned Judge had made up his mind from the very beginning and then proceeded to adjudicate upon the question. (Reads the evidence.) The evidence on the point is one-sided. We have mentioned the names of the men whom defendant No. 1 should have called. But she did not venture to call them although she had ample opportunity to do so. The plaintiff on the other hand has called in the Lambardars, the most respectable people of the village, who could be naturally expected to have been present on such occasions. Why Sheodayal did not mention the fact of adoption in the previous suit cannot be explained. I do not rely on Sheodayal's evidence. His interests would be affected if plaintiff's adoption be proved as in that case his share would diminish. I will now deal with the probabilities and the conduct and treatment of the plaintiff in the family. (Reads evidence.)

Then as to the compromise Mathuria has been given half for her life. Sheodayal's interest was adverse to that of the plaintiff; hence there was sufficient reason for him to compromise. After the compromise several plaints were filed in which the plaintiff was described as the son of Sheodayal. But after the attainment of majority of the plaintiff there is nothing to show that I adopted that position.

Then as to my other point I will show from the evidence that the properties had never been separated and that the family had all along been in joint possession of them. (Reads documentary evidence.) From the evidence it is clear that the family was joint in mess, joint in worship and joint in properties. There is no evidence except that of defendant No. 1 to prove separation. There is absolutely no documentary evidence to prove separation.

Then as to Kanta Prosad's Will, its object was to provide for Chhattan Kumari. He could execute the Will to give a status to his adopted son. By his Will he did not make any disposition of his properties, neither was then any schedule of properties annexed to the Will. I would contend that once your Lordships find that the properties are joint, the onus would be heavily on the other side to prove separation. The compromise decree is not binding on me, as it was obtained by the fraudulent suppression of the fact of adoption and the terms of the compromise were prejudicial to my interests. Refers to *Virupakshappa* v. *Shidappa* (1), *Rameswar Pershad Singh* v. *Ram Bahadur Singh* (2), *Biku Halwai* v. *Mohesh Halwai* (3), *Kidnapore Zemindari Co., Ltd.* v. *Gobinda Mahto* (4) per Woodroffe, J., *Ganesha Row* v. *Tulja Ram Row* (5); Order XXXII, rule 7, Civil Procedure Code.

Sir *Rashbihari Ghosh* (with him Babus *Charu Chandra Sen*, *Paresh Chandra Sen* and *Probhat Chandra Dutt*), for the Respondents.—The plaintiff is not entitled to raise the question of adoption unless the compromise decree is set aside. He is bound by the compromise. He ratified the terms of the said compromise on attaining majority. He himself said so in his deposition in the case. Further he effected a mortgage of the 8-annas share of a certain property to meet the expenses of this very suit. The compromise cannot be set aside now. The

(1) 26 B. 109, 3 Bom. L. R. 565.
(2) 34 C. 70; 11 C. W. N. 178; 5 C. L. J. 175; 17 M. L. J. 59; 2 M. L. T. 165 (P. C.).
(3) 8 C. L. J. 266.
(4) 8 C. L. J. 31 at p. 33.
(5) 19 Ind. Cas. 515; 40 I. A. 132 at p. 139; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 36 M. 295 (P. C).

parties to it cannot possibly be restored to their original position. The compromise was effected to the full knowledge of the Court which gave its consent thereto. The natural presumption would, therefore, be that the compromise was for the minor's benefit.

Then, as to the plaintiff's adoption, the learned Subordinate Judge's finding is clear, which ought not to be disturbed by the Appellate Court unless it is satisfactorily proved that he was wrong. The trial Court is the best judge of the credibility and veracity of the witnesses whose demeanour it had the opportunity to watch. The story of adoption as set out by the plaintiff is absolutely improbable and false. The fact that Bejoy performed the Sradh of Ramdin is not of much avail to the plaintiff. The performance of Sradh is not a matter of right but a matter of duty. It has no connection with the law of succession of the Mitakshara School. (Discusses evidence on adoption and compromise.) In support of my contention I would refer your Lordships to *Miles* v. *New Zealand Alford Estate Co.*, (6), *Jayawickreme* v. *Amarasuriya* (7), *Upendra Nath Bose* v. *Bindeshri Prosad* (8), *Birbhadra Rath* v. *Kalpataru Panda* (9), *Ganesha Row* v. *Tulja Ram Row* (5), *Biku Halwai* v. *Mohesh Halwai* (3), *Midnapore Zamindari Co. Ltd.* v. *Gobinda Mahto* (4); Order XXXII, rule 7, Civil Procedure Code; section 147, Civil Procedure Code. The learned Subordinate Judge, having fully gone into the merits of the case, has arrived at right and just findings which should not be disturbed.

Mr. *S. R. Das* replied in brief.

JUDGMENT.—In the suit out of which this appeal arises, the plaintiff seeks for a declaration that as the adopted son of one Ramdin he is entitled to an eight-annas share of certain properties situated in the District of Chittagong and for a further declaration that the defendant No. 6 has not been validly adopted to Ramdin by the latter's widow. The plaintiff also seeks to set aside a consent decree in a previous suit to which he was a party as a minor represented by his father.

The Subordinate Judge has arrived at the following conclusions:—

(1) that the plaintiff is not the adopted son of Ramdin;

(2) that Ramdin's widow had no authority to adopt a son and that the adoption by her of the defendant No. 6 is, therefore, invalid; and

(3) that the plaintiff is bound by the consent decree.

In the appeal before us (No. 151) the plaintiff appeals from the first and third of these findings.

The defendant No. 6 has also preferred an appeal (No. 145), the hearing of which we deferred at the instance of the parties.

(6) (1886) 32 Ch. D. 266; 55 L. J. Ch. 801; 54 L. T. 592; 34 W. R 669.

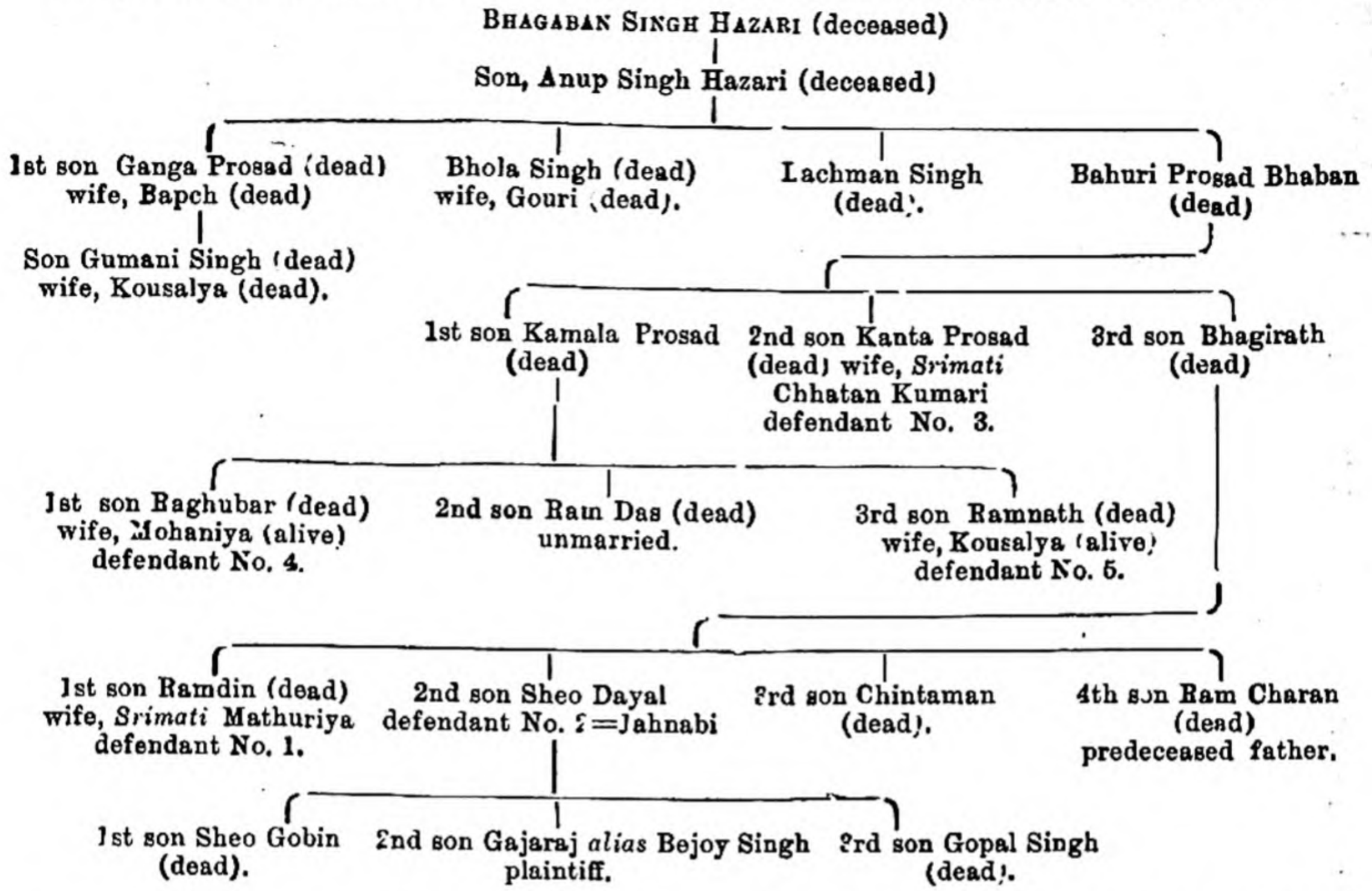
(7) (1918) A. C. 869 at p. 873; 87 L. J. P. C. 165; 119 L. T. 499.

(8) 32 Ind Cas. 463; 22 C. L. J. 452; 20 C. W. N. 210.

(9) 1 C. L. J. 388 at p. 397.

BEJOY SINGH v. MATHURIYA DEBYA.

The genealogical table which follows will be found convenient for reference:—



The Hazari family to which the plaintiff belongs originated in the village of Bisenda (the name is variously spelt) in the Banda District of the United Provinces, and is governed by the Benares School of Mitakshara Law. The family for the most part still lives there, but one or other of its members acquired considerable properties in the Chittagong District, which, according to the plaintiff's case, devolved on the three sons of Bahuri Prosad Bhabani, by name Kamala Prosad, Kanta Prosad and Bhagirath. The only living representatives of Kamala Prosad's branch are the widow of his eldest son, and Kousalya, the widow of his third son, Ram Nath, these ladies being the defendants Nos. 4 and 5 in this suit. Kanta Prosad's widow, the defendant No. 3, is an old lady. Bhagirath, like his brothers, is dead. The principal defendant is the defendant No. 1, Mathuriya, the widow of his eldest son Ramdin. His second son, Sheodayal, is the defendant No. 2 and Sheodayal's son, Bejoy or Gajaraj Singh, is the plaintiff.

There seems to be no question that the family possessions at Bisenda are joint undivided family property. According to the plaintiff, the much more valuable properties at Chittagong are also joint properties, and it is the family practice to send an intelligent member to Chittagong to manage them in the interests of the family as a whole. This post, the plaintiff says, was filled by Kanta Prosad Hazari, and though it is disputed whether he acted as manager or as proprietor, it is common ground that, in one capacity or the other, he controlled the Chittagong properties in his lifetime. It is also common ground that, having no son of his own, he adopted his brother's son, Ramdin.

Kanta Prosad died on the 25th September 1904 leaving a Will dated a few days earlier (18th September), by which he gave all his properties, moveable and immoveable, to Ramdin to be 'Malik thereof', the properties being described in comprehensive terms, but not in detail. The gift was subject to certain bequests to his widow and other persons. Whether it was in consequence of the Will or in consequence of the family practice or in consequence of both combined, Ramdin succeeded to the control of the Chittagong properties.

The plaintiff was born at Bisenda on the

18th November 1895 and he alleges that some 13 days later, on the 1st December 1895 (17th Aghran 1302 B. S.), he was adopted by Ramdin, who had been summoned by telegram from Chittagong. Shortly afterwards, it is said, Ramdin took his wife Mathuriya and the plaintiff and his natural mother to Chittagong. It may be mentioned that Sheodayal's eldest son died at the age of three or four years, a few months after Bejoy's birth. After spending, say, two years at Chittagong with Ramdin, the plaintiff and his mother returned to Bisenda where Sheodayal had been living. The plaintiff remained there for some years and was then sent back, when he was 8 or 9 years old, to Ramdin at Chittagong, where he was admited to the Upper Primary School in April 1906. The admission register describes him as Bejoy, son of Sheodayal, and refers to Ramdin as his "guardian". It may well be that he was destined to succeed Ramdin, much as Ramdin had succeeded Kanta Prosad, but the main question in the case is, whether Ramdin had actually adopted him.

On the 5th November 1906 Ramdin died suddenly. His Sradh was performed by the plaintiff, though Sheodayal had arrived before the ceremony. It was Mathuriya, however, who stood forth as her husband's heiress. She had her name registered in the Collectorate in place of Ramdin's and assumed the management not on behalf of the plaintiff as Ramdin's adopted son, but on her own behalf and in her own right. Sheodayal and the plaintiff lived with her, and the evidence shows that Sheodayal was cognizant of her proceedings and raised no finger in protest. After some months at Chittagong he returned to Bisenda.

He was back in Chittagong about the spring of 1908. Meanwhile, he had married a second wife, by whom, we are told by Kausalya, he has a daughter. His statement is that it was not till September or October 1908 that he discovered, while visiting estates in the Mufassal, that Mathuriya had had her name registered as proprietor. The discovery, he adds, led to a quarrel. The statement is disingenuous and untrue, but the question whether the Chittagong properties were joint family properties or not probably entered the stage of serious controversy about this time.

It also appears that Chhattan Kumari and Mathuriya were not on good terms. The elder lady was dissatisfied because her allowance for maintenance was irregularly paid, or not paid in full. In a suit instituted in 1910 against Mathuriya, Sheodayal and Bejoy, she obtained a decree for arrears of maintence which is referred to in the plaint of a similar suit instituted in 1912 (Exhibit 21).

The time was, therefore, ripe for the inevitable litigation, and in February 1909 Sheodayal, on behalf of himself and his son, whom he represented as next friend, instituted Suit No. 223 against Mathuriya and Chhattan Kumari. The plaint asserted the rights of the plaintiffs as members of a joint undivided Mitakshara family and prayed for a declaration of their title as such to the Chittagong properties in suit, and as against Mathuriya for recovery of possession. There was also a prayer for the appointment of a Receiver *pendente lite*. The adoption of Bijoy by Ramdin was not mentioned or suggested. The two ladies filed separate written statements. Chhattan Kumari insisted on her right to maintenance and had no objection to the properties being managed by Sheodayal. She went on to say that Bejoy had been adopted by Ramdin, and that statement, so far as we know, is the earliest reference in writing to the adoption. In her plaint of 1912, to which we have just referred (Exhibit 21), she made a similar statement. Mathuriya's written statement has not been printed, but the case she made is succinctly stated as follows in her deposition taken by a Commissioner in June 1910:—

'Previously my father-in-law was owner of the properties that are in Chittagong. Before the death of my father-in-law he gave the properties to my husband by a Will. My husband having left no issue, I have become the owner. During my father in law's lifetime he was Malik Dakhilkar of these properties: After my father-in law my husband became the Dakhilkar. After my husband I have become the Dakhildar. My father-in-law had been

in possession for 40 or 50 years (volunteers). He had adverse Maliki possession..... .....I did not see any one in the same mess with my father-in-law. In our family there was no one except my father-in law. My husband worked under orders of my father-in-law.

Q. Excepting this, was there any one in joint estate with your father-in-law or not?

A. No."

Such being the cases set up by the parties respectively, a compromise was arrived at which is embodied in a petition dated 6th July 1910. Sheodayal and his son were to have a decree for a moiety of the properties in dispute, and Mathuriya was to have a life-interest in the other moiety. The properties were to be partitioned on that footing. Mathuriya was also to be "entitled to adopt a son," and if she adopted a son, that son was to get her moiety of the properties "in absolute right from the date of adoption." Provision was made for the payment of maintenance to Chhattan Kumari at the rate of Rs. 1,000 a year, such maintenance to be paid by the plaintiffs and Mathuriya in equal shares. It was further provided that Mathuriya should have no claim to the properties in the Banda District which were to belong to the plaintiffs. The leave of the Court was obtained to compromise the suit on behalf of the minor plaintiff, Bejoy, on these terms, and a decree was drawn up accordingly. The partition was carried out by Commissioners appointed by the parties, and their award was confirmed by the Court with certain modifications in a final decree dated 19th January 1911.

The names of Sheodayal and his son were duly registered in the Collectorate in respect of the moiety assigned to them by the compromise, and after the partition, they entered into possession and enjoyment of that share.

It is this compromise which the plaintiff Bejoy now seeks to set aside, and the circumstances immediately leading to the present litigation may be shortly stated.

In April 1913 Mathuriya announced her intention of taking a son in adoption. Upon that a suit (No. 17 of 1913) was instituted by Bejoy, represented by his natural mother as his next friend, for an injunction to restrain Mathuriya from carrying out her intention. The plaint asserted the adoption of Bejoy by Ramdin. The temporary injunction for which the application was made was refused by the Court and on the 1st May 1913 Mathuriya purported formally to adopt her brother's son, the defendant No. 6. The suit, therefore, became infructuous, and on the 19th May 1914 it was withdrawn by Bejoy himself, who had come of age in November 1913.

The present suit was filed on the 12th June 1914.

Before dealing with the questions discussed at the Bar, it will be convenient to take stock of the plaintiff's position from the death of Ramdin to the compromise of 1910. During this period Sheodayal and the plaintiff were the only surviving male representatives of the family.

If the Chittagong properties were the separate and self-acquired properties of Kanta Prosad, which devolved on Ramdin, and if Ramdin adopted the plaintiff, then the latter was exclusively entitled to the properties as Ramdin's heir and the compromise was undoubtedly injurious to his interests, which, in such case, were in direct conflict with those of his father.

But it is not, and never has been, the plaintiff's case that the properties belonged exclusively to Kanta Prosad. It would have been a dangerous case to put forward, because, if he failed to prove the adoption, he and his father would have had no part or parcel in the properties at any rate during Mathuriya's lifttime.

His case is that the properties are joint family properties. If so, and if Ramdin adopted him, his title was to an eight-annas share on partition, the other eight annas going on partition to Sheodayal and any other sons Sheodayal might have. On this hypothesis the disparity of interests between the plaintiff and his father would be less, but there would still be conflict. The plaintiff would have a vested right to an eight annas share on partition, a share not liable to be diminished by the birth of other sons to his father. Though before partition Sheodayal might well claim to be manager or Karta of the whole in succession to Ramdin, nevertheless, the fact

of the son's adoption would require consideration in connection with any compromise that might be arrived at on his behalf. It would confine the father and his other son or sons to an eight annas share on partition, and it would leave to Mathuriya only the right to maintenance.

If the properties were joint and the plaintiff was not the adopted son of Ramdin, then the interests of father and son coincided and in any dispute that arose there could be no conflict between Sheodayal's personal interest and his duty to his son.

Now it was contended by Sar Rash Behari Ghose, appearing for Mathuriya, that until the compromise was set aside the plaintiff was not at liberty to raise the question of his adoption. In our opinion that is not so, because the main question agitated in the suit of 1909 was whether the Chittagong properties were joint or not. It is that question which formed the subject of compromise and the question of the plaintiff's adoption was not brought into discussion. (See the evidence of the Pleader Prasanna Kumar Das.) In order to determine whether the compromise binds the plaintiff, it is necessary first to ascertain whether he was or was not adopted in fact. The point possibly requires a little amplification in connection with what we have said as to the plaintiff's position.

It seems clear that nothing was said about the adoption when the leave of the Court to compromise the suit on Bejoy's behalf was obtained. There was no doubt the assertion made by Chhattan Kumari in her written statement. But, though a defendant, she was not a principal actor in the suit. She was mainly concerned with her allowance for maintenance and there is every reason to suppose that her reference to the adoption was not brought to the notice of the Court. The principal actors were Sheodayal and Mathuriya. No hint of any adoption is to be found in the plaint filed by the former, and the adoption is entirely inconsistent with the case made by the latter. No issue was framed on the subject. Chhattan Kumari was examined at length on commission. No question was put to her regarding the adoption, though she did say, when asked how Mathuriya had been managing the properties, that Sheodayal and Ram Narayan (a dependent of the family and salaried manager also known as Bara Baccha) were managing the properties on Bejoy's behalf, and that she had heard that they were being managed in his name. Both statements were untrue, and even assuming that this evidence was read to the Court it would not have attracted attention. There were interlocutory proceedings in the suit. The trial Court by order appointed a Receiver. There was an appeal to the High Court which discharged the order. The judgment of the learned Judge dated 6th December 1909 begins by saying that for the purposes of the case "the contest may be taken to be limited to be one between the plaintiff No. 1 Shibdayal Singh and the defendant No. 1 Mathuriya Debya." Bejoy is not even mentioned. The decision rests on the ground that Mathuriya was in exclusive and *bona fide* possession of the estate. If there had been any question of Bejoy's adoption, the learned Judges would hardly have spoken of the lady's *bona fides* in terms so positive.

If Bejoy was adopted by Ramdin, no one knew the fact better than Sheodayal, his natural father, or Mathuriya, his adoptive mother, and if they did not put the Court in possession of a fact so pertinent to the interests of the minor, they were guilty of a deliberate suppression of the truth, which could only be attributed to interested and unconscientious motives. The terms of the compromise would be grossly misleading not only by way of concealment but also in the clause stating that Mathuriya "shall be entitled to adopt a son," by active suggestion of the falsehood that there was then no adopted son in being.

If, then, Bejoy was adopted by Ramdin, the adoption was sedulously kept from the knowledge of the Court. That being so, the leave or consent of the Court to the suit being compromised would be no true consent and the minor would not be bound. Moreover, the obvious inference from the facts is that the case was presented and dealt with on the footing that Sheodayal and his son were sailing in the same boat, that their interests were identical. If that was not so and Sheodayal's position

was such that his personal interest conflicted with his duty to his son, then, unless at any rate he showed *uberrima fides*, he was not competent to act as his son's next friend. The result would be that Bejoy was not properly represented and that the decree would not be binding upon him [Order XXXII, rule 4 (1); *Unnoda Dabee* v. *Maria Louisa Stevenson* (10)].

On the other hand, if there was no adoption of Bejoy by Ramdin, though it might have been better if Chhattan Kumari's statement to the contrary had been openly and candidly denied, Sheodayal's conduct of the suit on his son's behalf would not be open to serious criticism. It is even possible that the statement was not brought to his notice or that of Mathuriya. Or he or Mathuriya might pass the statement by as a mere invention designed for use as a possible weapon against both or either of them, or at best, as the translation of what might or would have happened if Ramdin had lived into a fact accomplished before he died. Certainly Bejoy was not entitled to have a false claim put forward on his behalf. Minority has its privileges but that is not one of them, and it is no dereliction of duty on the part of a guardian to refuse to litigate on his ward's behalf a claim which he knows to be false and unfounded in fact. We may add that there is no reason for supposing that any attempt was made by Sheodayal or Mathuriya to persuade Chhattan Kumari to hold her tongue about the adoption. The maintenance provided for in the compromise does not exceed the amount assigned to her as widow in Kanta Prosad's Will. Mathuriya seems to have been as irregular in her payments after the compromise as before.

On the hypothesis of no adoption, the interests of father and son would coincide, and the latter could not successfully challenge the compromise decree. If there was no adoption, we are not prepared, on the materials before us, to say that Mathuriya's claim as her husband's heiress was not an honest and *bona fide* claim, or to pronounce it frivolous or vexatious. In that case, regard being had to such circumstances as Kanta Prosad's Will and the position which Mathuriya assumed, unchallenged, on Ramdin's death, Sheodayal might well consider it wise, as much in his son's interests as in his own, to come to terms with her. The agreement arrived at, sanctioned as it was by the Court on the minor's behalf, would be a valid and binding family arrangement.

We repeat, therefore, that the disputed adoption lies at the threshold of the case, and that the dispute must be determined on the available evidence before the Court can pronounce on the validity of the compromise which affects the plaintiff.

The plea that whether the compromise bound him or not, the plaintiff ratified it after he came of age, may be dismissed in a few words. The plea rests (1) on a statement by the plaintiff in the witness-box and (2) on a mortgage which he effected of an eight-annas share in a certain property for the purpose of raising money required to carry on this litigation. As to the former, the plaintiff in the course of his evidence quite correctly stated his claim in accordance with his plaint which no doubt was settled for him by his legal advisers, but he went on to say that he claimed a twelve-annas share of the entire properties made up apparently of the eight-annas share to which he would be entitled as adopted son of Ramdin, together with four annas of the eight annas share to which he and his father became entitled under the compromise decree. The claim is fantastic and inconsistent and can only be due to some confusion in his mind as to his legal rights. As to the mortgage, the property mortgaged is item No. 94 in the 1st schedule of the plaint. The plaintiff's case is that the properties listed in that schedule are in the joint possession of his father and himself (plaint paragraph 14). The schedule includes the entirety of certain properties among which is No. 94. This appears from Mathuriya's written statement, in which she denied that the plaintiff and his father were in possession of the whole of these properties and asserted possession of a moiety on behalf of the defendant No. 6. For the present purpose, therefore, the mortgage can be explained as a mortgage of the moiety of No. 94, to which the plaintiff would be entitled in his own right as adopted son of Ramdin. Differing

(10) 22 W. R. 290.

from the learned Subordinate Judge we are opinion that these materials are not sufficient to justify the conclusion that the compromise was ratified by the plaintiff.

The further plea that the compromise cannot be set aside because the parties cannot be restored to their original position, rests on a foundation even more slender. The question is not one between Sheodayal and Mathuriya. If the plaintiff is not bound by the compromise, it is voidable at his instance and if he is Ramdin's heir, he is entitled to his legal rights as such, whatever those rights may be. The suit constitutes an election to substitute those rights, if established, for the rights obtained under the compromise.

On the other hand we cannot accede to the contention of Mr. Das for the appellant that the order of the Court giving leave to compromise on his behalf was insufficient in point of form. The terms agreed upon by Sheodayal and Mathuriya were put in writing and then a special application was made by Sheodayal asking for the leave of the Court to compromise the suit on behalf of Bejoy. The application stated that the suit was a heavy one, and that there would be great difficulty and loss in carrying it on. Upon that the Court made an order, dated 6th July 1910, in the following terms:—

"Read the petition on behalf of plaintiff No. 2, minor, for permission to enter into the compromise proposed. Heard the Pleader. The permission is granted."

Exception was taken because the order does not state in so many words that the Court considered the compromise to be for the benefit of the minor. It is usual and perhaps desirable in giving leave to use words to that effect, but it is not essential. All that Order XXXII, rule 7, requires is that the leave of the Court should be "*expressly recorded in the proceedings.*" The rule corresponds to section 462 of the Code of 1882 in which the words italicised were not included, but their addition has not changed the pre-existing practice [*Monohar Lal* v. *JaduNath Singh* (11).] The Courts had insisted on the leave being recorded. The existing rule is express but no set incantation or formula is prescribed for utterance [*Virupakshappa* v. *Shidappa* (1).] The order in question distinctly states that the Pleader was heard, and it must be presumed that the Court on the materials placed before it considered that in the intrests of the minor leave should be given.

So far we have not had much difficulty, but when we come to the question of fact, the ground is more debateable. In support of the adoption there is a considerable body of direct and positive evidence coming from witnesses who for the most part are persons of respectable position in the village to which they belong. There is no direct evidence on the other side, except that of Mathuriya, to rebut these witnesses, but the story which they tell is attended by improbabilities, inherent and extraneous, which cannot be lightly brushed aside. Apart from Chhattan Kumari's written statement in the suit of 1909 and her plaints of 1910 and 1912, the adoption is not supported by any scrap of paper, formal or informal. The question depends almost entirely on oral evidence.

For the plaintiff nine witnesses were examined on commission in the District of Bande, who all speak to the adoption. In addition Chhattan Kumari was examined on commission in Chittagong and gives corroborative evidence. Sheodayal was examined in Court, but owing to the part which he had played, he cuts a sorry figure in the witness-box, and his evidence can count for little or nothing.

It is true that we are in as good a position to judge of the credibility and veracity of the witnesses examined on commission as the learned Judge in the Court below. It does not, however, necessarily follow that we shall not accept his valuation of their testimony. We ought not to differ from him unless we are satisfied that he is wrong or that justice was miscarried. It will appear that we are far from being so satisfied.

It may be again that some of the reasons by which the learned Subordinate Judge supports his conclusion are weaker than others, but weak reasons are sometimes offered in support of a right conclusion. In its broad aspects we concur in his reasoning.

The story of the adoption in its main outlines is as follows:—

(11) 33 I. A. 128; 8 Bom. L. R. 489; 10 C. W. N. 898; 4 C. L. J. 8; 16 M. L. J. 291; 3 A. L. J. 710; 28 A. 585; 9 C. C. 219; 1 M. L. T. 210 (P. C.).

BEJOY SINGH v. MATHURIYA DEBYA.

When Bijoy was born, Ramdin was at Chittagong. His wife had been for two years at Bisenda, where Sheodayal and his wife Jahnabi had also been living. Six months before the child's birth, Ramdin had expressed the intention of adopting him if he should prove to be a son. Very shortly after the birth, before the umbilical cord was severed, the mother placed the child in Mathuriya's lap. A telegram was then sent to Ramdin who hurried forth. The necessary arrangements were made and when the child was thirteen days old, he was adopted by Ramdin in the presence of a multitude of people with the usual ceremonies and concomitants, such as the feeding of Brahmins and so forth. On the occasion the plaintiff's name was changed from Gajaraj, the name given him on his sixth day, to the name by which he is now generally known, Bejoy. The sequel has already been set out.

The Subordinate Judge was criticized for first making up his mind that the story was improbable and then disbelieving the witnesses. But the order cannot be inverted. A story is disbelieved because it is improbable, not improbable because it is disbelieved. Not every probable story is true, nor every improbable story untrue, but improbability at least suggests untruth and compels scrutiny. No doubt a story is best appreciated in its setting. But there are two tests applicable. There are the internal merits or demerits of the story and the relation it bears to external and known facts. Both tests in the present case lead to the same result, that the story is artificial.

If we take first the course of the family affairs after Ramdin's death, it is not, and cannot be, disputed that the main current of those affairs is totally inconsistent with the adoption. Sheodayal stood by in complete silence while Mathuriya assumed the position of proprietor of the Chittagong properties in her own right as heiress of her husband. Her name was registered as proprietor in the Collectorate. The management of the properties became a matter of almost public concern. Mathuriya appointed a committee of five respectable citizens to advise and assist her. It does not seem to have occurred to any of them that she was a usurper, robbing an adopted son of his rights. By an instrument dated 12th November 1907 she also appointed Sheodayal her Am Mukhtar and one of the plaintiff's witnesses, Kailas Chandra Das, a Pleader and a member of the committee, states that the committee "worked for one year" and that Sheodayal "was a servant under the committee" (see also the evidence of the Pleader Narendra Nath Sen). Sheodayal may have done little, but we cannot accept his assertion that he knew nothing of the Am Mukhtarnama.

As to the suit of 1909 and the compromise in which it resulted, we have already said enough and we need not go over the ground again.

Much reliance was placed on the fact, as found by the Subordinate Judge, that it was Bejoy who performed the Sradh ceremonies for Ramdin. Sheodayal was not in Chittagong when Ramdin died, but he arrived before the Sradh, and it is argued that as the nearest male Sapinda in blood, he had a prior right to officiate at that ceremony unless Bejoy was Ramdin's son by adoption. It would seem that according to the Bengal ritual in default of a son the widow would ordinarily precede both the brother and the brother's son (Sastri's Hindu Law, 3rd Edition, page 202). If that had been the rule of this family, which was not suggested, it would have strengthened the argument for the appellant. In the suit of 1909 Chhattan Kumari speaking of the family usage said this: "If anybody in our family dies leaving a wife and a son, then his son performs the Sradh, not the wife. In default of sons, nephews do it. In default of them wife does it." That statement, if accepted and if it means that a nephew would come before his own father, would explain why Bejoy took precedence of Sheodayal. The deposition was exhibited in the present suit by the plaintiff, but in the course of her long examination for the purposes of this suit, Chattan Kumari's attention was not called to the point, and we cannot say that it is free from obscurity. We can only say that Bejoy's conduct of the Sradh is by no means conclusive in his favour. Regard being had to what followed, we have no doubt that it is capable of explanation in a manner consistent with

his natural relationship to Ramdin. The performance of the Sradh is not, properly speaking, a right of the performer but a pious duty to the deceased, and if the person on whom the duty first falls, fails for any reason to discharge it, we presume that the duty devolves on the person next in order according to the rule observed. Under the Mitakshara at any rate that order has no necessary relation to the order of succession to property.

If we turn back to the story of the adoption as narrated by the witnesses, it is on the face of it improbable. The Subordinate Judge, a Hindu, describes it in stronger terms as "extremely absurd and very much opposed to common experience of human affairs." It is not illegal to adopt an infant in arms, but there is no Hindu who would not be surprised or startled to hear that a child had been formally taken in adoption at the early age of thirteen days. It may be that, so far as the father was concerned, the period of ceremonial impurity terminated on the twelfth day, or one or two days before the adoption. But by family usage at least the mother remained ceremonially impure till the thirtieth day. It is idle to say that she took no part in the ceremony. She is said to have handed the child to the natural father who passed him on to the adoptive father.

The child moreover was still in need, and would continue for many months longer to be in need, of the services of his natural mother. The facts would be in daily conflict with the convention that the adopted child became from the moment of adoption the child of his new parents. According to the story, the two mothers with the child accompanied Ramdin to Chittagong. After two years the natural mother rejoined her husband at Bisenda, taking the child with her, and it was some years before he returned to Chittagong.

Where was the necessity for all the haste displayed, which might well be characterised as unseemly or indecent? It is true that Ramdin had been married for twelve or fifteen years and had no issue. It is suggested that he was impotent, though the suggestion was carefully safeguarded at the Bar. He was impotent, but not from birth. There is no evidence when he began to suffer, if he ever did suffer from this affliction, and there are other ways of accounting for lack of offspring. There is no evidence that Ramdin was in bad health or that he anticipated an early death. We were reminded more than once that he was an adopted son himself, though we were not told that the precedent extended to his being adopted in infancy or at Bisenda or to his name being changed at the time. He may well have contemplated or spoken of adopting his brother's son. In all likelihood, however, he would not commit himself to an actual or formal adoption, while any reasonable possibility remained that he might have a son of his own to succeed him.

Further, as the Subordinate Judge remarks, Kanta Prosad was still alive. Ramdin had not yet succeeded him in the control of the Chittagong properties. Even from the point of view which Sheodayal would naturally take, the time for the adoption had not yet come.

We may add that if anything was said or done between the two ladies principally concerned, at or about the time of Bejoy's birth, bearing on his future destiny, that would not by itself constitute a legal adoption

As to the name of Bejoy given to the plaintiff in substitution for, or in addition to, the name originally given to him, we are of opinion that the new name has no necessary connection with his adoption, at any rate his formal adoption, by Ramdin. It is true that the documents to which the Subordinate Judge refers in this connection came into existence after the compromise of January 1910 and that while he was at school he seems to have been known as Bejoy, but we have heard before of Hindus having two names. The Subordinate Judge evidently thought that the change might be accounted for otherwise than by supposing an adoption.

It may be objected that the narrative of the adoption which we have given is too brief and bald. In our opinion no artifice of language would remove the difficulties which lie in the way of accepting it.

It is said that the witnesses are not shaken in cross-examination. That is subject to qualifications which we will mention. But the story, though it might be spun

out, is simple in its details. It follows the regular and known procedure of a formal adoption. The scene is set, as far back in time as possible, at a place remote from the place where the suit was tried. The conditions multiply the difficulty of testing the veracity of the witnesses by cross-examination.

It is said again that the story is not rebutted. Well, it is contradicted by Mathuriya, who knows as much about the matter as Sheodayal or any one else. She is, no doubt, a partisan in her own cause, and she is not supported by any witness from Bisenda. The latter comment at first sight seems to possess considerable force, but on examination it narrows down and ceases to have much, if any, constructive value on the plaintiff's behalf.

The respectability of the witnesses may be conceded. The learned Subordinate Judge may have done them some injustice in treating them as mere villagers of little or no account in comparison with the professional men to be found at the head-quarters of a district. They were not examined before him, and the ground on which he ascribes ignorance in a matter of religion to one of them may be misconceived. It cannot be said that if the facts were true, witnesses of a higher social status could have been found to speak to them. Unfortunately, however, truthfulness does not always go with respectability of position and after careful consideration we have come to the conclusion, with the Subordinate Judge, that the evidence from Bisenda must be rejected. Sheodayal had lived there, and no doubt possessed some influence with his neighbours. The course, which Ramdin would have taken, or might have been expected to take had he lived, fell in with their views of the fitness of things and of the interest of an old family, well known in its original home. The witnesses rose to the requirements of the occasion. It is not necessary to postulate bribery. In neighbourly kindliness they treated that as done which in their opinion ought to have been done but which in fact was not done. We are not defending their conduct, which is nonetheless lamentable and wicked because it was dictated by good nature. We are endeavouring to find the reason which induced them to give evidence which we regard as false.

Concluding, as we do with the Subordinate Judge that there was no adoption of the plaintiff by Ramdin and that no reason is shown for setting aside the compromise decree in the suit of 1909, we are glad to find at any rate that the conduct of that suit by Sheodayal was not so unnatural as he and his son would now have us believe.

We might stop there, but it is perhaps desirable that we should gather up some of the arguments addressed to us with which we have not dealt or not fully dealt.

As to the witnesses cited on the plaintiff's behalf, Kausalya is the widow of Kamala Prosad's son, Ramnath, and resides at Bisenda. Her interests are on the side of Sheodayal. If the evidence of Mathuriya is to be discarded or discounted as interested and unreliable, much the same exception may be taken to the evidence of Kausalya and Chhattan Kumari. The latter, in her desire to thwart Mathuriya, goes so far as to deny that Ramdin was adopted by Kanta Prosad, a fact which is not disputed by any one else.

Gayadin Pandit says that the adoption was the only occasion on which he was invited to be present at a ceremony of the Hazari family. Yet he says he saw Ramdin's wife on the day of Bejoy's birth and was present when Ramdin explained his reason for adopting a son, a reason which, even if true in fact, he would hardly care to publish to strangers.

Ramnath Pandit says he was 23 or 24 years old at the time of the adoption. His grandfather was Kanta Prosad's Guru but died, he says, some years before the adoption. Jugal, who was also the Purohit of Ramdin and Sheodayal, was present but took no part in the ceremony.

Ramnath Misser is another priest on whose evidence no great stress was laid.

Mahi Pal is the family Bhat whose duty it is to invite people to the house on occasions of ceremony. He succeeded his father in that office.

Bela Bhadra Prosad is a Khas Darbari and a member of the District Board. He puts the ceremony in Sheodayal's new house. The other witnesses place it in the old

house. The new house apparently was not in existence at the time of the adoption.

Baldeo Singh says that he has litigation with Mathuriya.

Hanuman Singh is invited to almost all ceremonies at Sheodayal's house, and Sheodayal is invited to ceremonies at his house. Ram Adhin Singh and Ramnath Misser are also friends and neighbours.

These observations are intended merely to supplement the reasons we have already given for not crediting the story of the adoption.

As to the Banda witnesses, which it was suggested Mathuriya might and should have examined, only three names were ultimately insisted or, Raghunanda, Jagad Lambardar and Sheodayal, not the plaintiff's father but the husband of Mathuriya's cousin. Raghurandan is no doubt Mathuriya's priest, but Bala Bhadra Prosad says that he was not present at the ceremony. As to Sheodayal, Baldeo Singh says that "no relation of Mathuriya through her father or any villager of her father's village was present at the time of adoption of Bejoy." It would not, therefore, be of much moment if Mathuriya's relations came forward to say that they were present at no ceremony of adoption. Then remains Jagad Lambardar and he might be deterred from giving evidence by the number of witnessés on the other side coming from his neighbourhood. As the Subordinate Judge remarks, Mathuriya had lived long in Chittagong and was out of touch with the people at Bisenda. She was not likely to have many, if any, friends in the village on whom she could count.

Something was said of Mathuriya's failure to produce Ramdin's books of account. We are not satisfied that any serious attempt was made to have the books in Court. If there was anything in the accounts which threw light on the plaintiff's claim, the fact would probably have been known and the production of the accounts would have been insisted on.

Some, but not all, of the Chittagong witnesses say that Ramdin spoke of the plaintiff as his adopted son. We may refer to Kali Sankar Chakerbutty, the Editor, Kailas Chandra Das, the Pleader, and Joyanta Kumar Das, the Kabiraj, on the one hand and the Pleaders Narendra Nath Sen and Soshi Bhusan Sen on the other. Narendra Nath Sen was very intimate with Ramdin, and his statement that Ramdin never had occasion to tell him that he had adopted the plaintiff is, though of a negative character, significant. He saw Ramdin after he was seized by his last illness and before he lost consciousness and died. If the adoption were a fact, we should have expected more conformity in the witnesses and a much more certain and confident tone in the evidence. If Ramdin treated his nephew kindly and generously, that is not in itself proof of a formal adoption. It would be dangerous and unwise to treat the display of natural affection as proof of any such thing.

We do not attach much importance to the plaintiff being described in various documents as the son of Sheodayal. It appears that Ramdin himself was smetimes so described and most of the documents produced relate to the period after the compromise of 1910.

There was some argument about the precise nature of the plaint in Suit No. 17 of 1913. In paragraph (3) the statement occurs "the late Babu Ramdin Hazari brought the minor plaintiff and adopted him as his son." For the respondent it is urged that the words imply that the plaintiff was brought to Chittagong before he was adopted. The other side points to the first sentence of paragraph (5) which correctly and literally translated runs:—"The minor plaintiff is the adopted and brought son of the late Ramdin Hazari". Paragraph (5), it is said, rectifies paragraph (3). That may be so but the point is not one of any importance. Words are sometime loosely strung together.

There remains one matter with which we conclude. If the compromise decree were set aside, it would no doubt be open to the plaintiff to re-open the question whether the Chittagong properties were joint or not. The learned Subordinate Judge, holding that the plaintiff was not adopted by Ramdin and that he was bound by the compromise decree, advisedly refused to come to a finding on that issue. Having come to the same conclusions on the main questions involved, we have followed his example. While the compromise was in the balance, it was inevitable that our atten-

tion should be invited to various matters bearing on the character of Kanta Prosad's possession. But if the compromise is binding, the issue cannot be raised. It is closed by agreement. The whole purpose and value of such settlements would be destroyed if, apart from fraud or collusion or any vitiating circumstance, the question settled could afterwards be revived in Court for judicial determination. *Miles* v. *New Zealand Alford Estate Co.* (6), *Rameswar Pershad Singh* v. *Ram Bahadur Singh* (2).

In the result this appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 449 OF 1918.
March 16, 1920.
Present:—Mr. Justice Piggott and Mr. Justice Walsh.

MOJIZ FATIMA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Saiyad ALI AKBAR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 194 (1)—Lambardari mahal—Lambardar, *duty of, to realise arrears of rent, extent of.*

In a *lambardari mahal* the *lambardar* is, from the date of his appointment, the agent appointed to act on behalf of the co-sharers and he is the only person who has a right to institute a suit against a defaulting tenant for the recovery of any arrears of rent not statute-barred, whether of his time or prior to his appointment as such. [p. 113, col. 2.]

Second appeal from the decision of the District Judge, Aligarh, dated the 17th January 1918.

Dr. *S. M. Sulaiman*, for the Appellants.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This was a suit by three co-sharers against a Lambardar for profits. One minor complication we may dispose of at once. While the second appeal was pending in this Court, one of the three plaintiffs, by name *Musammat* Amir Begam, has compromised with the defendant Lambardar. In the compromise it is stated that *Musammat* Amir Begam's claim on account of the profits of her share has been completely settled out of Court and she is content that the appeal, in so far as it relates to her share, be dismissed without any order as to costs. This order will be noted when we come to pass the final decree of this Court. The remaining two plaintiffs, who are entitled each to a one tenth share in the divisible profits of this Mahal, have elected to proceed with their appeal and it will have to be decided in respect of the shares of these two plaintiffs. We have come with reluctance to the conclusion that it is impossible for us to decide the appeal without more specific findings from the Court below upon certain issues of fact. In this connection we may point out that the tabular statement filed by the Patwari, on the strength of which the Court of first instance arrived at certain figures as representing the divisible profits of the Mahal, is full of palpable mistakes. We have made an attempt to use it for the purpose of arriving ourselves at a final determination of the suit, but have found it impossible to do so because of the errors above mentioned.

We now proceed to consider the questions raised by the appeal. The suit was on account of the profits of the agricultural years 1321, 1322 and 1323 Fasli. It is admitted that this is a Mahal for which ordinarily a Lambardar is appointed to collect rents from tenants and otherwise to act on behalf of the other co-sharers under section 194 of the local Tenancy Act (II of 1901). The Lambardar who preceded the defendant respondent died in the month of July 1913, that is to say, slightly before the commencement of the agricultural year 1321 Fasli. It is admitted that there was an interregnum. The learned District Judge says at the commencement of his order that the defendant, Saiyad Ali Akbar, was appointed Lambardar on the 30th of August 1914. If we could accept this as a clear finding of fact, we should certainly have to recast the account on the basis of which the lower Appellate Court has framed its decree. It is true that the agricultural year 1322 Fasli had commenced before the 30th of August 1914, but not a single instalment of rent on account of the Kharif of the said year had yet fallen due; consequently the realisation of all rents falling due during the agricultural year

1322 Fasli would be the duty of the Lambardar and there would be no basis whatever for the procedure adopted by the learned District Judge in limiting the Lambardar's liability to the Rabi instalment, that is to say, to the second half of the agricultural year 1322 Fasli. When, however, this was pointed out in argument, the learned Counsel for the defendant-respondent pressed it upon us that there was nothing on the record that he could discover to warrant the learned District Judge's statement as to the date of the defendant's appointment, but that on the contrary the Patwari had distinctly stated that Ali Akbar only entered upon his duties as Lambardar from the Rabi of 1322 Fasli, that is to say, from the commencement of the second half of the said agricultural year. As the learned District Judge has recorded a finding of fact in one sense and then worked out his decision in a different sense, we are not prepared to accept either as a finding of fact binding upon this Court. We must, therefore, in any case remit the following issue and we do so accordingly.—

1. From what part of the agricultural year 1322 Fasli did the defendant enter upon his duties and responsibilities as Lambardar? Was it from the commencement of the said year, or from the commencement of the second half of the year?

When this point has been finally settled, a further question will arise with regard to the arrears of rent due on account of the period preceding the defendant's appointment as Lambardar. There was, as we have already pointed out, an interregnum during which the Mahal was not in charge of any Lambardar. The duration of this interregnum was either one year or one year and a half. During that period there was a dispute as to the right of succession to the share of Saiyid Amir Haider, the Lambardar, who had preceded the present defendant. As might be expected under the circumstances, collections during this period of interregnum were low and considerble arrears of rent accumulated. The learned District Judge has found, though we are unable to say on what precise evidence, that the defendant Ali Akbar as a matter of fact realised Rs. 300 on account of arrears of rent which had fallen due before his appointment as Lambardar. He has very properly treated this sum as part of the divisible profits and framed his account accordingly. The contention of the appellants is, however, that from the date of his appointment, it became the duty of the new Lambardar to realise all arrears of rent due from tenants which had accrued due during the period immediately preceding his appointment and the right to recover which was not yet barred by limitation. Further, the appellants contend that if the defendant-respondent was guilty of negligence or misconduct in consequence of which these arrears still remained uncollected, he is liable to account to the co-sharers for the same by reason of the second clause of section 164 of the Local Tenancy Act (II of 1901). The learned District Judge has disposed of this matter by holding that the Lambardar, after the date of his appointment, could not have maintained a suit against any single tenant in respect of arrears of rent which had fallen due prior to the date of the defendant's appointment. If this is a correct proposition of law, it is obvious that no duty lay upon the defendant in respect of these arrears and that it cannot be said that he had been guilty of any negligence in failing to realise the same. We are satisfied, however, that the learned District Judge is wrong on this point. This is a Lambardari Mahal, in which a Lambardar is ordinarily appointed, not merely to collect rents from tenants, but, as is stated in the Board of Revenue's Circular on the subject, to act on behalf of the other co-sharers under section 194 of the Agra Tenancy Act. Under clause 1 of this section the obligation imposed upon all co-sharers to sue jointly for any arrears of rent due to them jointly is made subject to this exception, that if they have appointed an agent to act on behalf of them, the suit may be maintained by the said agent. In a Lambardari Mahal the Lambardar is, from the date of his appointment, the agent appointed to act on behalf of the co-sharers, and he is the only person who under section 194, clause (1), aforesaid has a right to institute a suit against a defaulting tenant for the recovery of any arrear of rent not Statute-barred. To hold otherwise would involve practical consequences of a very

undesirable nature. In the present case, for instance, assuming for the sake of argument that the appointment of the defendant Ali Akbar as Lambardar took effect from the middle of the agricultural year 1322 Fasli, and that arrears of rent were due from a tenant on account of the first half of that year, the result would be that, before that tenant could be compelled to discharge his just liabilities, there would have to be separate suits, by the co-sharers for the first half of the year and by the Lambardar for the second half of the year. It does not seem to us that any such intention on the part of the Legislature is to be deduced from the wording of section 194 of the Tenancy Act. Under the former Tenancy Act the contrary was clearly held by a Bench of this Court in *Ganga Sahai* v. *Ganga Lakksh* (1). In a recent case, that of *Bharat Indu* v. *Syed Mohammad Mustafa Khan* (2), this Court in remitting an issue to the Court below clearly implied that a Lambardar could obtain decrees under the Tenancy Act on account of arrears of rent which had accrued due prior to the date of his appointment. We are satisfied that this is a correct view of the law. As regards the present case, however, it requires to be considered what sort of evidence of negligence or misconduct on the part of the defendant Lambardar would be required to discharge the burden of proof laid upon the plaintiffs by section 164, clause (2), of the Tenancy Act. It is easily conceivable that a distinction might require to be drawn in many cases between the degree of responsibility attaching to a Lambardar in respect of arrears of rent which had accummulated during an interregnum prior to his appointment and his responsibility for the realisation of the current demand as it fell due after the date of his appointment. If there were no other reasons for drawing such a distinction, it would be a sufficient reason to note that during the interregnum the power to realise rents, and consequently the responsibility for doing so, had reverted to the entire body of co-sharers. It will be necessary for us, therefore, before this appeal can be determined, to remit two further issues. We want to know what were the accummulated arrears due from tenants of this Mahal on the date on which the defendant assumed the office of Lambardar and we must also have a finding from the lower Appellate Court as to whether any of those arrears, and if any what portion, remained uncollected owing to negligence or misconduct on the part of the defendant. At present we have no real finding of fact on this point by the lower Appellate Court, because the learned District judge has brushed the question aside upon his view of the law as to the rights of a Lambardar to maintain suits for arrears of rent, from which view we have been compelled to dissent. We, therefore, remit the following further issues.—

2. What arrears of rent were due from tenants of this Mahal on the date on which the defendant entered into possession as Lambardar? (The arrears referred to in this issue are rents not paid by the tenants to any person.)

3. What portion, if any, of the said arrears remained uncollected owing to negligence or misconduct on the part of the defendant?

We should have preferred to direct that these issues should be determined on the evidence already on the record, as it is not suggested that either party was precluded from laying before the Court below any evidence which he thought desirable; but it seems to us that the Patwari will have to be recalled, if only to explain the statement of account which we have found ourselves unable to make practical use of. We are also of opinion that either party should be permitted to produce documentary evidence as to the date of the formal order appointing Saiyid Ali Akbar to be Lambardar of this Mahal. To this extent the lower Appellate Court may admit fresh evidence at the request of either party. Ten days will be allowed for objections.

Issues remitted.

(1) A. W. N. (1890) 3.
(2) 52 Ind. Cas. 836; 17 A. L. J. 167; 41 A. 316.

DARBARI LAL v. WASU MALIK.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 603 OF 1917.

April 19, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

Seth DARBARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

WASU MALIK—DEFENDANT—RESPONDENT.

Arbitration—Award embodying agreement between parties, validity of—Civil Procedure Code (Act V of 1908), O VI, r. 17—Amendment of pleadings, when should be allowed.

The fact that an award embodies an agreement arrived at between the parties does not prevent it being a valid and binding award. [p. 116, col. 1.]

Gobardhan Das v. *Jai Kishen Das*, 22 A. 224; A. W. N. (1900) 52 9 Ind. Dec. (N. S.) 1180, followed.

An award when delivered is binding upon the parties. [p. 116, col. 1.]

The law relating to the amendment of pleadings, as contained in Order VI, rule 17 of the Civil Procedure Code, confers a plenary authority upon the Court to allow a party to alter or amend his pleadings in such manner and upon such terms as may be just, and the amendment may be allowed at any stage of the proceedings. [p. 116, col. 2.]

An amendment should always be allowed if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided. [p. 116, col. 2]

Plaintiffs sued their *quondam* partner for rendition of accounts of the partnership and for recovery of money due to them. It appeared that the dispute had been referred to the arbitration of one *L.* who had given an award on 30th September 1914, which award was accepted by the parties and signed by them in token of their assent. The suit was instituted on 1st October 1914:

Held, (1) that the award was binding on the parties and the suit could not be maintained; [p. 116, col. 1]

(2) that the plaint could be amended so as to embody a prayer for a decree in accordance with the award and that such decree could be passed. [p. 116, col. 2.]

First appeal from the decree of the Subordinate Judge, 1st Class, Multan, dated the 17th November 1916, decreeing the claim for Rs. 5,000 in strict accordance with the terms of the award.

Mr. *Gokal Chand Narang*, for the Appellants.

Lala *Jagan Nath*, for Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The plaintiffs, Darbari Lal and his two brothers, brought this action against their *quondam* partner, Wasu Malik, for a rendition of the accounts of the partnership and for the recovery of the money due to them. The partnership was dissolved on 24th September 1911, and the suit, which was instituted on 1st October 1914, the first day on which the Courts re-opened after the summer vacation, was undoubtedly within time.

In answer to the claim the defendant pleaded that the dispute between the parties had been referred to the arbitration of one Lorinda Ram, who had given his award on 30th September 1914, which award was accepted by the parties and signed by them in token of their assent. The defendant consequently contended that the award operated as a bar to the suit for the rendition of accounts which could not, therefore, be maintained. The Subordinate Judge holds that the arbitrator delivered a valid award according to which a sum of Rs. 5,000 was due to the plaintiffs, and that in the face of this award the suit for the rendition of accounts does not lie. The learned Judge has, however, granted the plaintiffs a decree in terms of the award. Both parties are dissatisfied with this decree and have appealed to this Court.

The sole question raised in the appeal preferred by the plaintiffs is whether a valid award was given by the arbitrator Lorinda Ram. Now, the evidence of a large number of witnesses, including the arbitrator himself, shows that on 30th September 1914 an award was written on a stamp paper of the value of Rs. 5 and that it was signed not only by the arbitrator and witnesses but also by all the three plaintiffs and the defendant. The document was then taken to the office of the Sub-Registrar for registration, but on account of some defect it could not be registered on that day. The evidence shows that the plaintiff Badhu Ram then seized the document and made an attempt to snatch it away from Lorinda Ram, with the result that it was torn into two pieces, one of which remained with the arbitrator and the other was taken away by Badhu Ram. The portion which remained with the arbitrator has been produced in evidence and the whole of the award has, in so far as the material terms are concerned, been re-constructed with the help of an entry in the scribe's register containing the purport thereof.

We may say at once that there is no longer any dispute as to the terms of the award, but the plaintiffs, while admitting their signatures to the document, relate a curious story as to how it was destroyed. They state that the document, which they

signed, contained blanks which were subsequently to be filled up after obtaining the consent of both the parties. The arbitrator, however, without consulting the plaintiffs, fixed the amount due to them at Rs. 5,000 and asked the plaintiffs' agent, Kanhya Lal, to enter that amount in the deed and to fill up the blanks accordingly. The plaintiffs further state that when they learnt of it they protested, and the arbitrator in disgust said that he was not going to settle their dispute and himself tore up the document into two pieces.

Now this version, which depends entirely upon the testimony of the plaintiffs and their agent Kanhya Lal, receives no support whatsoever from any independent witness. On the other hand, the defendant's account of the affair is not only a probable one, but is borne out by a large number of reliable witnesses. It is difficult to believe that the plaintiffs, who are men of business, would sign a document which contained blanks and did not specify the amount due to them. At any rate, it is clear that the onus rested on them to establish their version, and they have entirely failed to discharge it.

It appears that the arbitrator did not make any independent enquiry into the matter in controversy between the parties, but the fact that the award embodies an agreement arrived at between the parties does not prevent the award being a valid and binding award between the parties, *vide, inter alia, Gobardhan Das* v. *Jai Kishen Das* (1).

Upon an examination of the evidence adduced by the parties we have reached the conclusion that the arbitrator delivered an award, which was agreed to by the parties and was signed by them in token of their consent. An award when delivered is binding upon the parties, and it is not, therefore, necessary to determine whether it was the arbitrator himself or the plaintiff Budhu Ram who destroyed the paper containing the terms of the award. The defendant has succeeded in proving the essential terms of the award, and we concur in the conclusion of the learned Subordinate Judge that the suit for rendition of accounts cannot be maintained. This finding disposes of the appeal preferred by the plaintiffs.

On behalf of the defendant it is contended that as the action was for a rendition of accounts, and as the plaint did not put forward any claim for a decree in accordance with the award, the Subordinate Judge should not have granted a decree in terms of the award, but should have dismissed the suit *in toto*. Now, it is true that the plaint does not expressly contain any alternative claim, but the omission is probably due to the fact that though presented to the Court on 1st October, it was really drafted before the 30th September 1914 when the award was delivered. There can, however, be no doubt that if the plaintiffs had added a prayer for the grant of a relief in terms of the award, which the defendant himself had set up to defeat the claim for rendition of accounts, the latter could have no possible answer to it. It is to be observed that what the plaintiffs wanted was to recover such sum of money as may be found due to them from the defendant, and the only question was whether that sum had already been determined by the arbitrator or should be determined by the Court after a scrutiny of the accounts.

The law relating to the amendment of pleadings, as contained in Order VI, rule 17, of the Civil Procedure Code, confers a plenary authority upon the Court to allow a party to alter or amend his pleadings in such manner and upon such terms as may be just, and the amendment may be allowed at any statge of the proceedings. The Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and an amendment should always be allowed if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided. It was probably for this reason that the learned Subordinate Judge acceded to the request for a decree in accordance with the award, and Mr. Gokal Chand Narang for the plaintiffs, in order to avoid all possible objections, has made an oral application to amend the plaint. There is absolutely no reason why this request should be refused, and why we should not affirm a decree, to which the defendant himself could have no real objec-

(1) 22 A. 224; A. W. N. (1900) 52; 9 Ind. Dec. (N. S.) 1180.

tion, considering that it proceeds upon a document upon which he himself placed his reliance. Viewing the plaint as embodying a prayer for a decree in terms of the award we uphold the judgment of the lower Court and dismiss both the appeals. We leave the parties to bear their own costs in this Court.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 735 OF 1919.
(ORIGINALLY CIVIL APPEAL No. 1851 OF 1919.)
April 19, 1920.

Present:—Mr. Justice Wilberforce.

HARI SINGH—PLAINTIFF—PETITIONER

versus

FAZAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 67—Book entry, whether bond—Suit for recovery of money due on book entry—Limitation.

A book entry containing a promise to pay at a certain rate of interest and attested by witnesses is a bond, and a suit for recovery of the money due thereon is governed by Article 67 of Schedule I to the Limitation Act.

Petition for revision of the decree of the Senior Subordinate Judge, Jhelum, dated the 14th June 1919, affirming that of the Munsif, 2nd Class, Chakwal, District Jhelum, dated the 25th April 1919, dismissing the claim with costs.

Pandit *Bindraban*, for the Petitioner.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.—The petitioner in this case sued for Rs. 300, the price of wheat due on a book entry which contained a promise to pay at a certain rate of interest and was attested by two witnesses. The learned Senior Subordinate Judge held that the entry was a bond as defined in the Stamp Act but that it was not a bond for the purposes of limitation, a decision which Counsel for the respondent was unable to support and is obviously indefensible. The Subordinate Judge went on to hold that as the entry was not a bond, the period of limitation was three years, apparently under Article 115. Even so he did not show how the case was time barred as he did not state when the express or implied contract was broken. The entry obviously amounts to a bond and the period of limitation is governed by Article 67. I accept the petition for revision and remand the case to the first Court for a trial on the merits. Costs will follow the result and the Court-fee on application will be refunded.

Petition accepted.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 15, 1919.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

M. R. SETURATNAM AIYAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VENKATACHALA GOUNDEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 103, O. XLI, r. 25—Appeal—Finding on particular issue, absence of—High Court, power of, to remit issues for trial and to determine questions of fact—Burden of proof, question of, when not pertinent—Landlord and tenant—Ryotwari holding, suit for possession of—Permanent tenancy, claim of, by defendant—Misjoinder of causes of action against separate defendants—Objection to use of irrelevant evidence not taken in trial Court, effect of.

Where a Court from whose decree an appeal is before the High Court omits to determine a question of fact essential to the right decision of the suit on the merits, the High Court has jurisdiction, under Order XLI, rule 25 of the Civil Procedure Code, to frame issues and refer them for trial by that Court. [p. 120, col. 2.]

Where a lower Appellate Court fails to determine an issue of fact, the High Court in second appeal has power to deal with it under section 103 of the Civil Procedure Code. [p. 121, col. 1.]

Where in a suit for the recovery of possession of agricultural land in a *ryotwari* tract the defendant claims a right of permanent tenancy, it is for him to establish permanency, and this may be done by proving a custom, a contract or a title, or by other means; and where in such a case custom is out of the question, and contract is negatived by the trial Court, but that Court leaves the question of title untouched, it is open to the High Court, in appeal, to make a pronouncement on that question. [p. 121, col. 2.]

Where in a controversy the relevant facts are before the Court, and all that remains for decision is, what inference should be drawn from them, the question of the burden of proof is not pertinent [p. 121, col 2]

Where a plaintiff in disregard of the provisions of the Civil Procedure Code unites in the same suit, not merely several causes of action, but several causes of action or suits against separate defendants, with the result that in effect the litigation is conducted and treated throughout as though the defendants are a community with common interests,

he cannot be heard to object to the use of evidence against him as irrelevant, but to which the irregularity of his procedure has given relevance and to which he took no exception when it was tendered at the trial. [p. 122, col. 1.]

Consolidated appeals from three decrees of the Madras High Court (Sir Ralph Benson, J., and Sundara Aiyar, J.), dated the 18th February 1913, modifying in second appeal three decrees passed by the District Court, Trichinopoly, on appeal from the District Munsif, Kulitalai.

FACTS of the case will sufficiently appear from their Lordships' judgment and from the judgment of the Madras High Court reported as 20 Ind. Cas. 374.

Mr. *De Gruyther*, K. C., and Mr. *Kenworthy Brown*, for the Appellants, submitted that the defendants-respondents had no right of permanent occupancy in the lands. If they had such right, it must be either by the permanent settlement or by contract. The lands here were divided into three classes, (1) dry land, (2) garden, (3) pasture. As to the third there is now no dispute. The High Court has decided in our favour and there is no appeal. As to the other two classes we do not object to pay compensation for improvements, but we contend we are entitled to ejectment. The High Court ought not to have remanded the case. In a second appeal the District Judge's findings of fact are final. The High Court practically say that there is a presumption in favour of occupancy rights, arising from long occupation and payment of a uniform rent. We say the burden of proof was on the cultivators and they failed to discharge it. The District Judge found as a fact that there was no occupancy right.

[SIR LAWRENCE JENKINS referred to section 103 of the Code of Civil Procedure.

That section does not apply: the lower Appellate Court had determined the issue. Its finding of facts is final: *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1).

There is no question here of expectation or encouragement. If the tenant makes a well without leave he does it at his own risk: but here the cultivators applied for licences, which the landlord gave. If he ejects them he must compensate them: but no question of estoppel as to permanent occupancy arises.

LORD PHILLIMORE.—Your case is that though they may have held for a great many years, it is a mere matter of contract and they have no right to continue?]

The matter has been confused by a mass of authorities which have little bearing: the crucial question is to determine what were the rights of the parties when the permanent settlement was made in 1812. Custom is not alleged. If these people's predecessors had occupancy rights in 1802, *cadit quæstio*: if not, we took the land then free of occupancy right: it was we who had the occupancy right, the Kudivaram. Now have they acquired the right since? We say not.

[SIR JOHN EDGE.—You say that continuous occupation since 1803 raises no presumption?]

If all you have to go on is a uniform rent and long holding, those are elements to be considered. If you know nothing about the origin of the tenancy, you must deal with it on such materials as you have: but here you *do* know the origin. All that is established here is that some, not all, of these holdings have been held by the present tenants for a very long time. Uniformity of rent is not so clear; it is merely a uniform rate for the quality of the land: the rate changed if the land were converted. The plaintiffs' predecessors here were the "*ryots* or cultivators" mentioned in the Fifth Report of 1812 (Madras Presidency), page 61: being Brahmins they could not and did not cultivate themselves, but they had the tenant right. Reference was made to the following:

Secretary of State for India in Council v *Luchmeswar Singh* (2), *Seena Pena Reena Seena Mayandi Chettiyar* v. *Chokkalingam Pillay* (3), *Chidambara Pillai* v. *Tiruvengadathiengar* (4), *Rangasami Reddi* v. *Gnana Sammantha Pandara Sannadhi* (5), *Cheekati Zamindar* v. *Ranasooru Dhora* (6), *Seshamma Shettati* v. *Chickaya Hegade* (7), *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8),

(1) 17 I. A. 122; 18 C. 23; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16.

(2) 16 I. A. 6; 16 C. 224; 5 Sar. P. C. J. 275; 13 Ind. Jur. 10; 8 Ind Dec. (N. S.) 147.

(3) 31 I. A. 33; 2 M. 21 (P. C.); 8 C. W. N. 345; 14 M. L. J. 200; 8 Sar. P. C. J. 587.

(4) 7 M. L. J. 1.

(5) 22 M. 264; 8 Ind. Dec (N. S.) 188.

(6) 23 M. 318; 8 Ind. Dec (N S) 624.

(7) 25 M. 507; 12 M. L. J. 119.

(8) 44 Ind. Cas. 814; 34 M. L. J. 234; 23 M. L. T. 161; 7 L. W. 380.

Ponniah Nadan v. *Deivanai Ammal* (9). Fifth Report (Madras Presidency), pages 178, 459—461, 615, 790, 797, 808.

The ruling in *Veeranan Ambalam Peria Karuppan* v. *Annasawmi Iyer* (10) is merely that the mere fact of the landlord being Pattadar is not conclusive; that case does not decide that there is any presumption against him. The tenants here have no right, except to compensation.

Messrs. *E. B. Raikes* and *Palat*, for the Respondents.—The District Judge here took an altogether erroneous view of the law applicable to the case.

There was evidence on which he could have come to a finding on the issues framed by the High Court, but he failed to do so and under section 103 the High Court had jurisdiction to determine the issue itself. The burden of proof was on the plaintiff: he alleged he had the right to eject, and must prove it. The mere fact that he is Pattadar does not shift the burden. The Fifth Report shows that the Mirasdar always had the first right to the issue of Patta whether there were occupancy rights or not.

In *Secretary of State for India in Council Luchmeswar Singh* (2) the circumstances under which Government, who were in that case the tenants, came into possession were known: that is not so here.

The decision in *Seena Pena Reena Seena Mayandi Chettiyar* v. *Chokkalingam Pillay* (3) turned upon the terms of the contract in that case.

The High Court have rightly inferred from the facts in this case that the cultivators have permanent rights: there is nothing in any of their own previous decisions which conflicts with that view, and it is supported by *Veeranan Ambalam's case* (10), *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8), *Krishnasami Pillai* v. *Varadaraja Ayyangar* (11).

Reference was also made to Trichinopoly Manual, page 178. Fifth Report (Madras) pages 104—106, 489, 615, 622, 625, 750-1, 785, *Suryanarayana* v. *Patanna* (12), *Afzal-unnisa* v. *Abdul Karim* (13).

Mr. *DeGruyther*, *K. C.*, in reply.—If there had been any independent tenant with occupancy rights at the time of the permanent settlement, the Fifth Report shows that the settlement would have been made with him direct. There were wet lands included in the original Patta, but it is not suggested that the cultivators of these lands had occupancy rights. The only right which the tenants here have is to be compensated for the wells made in the garden (or wet) lands.

JUDGMENT.

SIR LAWRENCE JENKINS.—These consolidated appeals are from three decrees of the High Court at Madras, dated the 18th February 1913. The decrees had modified three appellate decrees of the District Court of Trichinopoly, which in turn had modified three original decrees of the Court of the District Munsif of Kulitalai.

The three suits thus came before the High Court in second appeal, so that the Court had no jurisdiction to interfere with any finding of fact by the District Court; its only power to determine issues of fact was that created by section 103 of the Code of Civil Procedure, 1908.

Each of the suits is for the recovery of possession of agricultural land in a *ryotwari* tract, and has been instituted by the plaintiff as the Government Pattadar.

The number of the defendants in the several suits is 165, 103 and 30. They are not, however, in joint possession; on the contrary, they have separate holdings and should have been separately sued.

The plaintiff's title is conceded, and he alleges that the defendants are tenants under him and that their several tenancies have been determined by notice. The defendants plead in answer to his claim for possession (1) that they severally have a permanent tenancy or right of occupancy

(9) 52 Ind. Cas. 247; 36 M. L. J. 463; 9 L. W. 453; 26 M. L. T. 311.

(10) 12 Ind. Cas. 1; 21 M. L. J. 845; 10 M. L. T. 185; (1911) 2 M. W. N. 162.

(11) 5 M. 345 at pp. 355, 356; 2 Ind. Dec (N. S.) 240.

(12) 48 Ind. Cas. 689; 45 I. A. 209; 36 M. L. J. 585; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. P. C.) 11; 21 Bom. L. R. 547; (1919) M. W. N. 463 P. C.).

(13) 50 Ind. Cas. 749; 46 I. A. 131; 17 A. L. J. 60; 36 M. L. J. 580; 26 P. W. R. 1919; 1 U. P. L. R. P. C.) 47 & 71; 26 M. L. T. 55; 81 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 891; 65 P. L. R. 1919; 47 C. 1; 11 L. W. 173 (P. C.).

and (2) that they are protected from ejectment by the doctrine of estoppel.

The land in suit is of three classes, garden, dry, and pasture. In the Court of the Munsif it was held that the plaintiff's claim to recover the garden land was barred by the plea of estoppel, but that his claim to the rest must succeed as no right of permanent tenancy was established.

From this decision cross appeals were preferred. At the first hearing of the appeals the District Judge disallowed the plea of estoppel, and also held that the defendants had not established their right to a permanent occupancy. It is important to observe how he dealt with this last aspect of the case:—

"The question for consideration in this case," he said, "is whether the defendants have shown that the plaintiff or his predecessor-in-title had contracted the right of tenancy (which) should be changed into a right of permanent occupancy."

His finding on this was as follows:—

"In these circumstances it is, I think, clear that the defendants have not established any contract on the part of the plaintiff or his predecessor-in-title to convey to them a right of permanent occupancy."

Ultimately he passed decrees in the plaintiff's favour for possession of all the suit lands. The defendants appealed to the High Court, and the learned Judges expressed the view that the mode in which the District Judge had dealt with the question of a permanent tenancy was not satisfactory. And after quoting the proposition as formulated by him they observe that:—

"The real point for determination before the learned Judge was whether on the admitted and undoubted facts of the cases and the evidence of both sides the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy."

The distinction between the two propositions is manifest. In the result the learned Judges asked the District Judge to return revised findings on the following questions:—

"1. Whether the appellants in these appeals are tenants from year to year, or whether they have a permanent right of occupancy in the lands in dispute?

"2. Whether the plaintiff is estopped from denying that the appellants in these appeals have a permanent right of occupancy?

"3. What compensation, if any, the appellants in these appeals are entitled to for effecting improvements on the land by digging wells and ponds?"

It has been contended that the Court acted without jurisdiction. But this proceeds on a misapprehension of what the High Court did. It did not remand under rule 23 of Order XLI of the Civil Procedure Code but merely framed issues and referred them for trial to the District Court as provided in rule 25, and for this reason.

In the opinion of the learned Judges of the High Court, the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights.

It is perhaps to be regretted that the learned Judges of the High Court did not give a fuller and clearer explanation of the reasons which influenced them, for the result was that the District Judge failed to grasp the true meaning of the issues framed by the High Court, and again dealt with the question in the same incomplete manner.

He treated the long duration of the tenancy and the uniform and unvarying rate of the rent as a circumstance by itself not sufficient "to raise a presumption of an implied contract that the right of tenancy should be changed into a right of permanent occupancy."

The District Court's findings were returned to the High Court, and the learned Judges pointed out that the District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court, again assumed that the defendants' original right was that of tenants from year to year, and that it lay on them to prove an express or implied contract by

which the right of tenancy from year to year was changed into a right of permanent occupancy.

Instead of a further reference the High Court proceeded to determine this issue and, if and so far as this was an issue of fact—a point on which it is not necessary to express a definite opinion in the circumstances of this case—the Court had power to deal with it under section 103 of the Civil Procedure Code, 1908.

The conclusion at which it arrived was that the defendants had occupancy rights.

This finding, however, is attacked on the ground, first, that the burden of proof was wrongly thrown on the plaintiff, and secondly, that in any case the facts did not justify the inference.

To determine on whom the burden of proof lay it is necessary to ascertain with precision upon what propositions of fact or of law the parties were at variance, and how matters stood when the cases reached the High Court.

The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and, to adopt the language of section 101 of the Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right, the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognised in the series of Madras decisions cited in argument and is, in their Lordships' opinion, not open to doubt.

There are passages in the High Court's final judgment which unquestionably invite the comment that the learned Judges misapprehended the proper incidence of the burden of proof. Thus the learned Judges say :—

"We hold that the mere fact of the plaintiff being Pattadar does not entitle him to any presumption in his favour."

This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned Judges there say:—

"We also hold that even if that fact could be of any use to him, the various circumstances proved, unrebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights."

The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them.

In the end the learned Judges drew the inference—they speak of it as a presumption—in favour of the defendants' occupancy rights, and as finally expressed their determination was unvitiated by any error as to the burden of proof.

Nor is their inference contradictory of any finding of fact by the District Court; on the contrary, it rests on the findings of that Court and in the shape it took in the High Court it certainly had not been negatived by the District Court.

A word of explanation will make this evident. Permanence is not a universal and integral incident of an under-ryot's holding; if claimed, it must be established. This may be done by proving a custom, a contract, or a title, and possibly by other means. Custom is out of the question here; there is no suggestion of it. Contract has been decisively negatived by the finding of the District Court. Title was left untouched, and it was on title that the High Court pronounced in the defendants' favour; for the meaning of their finding is not that there was a subsequent change in the relations of the parties, but that at the inception of those relations the defendants' predecessors possessed occupancy rights.

Conflict with any finding of the District Court being eliminated, it next has to be seen whether there were materials on which the High Court could come to its conclusion. They are minutely indicated in the judgment under appeal, and, in the absence of all information as to the origin of the defendants' holdings, it cannot be said that there is no evidence to support the

High Court's finding. It may be that regarded even as a finding of fact—and it has been so treated throughout—it is not conclusive, though curiously enough it would have had that character had it been pronounced by the District Judge and not by two Judges of the High Court. But after due consideration of the evidence brought to their notice and of all the circumstances, their Lordships see no sufficient reason to interfere with the High Court's conclusion; nor is it in their opinion to be regretted that effect has been given to the very long possession—"immemorial" in the High Court's view—of the defendants and their predecessors.

It has been objected by the appellant that much of the evidence that has been used against him is not relevant, as the long possession, the alienations and the improvements to which it relates have not been traced to the several defendants or their predecessors-in-title. But the plaintiff, in disregard of the provisions of the Code, has united in the same suit not merely several causes of action, but several actions or suits against separate defendants, with the result that in effect the litigation has been conducted and treated throughout as though the defendants were a community with common interests. The plaintiff, therefore, cannot now be heard to object to the use of evidence to which the irregularity of his procedure has given relevance and to which he apparently took no exception when it was tendered at the trial.

The objection might have been formidable had the plaintiff sued the several defendants in separate suits, and their Lordships recognise that in view of the exceptional and irregular character of this litigation this case cannot in this respect be a satisfactory precedent in a properly constituted suit. As it is, however, the objection must fail and the High Court's finding as to the permanence of the defendant's rights in the garden and dry lands must stand.

Following on this finding the High Court, while confirming the decree for possession of the pasture land passed by the lower Courts, ordered that the plaintiff's suits, so far as they sought delivery of possession of the garden and dry lands, be dismissed.

The plaintiff alone has appealed from the High Court's decree, and the present appeals are limited to the garden and dry lands. For the reasons already indicated they must fail.

Their Lordships, therefore, will humbly advise His Majesty that the appeals should be dismissed. The appellant must pay the costs of the appeals.

Appeals dismissed.

Solicitor for the Appellant:—Mr. *Douglas Grant.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 222 OF 1917.

August 25, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Newbould.

RADHARAMAN CHOWDHURI AND OTHERS—APPELLANTS

versus

GOPAL CHANDRA CHAKRAVARTY —RESPONDENT.

Will—Probate—District Judge, order of, holding that objector has no locus standi *—Appeal, whether lies—Revision—Civil Procedure Code (Act V of 1908), s. 115—Hindu Law*—Dayabhaga—*Person interested, right of, to oppose application by stranger for Probate.*

An order by a District Judge, holding that the objector to the grant of Probate of a Will has no *locus standi* to object and that the applicant is entitled to Probate on proof of the Will in common form, is not open to appeal but the order can be revised by the High Court upon an application made to it under section 115 of the Civil Procedure Code. [p. 123, col. 1.]

Where a person applying for Probate of the Will of a Hindu governed by the Dayabhaga School of Hindu Law is a stranger to the family of the deceased testator, a person having some sort of relationship with the family of the deceased has some interest to appear and oppose the application for Probate and is, consequently, entitled to be present at the hearing of the application. [p. 126, col. 1.]

Appeal against the decree of the District Judge, Burdwan, dated the 17th August 1917.

Babus *Bepin Behary Ghose* and *Mohesh Chandra Banerjee*, for the Appellants.

RADHARAMAN CHOWDHURI v. GOPAL CHANDRA.

Babu *Satindra Nath Mookerjee*, for the Respondent.

JUDGMENT.—This appeal arises out of an application for Probate of a Will. The respondent Gopal Chandra propounded a Will said to have been executed by one Krishna Chandra. The appellants Radha Raman and others, who are the grandfather's daughter's son's sons of the deceased, opposed the application. The learned District Judge held that the appellants had no *locus standi* to oppose the grant, and that Probate would be granted to the respondent on proof of the Will in common form. Radha Raman and others have appealed to this Court and an application also has been made under section 115, Code of Civil Procedure, against the order of the Court below.

It has been held in several cases that no appeal lies against such an order. The order, however, can be revised upon the application under section 115, Code of Civil Procedure.

The opposite party being the brother of the sister's husband of the deceased is a perfect stranger to the family, but the Court below held that the petitioners were not heirs and, therefore, had no *locus standi* to oppose the grant of Probate. The question for consideration, therefore, is whether the petitioners have any *locus standi* to oppose the application.

It is contended on behalf of the petitioners that they are heirs. Under the Mitakshara a daughter's son's son in the absence of other heirs succeeds as a *bandhu*. See *Krishnayya* v. *Pichamma* (1) and *Shecbarat Kuari* v. *Bhagwati Prasad* (2). A grandfather's daughter's son's son stands on the same footing. But the question is whether a daughter's son's son is an heir under the Dayabhaga, because if he is not, *a fortiori* the grandfather's daughter's son's son cannot be held to be in the line of heirs.

A daughter's son's son offers no oblation to the maternal grandfather of his own father, and it is accordingly contended on behalf of the opposite party that he is no heir according to the test laid down in the case of *Gooroo Gobind Shaha* v. *Anund Lall Ghose* (3).

That the principle of spiritual benefit governs the law of inheritance in the Dayabhaga was laid down by the Full Bench in the above case, and again by another Full Bench in the case of *Digumber Roy Chowdhry* v. *Moti Lal Bundopadhya* (4).

Attempts have been made from time to time to induce the Court to have the matter reconsidered by the Full Court on the ground that spiritual benefit is no test, at any rate not the only test, of heirship, and that the Full Bench took an erroneous view of the fundamental principles which underlie the Dayabhaga and consequently arrived at an incorrect conclusion. These attempts have, however, been unsuccessful, and this Court has held that the matter should not be re opened. See *Kedar Nath Roy* v. *Amritalal Mookerjee* (5) and *Kailash Chandra Adhikary* v. *Karuna Kantha Chowdhury* (6).

It must now, therefore, be taken as settled that the principle of spiritual benefit is the test of heirship under the Dayabhaga, whatever view might have been taken of the matter had it been *res integra*. It is to be observed that in all the cases cited above, the question was who was the preferable heir, according to the principle of spiritual benefit. In the present case no question of preference arises as between the petitioners and the opposite party, and, therefore, there is no question as to the superiority of spiritual benefit to be conferred on the deceased by one as compared to that by the other. The opposite party is a perfect stranger to the family and in no circumstances can he be in the line of heirs, whereas the petitioners are the daughter's son's sons of the grandfather of the deceased. As stated above, their position is similar to that of a daughter's son's son, and the question, therefore, is whether a daughter's son's son is excluded from inheritance under the Bengal School even where there is no other heir at all.

The Dayabhaga (Chapter XI, section 11, verse 2) in discussing the right of the daughter's son to succession, says: "It is the daughter's son who is the giver of

(1) 11 M. 287; 4 Ind. Dec. (N. S.) 200.
(2) 17 A. 523; A. W. N. (1895) 117; 8 Ind. Dec. (N. S.) 660.
(3) 18 W. R. 49 (F. B.); 5 B. L. R. (F. B.) 15.
(4) 9 C. 562; 12 C. L. R. 204; 7 Ind. Jur. 529; 4 Ind Dec. (N. S.) 1023.
(5) 17 Ind Cas. 283; 16 C. L. J. 342; 17 C. W. N. 492.
(6) 19 Ind. Cas. 677; 18 C. W. N. 477.

the funeral oblation not his son, nor the daughter's daughter for the funeral oblation ceases with him." The daughter's son's son is, therefore, expressly excluded from inheritance.

On behalf of the petitioners, however, reliance is placed upon the arguments advanced by Raj Kumar Sarvadhikari in his Tagore Lectures in favour of the heritable right of a daughter's son's son. The first is that the mere fact that a daughter's son's son is not a Sapinda heir does not show that he is excluded altogether from inheritance. It is pointed out by him that in the verse cited above Jimutavahana is discussing the preferable right of a Sapinda to succession. The daughter's son is a Sapinda heir but his son is not so; he is not in the line of Sapinda heirs because he is not competent to offer an oblation. A great-grandson's son is not a Sapinda and, therefore, cannot succeed as a Sapinda, but he succeeds as a Sakulya. The mere fact, therefore, that a person cannot succeed as a Sapinda does not show that he is excluded altogether.

The next and the main ground which Raj Kumar Sarvadhikari urges in support of his view is that a daughter's son's son is a Samanodaka and a Sakulya and, therefore, is entitled to inherit on failure of nearer heirs even on the principle of spiritual benefit.

The reason given by him may be summarised as follows:—The Dayabhaga, after dealing with the succession of Sapindas *ex parte paterna* and *ex parte materna* and that of Sakulya (distant kinsman), in Chapter XI, section 6, verse 23, states: "If there be no such distant kindred the Samanodakas or kinsmen allied by a common libation of water must be admitted to inherit as being signified by the term Sakulya (conformably with Budhayana's explanation of it).

After the near Sakulyas, therefore, the Samanodakas come in, and these Samanodakas are also mentioned by Jimutavahana as Sakulyas, they are, therefore, the remote Sakulyas. Though every person who presents water is, properly speaking, a Samanodaka of the deceased, the law of inheritance has given a limited significance to the term. Every Samanodaka cannot be heir because every person is competent to offer libation of water to every other person, and in fact in making Tarpan water is offered to every created being. In order that he may inherit the Samanodaka must be also a Sakulya, *i. e*, must belong to the Kula or family.

If the word Kula be understood as meaning only the agnatic family, then the daughter's son's son would not belong to the same Kula, but Jimutavahana has not confined the expression to the agnatic family alone. The male descendants of the daughters of the family known as *bandhus* in the Mitakshara have been included by him in the expression Kula (family) of the deceased. "Such kinsman, having sprung from his family though of different male descent as his own daughter's son or his father's daughter's son or having sprung from a different family as his maternal uncle or the like, is heir." It appears, therefore, that not only those who bear the same Gotra or family name, but also those who, though they do not bear the family name, are sprung from the same line, *i. e.*, cognatic kinsmen known as *bandhus* have been treated as belonging to the same Kula.

Jimutavahana has not stated who these Somanodakas are. Srikrishan Tarkalankar has treated them as "remote Sakulyas or persons who are sprung from the same family, but whose right of inheritance is postponed to the near Sakulyas who confer a larger amount of benefit on the deceased." Sarbadhikari, pages 842—843.

Raghunandan has not mentioned the Samanodakas as a class of heirs, but the three classes of *bandhus* (under the Mitakshara) are stated by him to be entitled to the inheritance. Most of them are heirs being connected by Parvana oblations. The rest must, therefore, come in as Samanodakas (as conferring spiritual benefit). He has mentioned the near Sakulyas. The Samanodakas, therefore, must be taken to be the remote Sakulyas.

"As the author of the Dayabhaga has not given us any interpretation of the term Samanodaka himself, we shall be justified in consulting other writers of the Bengal School who have followed in the footsteps of Jimutavahana for an explanation of the term. We have seen that Srikrishna takes it to mean remote Sakulyas or persons who are sprung from the same family but whose

right of inheritance is postponed to the near Sakulyas who confer a larger amount of benefit on the deceased. Let us now see what Raghunandan says on the subject. "We have the authority of Harita for saying that the relation of Samanodaka ends only where birth and family name are no longer known. Samanodakas are kinsmen who came in after the partakers of the divided oblations. If the details regarding the descent of a given person from a common ancestor are known or if it is known in a general manner that he is simply sprung from the family, he is reckoned as a Samanodaka.... If our interpretation of the word Samanodaka be correct, it would follow that certain male descendants of the daughters of the family are entitled to inheritance. It would follow, I mean ,that according to the Dayabhaga, the daughter's son's son and similar cognate kinsmen are also heirs"..... "Only two conditions then are necessary to entitle a kinsman to be ranked as a Samanodaka heir. He must present the water and be 'allied by the family.' Both these conditions are met with in the daughter's grandson. On what ground then can he be excluded from succession? Even by the principle of spiritual benefit he ought to take his natural place as heir of his father's maternal grandfather."

It was also argued on behalf of the petitioners that we should follow the Mitakshara in matters not expressly dealt with by the Dayabhaga, and reliance was placed on a passage in the judgment of Mitra, J., (sitting singly) in the case of *Akshay Chandra Bhattacharya* v. *Hari Das Goswami* (7), where he observed that in cases not contemplated by Jimutavahana or his followers the law should be interpreted on rational lines consistently with principles in similar cases, and the decisions of our Courts should not be based on a blind adherance to the principle of spiritual efficacy, as it may lead to the violation of other recognised principles consistent with natural justice, and that in all cases of absence of any express texts or precedents under the Dayabhaga Law, Courts should have recourse to the theory of propinquity and natural love and affection as adopted by Vijnaneswara and the commentators of the more ancient and orthodox schools of Hindu Law.

It is also pointed out on behalf of the petitioners that the Dayabhaga lays down that on failure of heirs, the spiritual preceptor or a fellow pupil succeeds; and in default of them the King gets the property. That under the Bengal Tenancy Act in the case of an occupancy holding it goes to the Zemindar, who may be a Muhammadan or a Christian; and that it is difficult to see how it would be consistent with the doctrine of spiritual benefit that the estate should devolve upon a person belonging to a different religon than upon a daughter's son's son or a grandfather's daughter's son's son.

On the other hand the respondents rely upon the view taken by Banerjee, J., in the case of *Dino Nath Mchunto* v. *Ohundi Koch* (8), *viz.*, that "the scheme of the Dayabhaga is radically distinct from and to some extent incompetible with the scheme of the Mitakshara and the one cannot well be made to supplement the other so far as the law of inheritance is concerned. Nor can it be said that the Dayabhaga is silent upon this point, seeing that although the Dayabhaga may be silent so far as express enumeration goes, it is not silent so far as the indication of general principle according to which heirship is to be determined is concerned, that general principle being clearly the principle of spiritual benefit" and which is settled by authority.

Now the question whether the daughter's son's son or the grandfather's daughter's son's son can come in as an heir, on failure of heirs, depends upon whether Raj Kumar Sarvadhikari has taken a correct view as to the meaning of the words Sakulya and Samanodaka upon which he bases the right of the daughter's son's son to succession on the principle of spiritual benefit under the Dayabhaga; or whether the view that the Dayabhaga should be supplemented by the Mitakshara, in cases where there is no heir according to the principle of spiritual benefit, is correct. The question, however, cannot be finally decided in the present proceedings which arise out of an application for Probate, and when the persons who would be entitled to get the property (on intestacy) on failure of heirs, *viz.*, the Crown or the Zemindar (if the property is an occupancy holding) are no parties to the proceedings.

(7) 35 C. 721; 12 C. W. N. 511.

(8) 16 Ind. Cas. 349; 16 C. L. J. 14.

RAHIT SAHU v. MAHADEO CHAUDHURI.

As already stated, the opposite party is a perfect stranger to the family, whereas the petitioners claim some sort of relationship (however distant) with the family of the deceased and if the Will is disproved, the questions stated above may have to be decided in a title suit between the petitioners and the person entitled to the estate of the deceased on failure of heirs.

Without deciding any of the said questions, we think that in the particular circumstances the petitioners have some interest in appearing and opposing the application for Probate. We accordingly set aside the order of the Court below and direct that the application for Probate be heard in the presence of the petitioners as early as possible.

The appeal is dismissed on the ground that no appeal lies and the above order is made upon the application under section 115 of the Civil Procedure Code. We make no order as to costs. Let the records be sent down without delay.

Appeal dismissed;
Rule made absolute.

PATNA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 55 OF 1917.
Feburary 9, 1920.
Present:—Mr. Justice Jwala Prasad and
Mr. Justice Das.
RAMHIT SAHU AND OTHERS—OPPOSITE PARTY—APPELLANTS
versus
MAHADEO CHAUDHURI AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 23—Tenant, right of, to cut trees—Landlord, right of, to timber—Land Acquistion Act (I of 1894), s. 18—Reference by Collector after money awarded withdrawn, legality of.

Although under section 23 of the Bengal Tenancy Act a tenant has the right to cut trees growing on his holding, the landlord is entitled to the timber of the trees when cut, unless the tenant can establish a custom to the contrary. [p. 126, col. 2.]

The fact that the compensation awarded under the Land Acquisition Act is withdrawn by the party to whom it was awarded does not affect the right of the party who is entitled to receive it to have a reference made to the Court under section 18 of the Act. [p. 127, col. 1.]

Appeal from a decision of the District Judge, Mozufferpore, dated the 13th June 1917.

Mr. *Bimola Charan Singh*, for the Appellants.

Mr. *S. N. Palit*, for the Respondents.

JUDGMENT.—This appeal arises out of a reference under the Land Acquisition Act. The District Judge who heard the reference has awarded compensation, fixed by the Collector in respect of the trees, to the landlords-respondents. The tenants, who are appellants before us, contend that they were entitled to the said compensation inasmuch as the trees belonged to them. There is no substance in this contention. Under the Common Law the property in trees belongs to the landlord. Section 23 of the Bengal Tenancy Act relied upon by the appellants has nothing to do, for that section only declares the right of tenants, to cut the trees, but that does not entitle them to the timber of the trees when cut, unless a custom to the contrary is established, the onus whereof is upon the tenants. But upon the finding of the Court below there is no evidence of any custom supporting the tenants' right to the trees. This contention must, therefore, be overruled.

The next contention of the appellants is that the award by the Collector in respect of the trees having been withdrawn by them from the Land Acquisition Department, the reference to the District Judge was incompetent and that the District Judge had no jurisdiction to entertain the reference.

The award in this case was made on the 27th March 1915 and the objection to the apportionment or to the allotment of the compensation in respect of the trees to the tenants was made by the landlords on the 30th April 1915. This was well within the time prescribed by section 18 of the Act for an application by any person not accepting the award made by the Collector to refer the same for the determination of the Court. Reliance has been placed upon the case of *Gobinda Ranee Dasee* v. *Brinda Ranee Dasee* (1), in which a doubt was expressed by the learned Judges who decided that case as to whether section 18 or section 30 of the Act can have any

(1) 35 C. 1104; 12 C. W. N. 1039.

application after money has actually been paid under section 31 (2). In that case one of the parties to the award was a Hindu widow and there was no dispute as to the amount of the compensation or to the interest of the persons in the amount awarded, or to any apportionment thereof, and the money awarded by the Collector was withdrawn according to the allotments made by him by the several persons entrusted therewith. Six months after the award, that is, long after the period prescribed for applying for a reference under section 18, an application for reference was made by a daughter of the widow who was not a party in the acquisition proceedings. The object of the reference was to have a determination as to the limited interest of the widow and as to her not having any power to alienate the land referred to in clause (2) of section 31. That case does not appear to have any bearing on the present case.

It does not stand to reason why the right of the respondent to have a reference made to the Court should be affected by the appellants having taken out the money from the Collector, behind the back of the respondents. The proviso to sub-section 2 of section 31 clearly provides for such an emergency and makes the person who may have received the whole or any part of any compensation under the Act to pay the same to the person lawfully entitled thereto. The Court below is, therefore, right in the view that it has taken. The appeal is dismissed with costs.

We may, however, observe that sub-section 2 of section 31 requires that the Collector shall, when making reference under section 18 and when the parties to the acquisition do not receive the amount tendered by him, deposit the amount of the compensation in the Court to which the reference is submitted. We fail to find out the circumstances under which the money was paid to the opposite party and why the Collector permitted the money to be withdrawn before the expiry of the term fixed by section 18 for objecting to the award and applying for reference. The District Judge had also a right to demand the deposit of the money in Court when the reference was made and to insist upon its being done, and in our opinion he ought to have done so before disposing of the reference so that the money could be ready for payment forthwith in pursuance of the decree made by him.

As to the cross-appeal, we think that the decree of the Court below is wrong in so far as it has not awarded the additional compensation of 15 per cent. on the value assessed in respect of the trees. That amount has been specified in the schedule attached to the award under section 11, pages 7—10 of the paper book. The decree of the Court below must, therefore, be amended and modified by awarding 15 per cent. of the compensation on the value of the trees. The cross-appeal is, therefore, decreed with costs.

Decree amended.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 803 OF 1919.

January 12, 1920.

Present:—Mr. Justice Richardson.

HARICHARAN MANDAL—PLAINTIFF—APPELLANT

versus

BIGHORE GAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 49—Notice to quit—Mode of service—Tenants-in-common—Duty of Court—Civil Procedure Code (Act V of 1908), O. V, r. 15.

A notice to quit under section 49 of the Bengal Tenancy Act should be served in the manner prescribed in the Civil Procedure Code for the service of a summons. Where such a notice is issued to tenants-in-common, and one of the tenants receives the notice for all, the Court should, in deciding whether service has been properly effected on all, consider the facts with reference to Order V, rule 15, of the Civil Procedure Code, or with reference to the rule that service upon one joint tenant is *prima facie* evidence that it reached all. [p. 129, col. 1.]

Appeal against the decree of the Second Additional District Judge, 24-Pergunnahs, dated the 18th of February 1919, reversing that of the Munsif, 1st Court, at Basirhat, dated the 20th of March 1918.

FACTS appear from the judgment.

Babu *Monomohan Banerjee* (for Babu *Saral Chandra Mukherjee*), for the Appellants.—

HARICHARAN MANDAL *v.* BAIGHORE GAIN.

The appeal arises out of a suit for ejectment after service of notice under section 49 of the Bengal Tenancy Act. The defence, *inter alia*, was that there was no notice of ejectment under section 49 and that if there was any notice it was not served on the defendants. The learned Munsif found that notice had been duly served on the defendants who were members of a joint Hindu family and decreed the suit. On appeal the learned Second Additional District Judge reversed the judgment and decree of the first Court and dismissed the suit. The learned Judge found that the defendants, although not joint in mess, all lived in the same *bari* and held that service of notice on defendant No. 1 alone (as the other defendants could not be found) was not a proper or any service on the other defendants. Hence the appeal was allowed on this ground alone.

The sole question, therefore, that arises for consideration in this appeal is whether the service of notices to quit under section 49 of the Bengal Tenancy Act on one of the several defendants residing at the same house, is valid and in accordance with law.

My submissions are: The mode of service of notices to quit under section 49 of the Bengal Tenancy Act is to be in accordance with the provisions of the Code of Civil Procedure. (Reads rule 3 of the Government Notification, dated 31st October 1907 and refers to *Tara Das Malakar* v. *Ram Doyal Malakar* (1) and *Babu Ram Roy* v. *Mahendra Nath Samanta* (2).] In cases like the present service of notice may be made on any male member living in the same house. See Order V, rule 15, Civil Procedure Code. In other words, the living together of the defendants in the same house is the only essential element that is required by law. The evidence on the record, which the learned Judge ought to have taken into consideration, amply bears out that the notices were received by defendant No. 1 on his own behalf as well as on behalf of defendants Nos. 2—4 who were living in the same *bari* and that he gave his thumb impression on the receipt which has been found to be his by the expert who was examined. Further it is a well-known principle of English law that service of notice upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants. *Doe d. Macartney* v. *Orick* (3), *Doe d. Bradford* v. *Watkins* (4) and *Pollock* v. *Kelly* (5).

The principles laid down in the above cases have been followed uniformly in India. See *Rajoni Bibi* v. *Hafisonnissa Bibi* (6); also the recent Privy Council ruling reported as *Harihar Banerji* v. *Ramsashi Roy* (7). In view of these cases I submit that the learned Sub Judge has erred in holding that the service of notice on defendant No. 1 alone, in the absence of the other defendants who were his nephews living in the same house, is invalid and illegal. The case ought to go back for trial on the merits on which the learned Judge did not decide the case at all.

Babu *Pares Chandra Mitra*, for the Respondent.—The learned Judge has distinctly found that the evidence on both sides would go to show that the defendants lived separately. The learned Judge has fully considered the evidence on the record. The other side cannot in second appeal go behind the finding of the learned Judge and rely on that of the Munsif to show that the defendants lived in joint mess. The defendants did not form a joint Hindu family inasmuch as they lived in separate mess. The case in *Harihar Banerji* v. *Ramsashi Roy* (7) is rather in my favour (Reads the judgment of Fletcher, J.)

The case is wholly concluded by findings of fact. The other side has not made out a case for remand. The appeal should be dismissed.

Babu *Monomohan Banerjee* replied in brief.

JUDGMENT.—The plaintiff, who is the appellant to this Court, is said to be a *raiyat* and the defendants are said to be his under-*raiyats*. The suit was brought for ejectment of the defendants after service of notice to quit under section 49 of the Bengal Tenancy Act. The Munsif gave the plaintiff a decree. The learned District

(1) 2 C. W. N. 125.
(2) 8 C. W. N. 454.
(3) (1805) 5 Esp. 196; 8 R. R. 848.
(4) (1806) 7 East 551; 103 E. R. 213; 3 Smith. 517; 8 R. R. 670.
(5) (1856) 6 Ir. C. L. R. 367.
(6) 4 C. W. N. 572.
(7) 48 Ind. Cas. 277; 29 C. L. J. 117 at p. 135; 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J 707; 9 L. W. 148; 46 C. 458; (1919) M. W. N. 471; 1 U. P. L. R. (P. C.) 56; 45 I. A 222; 25 M. L. T. 159; 21 Bom. L. R. 522 (P. C.).

Judge has dismissed the suit on the sole ground that the notice to quit served on defendant No. 1 does not affect the other defendants and that there has been no proper or any service of notice on them. The defendants are four in number. Defendants Nos. 2 and 3 are the nephews of the defendant No. 1 and defendant No. 4 is his brother's widow.

It is not disputed that the defendants are tenants-in-common of the holding in question. Under the rules framed by the Government notices under section 49 of the Bengal Tenancy Act have to be served in the manner provided in the Code of Civil Procedure for the service of a summons. It is said that the notices to quit on the defendants Nos. 2, 3 and 4 were in fact issued by the Court and that they were left with the defendant No. 1 who gave a receipt for them. In arriving at his decision the learned Subordinate Judge does not appear to have considered the facts with reference to the provisions of rule 15 of Order V of the Code of Civil Procedure or with reference to the observations regarding the service of notice to quit on tenants-in-common made in the case of *Rajoni Bibi* v. *Hafizonessa Bibi* (6). The ruling of the Privy Council in the case of *Harihar Banerjee* v. *Ramsashi Roy* (7) may also be referred to in the latter connection.

In my opinion, the judgment and decree of the lower Appellate Court must be set aside and the case be remitted to that Court for a fresh decision whether there was a valid service of notice to quit on the defendants and for the determination of the other questions which arise in the case. It will be for the lower Appellate Court to make a decree in accordance with the conclusions at which it may arrive when the appeal is reheard.

Costs will abide the result.

Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 94 OF 1918.

October 9, 1919.

Present:—Sir Henry Drake-Brockman, Kt., J. C., and Mr. Findlay, A. J. C.

PADAMRAJ AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOPIKISAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Account, settled, when can be re-opened—Hindu Law—Joint family—Business carried on by co-parcener, whether family business—Presumption—Minor, liability of—Burden of proof—Ancestral trade—Manager, acts of, whether binding on minor—Minor, when can be partner—Evidence—Account books, withholding of—Presumption.

A settled account cannot be re-opened without specifically charging at least one definite and important error and supporting that error with evidence confirming it. [p. 135, col. 1.]

Moulvi Nizamuddin v *Kasturchand*, 15 C. P. L. R. 61, *Parkinson* v. *Hanbury*, (1867) 2 H. L. 1 at pp. 11, 19; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642, *Williamson* v. *Barbour*, (1878) 9 Ch. D. 529; 50 L. J. Ch. 147; 37 L. T. 698, relied on.

There is no presumption that a Hindu family has any joint property or that a business carried on by a co-parcener is a family business. [p. 135, col. 2.]

Vithal v. *Siwa*, 15 Ind. Cas. 933; 8 N. L. R. 82, *Ram Kishen Das* v. *Tanda Mal*, 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 723, followed.

If a plaintiff seeks to impose upon a minor in a joint family any liability as a member of a family partnership, it is for him to show how the minor's liability arises. [p. 135, col. 2.]

Vadilal Lallubhai v. *Shah Khushal Dalpatram*, 27 B. 157; 4 Bom. L. R. 968, *Baldeodas* v. *Manekchand*, 3 Bom. L. R. 144, followed.

A minor member of a joint family upon whom an ancestral trade has descended is bound by all acts of the manager, or the adult members acting as managers, which are necessarily incidental to and flowing out of the carrying on of that trade. But where a business is not ancestral, a minor member is not necessarily interested in a business carried on by the major members of the joint family to which he belongs. [p 135, col. 2.]

A minor member of a joint family cannot become a partner in an ancestral business unless on attaining full age he takes active steps to be recognised as such [p. 135, col. 2.]

Lutchmanen Chetty v. *Siva Prokasa Mudaliar*, 26 C. 349; 3 C. W. N. 190; 13 Ind Dec (N. S.) 826, *Bishambhar Nath* v. *Fateh Lal*, 29 A. 176; 4 A. L. J. 94; A. W. N. (1907) 13, *Lalji Nensey* v. *Keshowji*, 17 Ind. Cas. 193; 37 B. 340; 14 Bom. L. R. 840, followed.

A minor member of a joint family firm can only be liable to the extent of the assets of the business, *i. e.*, the property which has been used by the family for the purpose or which has been acquired therefrom. [p. 135, col. 2.]

Where a party persistently omits to produce his books of account, there is a justifiable presumption

that they are not produced because they do not support him. [p. 137, col. 2.]

Appeal against the decree of the District Judge, Nimar, in Civil Suit No. 11 of 1915, decided on the 31st of August 1918.

Mr. *M. V. Joshi*, for the Appellants.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises was filed at Khandwa on the 27th April 1915 to recover Rs. 19,001 with interest at 7 annas 9 pies per cent. per mensem from the 15th July 1912. This claim has been decreed in full and interest at the aforesaid rate has been allowed from the date of the suit to the date of the decree (31st August 1918). The defendants have preferred this appeal.

The plaintiffs constitute a firm known at Khandwa as Radhakishan Jaikishan which has three shops, one at Khandwa in the Nimar District, one at Harda in the Hoshangabad District and one at Sanawad in the Indore State. In addition to other business the firm works as Arhtia or commission agent and in that capacity began business in October 1910 with the defendants, who are described in the plaint as members of a joint family carryig on business at Amraoti and also in Calcutta under the style "Phulchand Padmraj", the defendant Padamraj being the manager. The other defendants are Dharamchand and Hariram, the brother and son of Padamraj respectively, of whom Hariram is still a minor.

The plaintiffs bought cotton for the defendants and consigned it as directed from time to time. The plaintiffs' case is that in July 1912 Radhakishan, father of the plaintiff Sunderlal and head of the firm at the time, but since deceased, went with the plaintiff Ranchoddas and two clerks (Amolakchand and Ramkishan) to Calcutta, to settle their account with the defendants whose principal shop is at Calcutta where Padamraj himself resides. On the 11th July 1912 Padamraj agreed to be responsible for Rs. 7,000 out of the sum due to the plaintiffs from the local firm D. B. Mehta, for whom the plaintiffs had bought cotton on commission in the Mahajani year beginning with Diwali 1910 and ending with Diwali 1911. On the 13th idem accounts were made up between the plaintiffs' firm and the defendants' firm, when the following amounts aggregating Rs. 17,875-7-9 were found due:—

(1) Rs. 8,075-0-6	on account of purchases made at Khardwa on behalf of a third party.
(2) Rs. 3,480-7-3	on account of purchases made at Khardwa for the defendants.
(3) Rs. 5, 105	on account of purchases made at Sanawad for the defendants.
(4) Rs. 215	on account of purchases made at Harda for the defendants.
(5) Rs. 1,000	being the share of the loss sustained on 505 bales of cotton which had been bought and sold by the two firms in partnership.

Padamraj as the manager of the defendants' firm accepted liability for Rs. 19,001 in all, the plaintiffs relinquishing Rs. 5, 874-7-9. Two days later Padamraj signed an acknowledgment (Exhibit P-9) in the plaintiffs' account books and at the same time agreed to pay the balance with interest at 7 annas 9 pies per cent. per mensem at Khandwa.

Padamraj refused to act as guardian *ad litem* for his minor son and three written statements were put in for the defence. It was admitted in all that the defendants are members of a joint family having shops at Calcutta and Amraoti, but it was denied that Padamraj is the manager of the family firm and that he agreed to pay the plaintiffs Rs. 7,000 out of the sum alleged to be due by Messrs. D. B. Mehta and Co. or that accounts were made up and the balance acknowledged at Calcutta in July 1912. The defendant Dharamchand further pleaded that he was not bound by any settlement or acknowledgment made by Padamraj. Hariram went further and repudiated all liability to the plaintiffs, on the ground that he never took any part in the business of the defendants' firm which he alleged to consist of his co-defendants alone.

Certain preliminary issues were framed

on the 1st November 1916 after the plaintiffs had successfully moved this Court in Civil Revision No. 202 of 1915, decided on the 3rd August 1916 [*Gopikisan* v. *Padamraj* (1)], to set aside an order passed by the District Judge on the 7th August 1915 staying the suit under section 10, Civil Procedure Code. On the preliminay issues another District Judge decided on the 11th August 1917 that the original contract of Arhat was made in Khandwa and that the defendants were to make payments there, the suit being, therefore, maintainable at that place. The followig issues were then framed:—

"1. Did the defendant Padamraj in Calcutta on the 15th July 1912 on account stated between the parties acknowledge a liability for Rs. 19,001 as alleged?

"2. Did he promise in consideration of being released from a further liability of Rs. 5,874 and odd to pay the same in Khandwa with interest at 7 annas 9 pies per cent. per mensem?

"3. If issue No. 1 be proved, but not issue No. 2, what interest should be allowed, if any?

"4. Had Padamraj power to bind the other defendants (1) by his acknowledgment, and (2) by his novation of contract?

"5. Relief and costs."

The judgment was written by the Fourth District Judge who handled the case. This officer recorded the evidence of five witnesses of the plaintiffs including the plaintiffs, Ranchoddas and Deokishan, themselves and the evidence of the defendant, Padamraj, for the defence besides completing the evidence of the plaintiffs' sixth and eighth witnesses, Amolakchand and Ramkishan, who had been examined in April and May 1917 by one of his predecessors. Three witnesses for the plaintiffs and two for the defendants were examined on commission in Calcutta; another commission was issued to Amraoti on which one witness for the defence was examined. The plaintiffs formally closed their case on the 8th May 1918 and the defendants theirs on the 20th August following, but the plaintiffs were allowed on the last mentioned date to examine Amolakchand and Ramkishan further and to put into the witness-box the plaintiff Deokishan and three other persons, named Tejkaran, Goverdhandas and Bansidhar, to formally prove their account books which the plaintiff Deokishan produced in original for the purpose. The defendant then asked for permission to produce their account-books and to prove them, but the District Judge refused permission on the ground that the defendant had so far filed no accounts or extracts from accounts.

The District Judge found that accounts were made up at Calcutta and an acknowledgment signed as alleged by the plaintiffs; that in consideration of being allowed a short time to pay the amount due, Padamraj agreed to pay the same at Khandwa with interest; and that Padamraj was the manager of the family firm and had authority to bind the other defendants both by his acknowledgment and fresh promise to pay. As already stated, the claim with interest up to the institution of the suit was decreed in full; future interest was, however, refused.

The main question raised in this appeal is whether the plaintiffs' evidence justified the finding that Padamraj signed Exhibit P 9 and promised to pay the balance due within a short time. The witnesses relied on in this connection are Amolakchand (P. W. No. 6), Ramkishan (P. W. No. 8), the plaintiff Ranchoddas (P. W. No. 9), Jiwandas (P. W. No. 14) and Makundlal (P. W. No. 15), of whom the last two were examined on commission. Before dealing with the reasons put forward by the appellants for discrediting the story of the settlement, it seems desirable to quote the following from the defendant Padamraj's deposition recorded by the District Judge on the 20th August 1918.

Examination-in-chief.—"I had cotton dealings with the plaintiffs I had dealings with the plaintiffs on behalf of D. B. Mehta and Co. and some on my own account. No account has been made between the plaintiffs and me. There was an account made of the dealings between D. B. Mehta and Co. and the plaintiffs. The account was made at Calcutta. No other account was made at that time. No account of my dealings was made."

Cross examination.—"Dharamchand is 3 or 4 years younger than I. Hariram is my son.

(1) 37 Ind. Cas. 510; 12 N. L. R. 174.

Our family is joint. The Amraoti business is managed by Dharamchand and I manage the Calcutta business. We have two shops, one at Calcutta and one at Amraoti. The head office is at Calcutta. None of the Amraoti business is done at Calcutta. I am in charge at Calcutta. An account of both the Calcutta and Amraoti shops of the profit and loss for the year is made at Calcutta by Dharamchand and myself. Some accounts are made at Diwali and some are not made. An account is made every year to see what is the profit and loss of each shop. We keep accounts of both shops according to the Mahajani system. In 1966-67 and 1967-68 I had dealings with the plaintiffs on behalf of D B. Mehta and Co..... *Kachcha* accounts were rendered to me before the suit but not *pacca* accounts. I did not state or inform the plaintiffs that there was anything wrong in these accounts. These accounts were sent with the consignments. These accounts are still in my shop. I never compared them with my own accounts.

"The account of D. B. Mehta and Co. was made at Calcutta in my presence. Radhakishan, Ranchoddas and a *munim* had come on behalf of the plaintiffs for the account. The *munim* was perhaps Singa. (Ram Singh Singai here produced in Court.) I do not know whether Amolakchand came or not.

"The accounts of D. B. Mehta and Co. and my own accounts with the plaintiffs were closed in the same season. If my account-books had been present, my account would have been settled at the same time as D. B. Mehta and Co.'s."

The admissions thus made are very important, inasmuch as they show that the defendant Padamraj at Calcutta was not without facilities for checking there the accounts of both the Calcutta and Amraoti shops and that the representatives of the plaintiffs' firm did visit Calcutta to come to a settlement with D. B. Mehta and Co.

As the District Judge remarked in the ninth paragraph of his judgment, it is most improbable that the opportunity of the visit to Calcutta was not taken to come to some settlement with the defendants, with whom transactions had ceased for about a year. The persons said by the plaintiffs to have gone to Calcutta are Radhakishan, the then head of the plaintiffs' firm and the manager of the Khandwa shop, the plaintiff Ranchoddas who managed the Harda shop and Amolakchand and Ramkishan, *gomashta* and *munim* of the Sanawad and Khandwa shops respectively. As already shown, Padamraj, while admitting that Radhakishan, Ranchoddas and Ramkishan were of the party, was not prepared to deny that Amolakchand also came. The story told by Amolakchand (P. W. No. 6), Ramkishan (P. W. No. 8) and Ranchoddas (P. W. No. 9) is supported to some extent by the evidence of Jiwandas (P. W. No. 14) and Makundlal (P. W. No. 15) examined at Calcutta and seems to us both consistent and probable. The principals put up in a *dharamsala* and after settlement with Mehta and Co. the two clerks went to the defendant Padamraj's shop and there made up the accounts with the aid of Padamraj's account-books and extracts from the plaintiffs' account books which the party had brought with them. Padamraj, being unable to pay the entire balance of Rs. 24,875, offered to pay Rs. 19,001 in cash, if the balance was relinquished and two days' time given him. These terms were accepted, but two days later Padamraj confessed his continued inability to pay and then executed in the plaintiffs' *hisab bahi* the acknowledgment (Exhibit P. 9), promising to send the money to Khandwa in a short time.

Our attention has been called to some discrepancies between the statements of some of these witnesses and it is urged that Radhakishan would have brought all the account-books of the firm with him if he had intended to come to a settlement with the defendants. As for the alleged discrepancies we can find no substantial difference between the accounts given. It is true that Amolakchand said that there was some bargaining at the *dharamsala* regarding the amount which Padamraj was to pay. All that Ramkishan said in cross-examination on the point was:—

"Padamraj offered to pay Rs. 19,001 and the plaintiffs agreed to this at once. There was no bargaining."

The statement quoted, however, should be read with the one made by Ramkishan in his examination-in chief, which indicates that Rs. 19,001 was not reached without some discussion and that when Padamraj offered this sum his offer was promptly accepted. Ramkishan's words were as follows:—

"The account was made at the defendants' shop. Some Rs. 24,800 was found due. After the account was made, we went back to the place where Radhakishan and Ranchoddas were staying and told them. They told us to go and that they would see the defendant. On the same day a little later Padamraj himself came and said that the account had been made and that Rs. 24,800 had been found due. He said that he had suffered loss in the transactions and so he asked the plaintiffs to remit some of the amount. After some discussion it was settled that the defendant should pay Rs. 19,001 in cash and that the balance should be remitted."

In this connection it is to be remembered that though Amolakchand and Ramkishan were old servants of the firm, they are not related to any of the plaintiffs and were not much concerned with the actual amount, if any, to be relinquished by their principals.

It is also urged that Amolakchand did not speak of any tallying of the plaintiffs' accounts with the defendants' accounts, though Ramkishan deposed on this point as follows:—

"Amolakchand and I went together to the defendants' shop. Padamraj was sitting there and the account was checked in his presence by Biharilal. The books of the defendants' Calcutta firm were tallied. The Amraoti account was checked with the Calcutta books."

Ramkishan's evidence is certainly more detailed than that of Amolakchand, but there seems to be no real inconsistency as to the accounting. Amolakchand said that he and Ramkishan went to Padamraj's shop to make the account and gave a summary of the result reached: he does not appear to have been questioned as to the method followed.

With regard to the absence of the plaintiffs' original books we would observe that if they were essential at all they would have been required in connection with the settlement with Mehta and Co. The journey to and return from Calcutta as well as the stay at that city must have occupied not less than a week and the removal of the account-books from three shops at different places would have entailed considerable inconvenience, to say nothing of the risk of losing those important records. Moreover, we are satisfied from the evidence of Amolakchand coupled with the admission of Padamraj that the latter was already in possession of extracts from the plaintiffs' accounts besides having books of his own firm to go by.

It is also pointed out that Amolakchand did not mention any promise by Padamraj to remit the balance agreed upon to Khandwa, although both Ramkishan and Ranchoddas speak of such an express undertaking. We are not prepared on the strength of such a discrepancy as this to disbelieve Ranchoddas and Ramkishan on the question whether there was a promise to remit to Khandwa or not. Amolakchand was the *gumashta* of the Sanawad shop and was, therefore, little concerned with an undertaking which directly concerned the Khandwa shop only.

The appellants' Advocate in view of Padamraj's wholesale denial of the settlement and his signature on Exhibit P.9, asked us to treat the balance of wholly independent witnesses as a matter for suspicion. We cannot, however, think that complete outsiders would have been admitted to the scrutiny of accounts or to the negotiations for a settlement. Jiwandas Puglia (P. W. No. 14), who professes to have been present when Padamraj signed Exhibit P-9, is not altogether an outsider: he was in 1912 and for more than a year afterwards the *munim* of Lakhmichand Kanhayalal of Calcutta, who worked as the plaintiffs' commission agents and under instructions from his employers attended Radhakishan and Ranchoddas daily. Another person said to have been present on the occasion is Sheodas who, however, was Radhakishan's brother-in law and might have been present on the strength of this connection. The plaintiffs

endeavoured to secure the attendance of Sheodas, but were unable to trace him.

Our attention has also been drawn to the fact that Biharilal, who was examined on commission at Calcutta on the 2nd March 1917, was not asked any question regarding the settlement of accounts in July 1912, though according to Ramkishan (P. W. No. 8) Biharilal acted in the matter on the defendants' behalf. This Biharilal is the *munim* of the firm Phulchand-Padamraj, but he was examined at a time when the preliminary issues only were under inquiry. This witness was not questioned about the final settlement. The plaintiffs were represented by a Pleader before the Commissioner who recorded Biharilal's evidence, and it is not likely that his cross-examination regardig the settlement would have been omitted had its existence been in issue at the time. If the appellants wished to rely on Biharilal to contradict Ramkishan, they should have had him further examined after the final issues were framed. Such evidence as Biharilal actually gave includes some particulars which support the plaintiffs' case; for instance, he said that the head office of the firm is at Calcutta, the Amraoti office being a branch only, and that the firm's books are regularly kept in Calcutta, though sometimes filed in Court.

It is a necessary part of the appellants' case that the signature of Padamraj on Exhibit P-9 is a forgery and it is said that satisfactory evidence is lacking to show from the signature itself and admitted signatures of Padamraj that the one on Exhibit P-9 is genuine. Makundlal (P. W. No. 15), the Head Munshi of the Bank of Bengal, Calcutta, was examined in Calcutta and asked to compare some signatures of Padamraj and the alleged signature on Exhibit P-9 with what is admitted to be a genuine signature in one of the Bank's books. Much is made by the appellants of the fact that Makundlal noticed a slight difference between the signature on Exhibit P-9 and that in the Bank's books. Against this, however, must be set the Munshi's opinion as to the admitted signiture of Padmaraj slightly differing from those in the Bank's books and his final opinion that the signature on Exhibit P-9 is that of Padamraj. The appellants made some show of securing the attendance of Mr. Hardless, an expert in handwriting, but gave him up after the plaintiffs had applied for permission to photograph the specimen of signature of Padamraj in the book produced by the Head Munshi. No attempt has been made in this Court to convince us that the lower Court was wrong in seeing a distinct resemblance between the signature on Exhibit P-9 and that on Exhibit P-13, and from our own observation we are disposed to agree with the District Judge in considering the evidence afforded by the signature itself to be unfavourable to the defence.

It is urged for the appellants that the plaintiffs' delay of nearly three years in suing points to their story being false. It is, however, certain from Exhibit P-33, a letter written by the defendants' Pleader at Amraoti in answer to a notice sent by the plaintiffs' Pleader at Khandwa, that the plaintiffs were already in September 1913 relying upon a signature of Padamraj. The plaintiffs had in the previous August addressed the Amraoti shop regarding payment of their money, as appears from the defendant Dharamchand's reply (Exhibit P 29), the signature on which Padamraj in his deposition admitted to be his brother Dharamchand's. In this connection it is significant that the appellants are still unable to point to any inaccuracies in the plaintiffs' accounts and never put in their own accounts at all, although their failure to produce them was adversely commented on by the District Judge in his findings of the 11th August 1917 on the preliminary issues. Padamraj as D. W. No. 3, when questioned on the 20th August 1918 regarding the omission, could give no reason for it and we think it a fair inference that if his accounts were forthcoming they would support the plaintiffs.

The probabilities of the case have been well considered by the lower Court and after criticising the evidence for ourselves, we have no hesitation in concluding that Padamraj executed the acknowledgment (Exhibit P 9) of the 15th July under the circumstances alleged by the plaintiffs. We also accept as true the evidence that Padamraj agreed to pay Rs. 19,001, with interest at Khandwa within a short period, though when the amount was originally fixed the undertaking was to pay it in a day or two; the respite thus granted was

sufficient consideration for the new promise. The suit was, therefore, rightly instituted at Khandwa in view of clause (*c*), section 20, Civil Procedure Code. The first, second, fifth, eighth and ninth grounds of appeal are thus disposed of.

In the fourth ground of appeal objection is taken to the permission the plaintiffs obtained on the 20th August 1918 to formally prove their accounts. In this connection we need only say that no objections having been taken to any of the numerous extracts filed on the 29th April 1915, the necessity to formally prove the original books of account is not apparent. The major defendants in their written statement impeached no particular item, but contended themselves with a general statement of belief that if accounts were made up the plaintiffs would be found indebted to them. This is not a suit based on a mere acknowledgment but on a definite promise to pay following upon an acknowledgment. In July 1912 no part of the plaintiffs' claim could have been time-barred, inasmuch as their dealings with the defendants began only 11 months previously. The settlement of the accounts having been proved, the rule that a settled account cannot be re-opened without specifically charging at least one definite and important error and support that error with evidence confirming it applies: see *Moulvi Nizamuddin* v. *Kasturchand* (2), *Parkinson* v. *Hanbury* (3), *Williamson* v. *Barbour* (4) and *Boo Jinatboo* v. *Sha Nagar Valab Kanji* (5). It is unnecessary to consider the question raised on behalf of the respondents whether the settled account amounted to an "account stated" in the more technical sense of that expression or not: that question could be of importance only if we had to determine whether Article 64 of the Limitation Schedule is or is not applicable.

In the sixth ground of appeal it is urged that neither the defendant Dharamchand nor the minor Hariram can be bound by the acknowledgment or the subsequent promise to pay. On this point we consider that no case for treating the minor appellant as a member of the so-called family firm and so liable for its debts has been made out. It is neither admitted nor proved that the trade carried on by the appellants Padamraj and Dharamchand was an ancestral one and confined as it was, so far as the plaintiffs are concerned, to buying and selling cotton for a single season it may have been of very recent origin. There is no presumption that a Hindu family has any joint property or that a business carried on by a co-parcener is a family business: see *Vithal* v. *Siwa* (6) and *Ram Krishen Das* v. *Tanda Mal* (7). And if the plaintiffs sought to impose any liability on the minor's interest, they should have shown how his liability arises: see *Vadilal Lallubhai* v. *Shah Khushal Dalpatram* (8) and *Baldeodas* v. *Manekchand* (9). In *Ramlal* v. *Lakhmichand Muniram* (10), a case which has frequently been followed, it was laid down by Sausse, C. J., that a minor member of a family upon whom an ancestral trade has descended will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incidental to and flowing out of the carrying on of that trade. But where a business is not ancestral, a minor member is not necessarily interested at all in a business carried on by the major members of the joint family to which he belongs, and there is authority for the proposition that a minor cannot become a partner even in an ancestral business unless on attaining full age he takes active steps to be recognised as such: see *Lutchmanen Chetty* v. *Siva Prakasa Mudaliar* (11) and *Bishambhar Nath* v. *Fateh Lal* (12), both of which cases were decided under the Mitakshara Law, and also *Lalji Nensey* v. *Keshowji* (13). In *Sanka Krishnamurthi* v. *Bank of Burma* (14) it was held that a minor of a joint family firm can only be liable to the extent of the assets of the business, *i. e*, the property which has been used by the family for the purpose or which has been acquired therefrom. A

(2) 15 C. P. L. R. 61.
(3) (1867) 2 H. L. 1 at pp. 11, 19; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642.
(4) (1878) 9 Ch. D. 529; 50 L. J. Ch. 147; 37 L. T. 698.
(5) 11 B. 78 at p. 85; 6 Ind. Dec. (N. S.) 51.
(6) 15 Ind. Cas 933; 8 N. L. R. 82.
(7) 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 723.
(8) 27 B 157; 4 Bom. L. R. 988.
(9) 3 Bom. L R. 144
(10) 1 B. H. C. R. App. 51 at p. 71.
(11) 26 C 349; 3 C. W. N. 190; 13 Ind. Dec. (N. S.) 823.
(12) 29 A 176; 4 A. L. J. 94; A. W. N. (1907) 13.
(13) 17 Ind. Cas. 193; 37 B. 340; 14 Bom. L. R. 840.
(14) 11 Ind. Cas. 79; 35 M. 692; (1911) 1 M. W. N. 385; 21 M. L. J. 620; 11 M. L. T. 56.

similar view was taken in *Raghunathji Tarachand* v. *Bank of Bombay* (15), where the business was ancestral. A like liability is imposed upon a minor partner by section 247, Indian Contract Act: See *Sanyasi Charan Mandal* v. *Asutosh Ghosh* (16). It is admitted for the respondents that the lower Court's decree which makes the minor personally liable must be modified accordingly. We think, however, that having regard to the authorities cited the plaintiffs have made out no case for treating Hariram as a member of the firm at all. It is not suggested that the minor has ever been held out as a member or that the plaintiffs gave credit to the firm on the strength of any joint family assets whatever. On the other hand the evidence adduced by the plaintiffs themselves indicates that the contract with Phulchand Padamraj was entered into on the strength of its working as agent for Mehta and Co. The minor appellant will accordingly be discharged from all responsibility.

As regards the defendant-appellant Dharamchand the contention that he is not liable for the cotton actually supplied by the plaintiffs as commission agents for Phulchand-Padamraj is not seriously pressed. We think it perfectly clear on the evidence that Padamraj was the managing member of the firm and as such competent to bind his adult brother. We have no doubt that the Calcutta shop was regarded as the headquarters of the firm and that the accounts of both shops were regularly made up there. The plaintiffs' behaviour in going to Calcutta is realy explicable only in this basis, for if there was an entirely separate contract as to the Amraoti shop, it would have been a simple matter for them to visit Amraoti also, that place being reached by a short railway journey from Khandwa.

With regard to the question whether Dharamchand can be bound by the *hawala* for Rs. 7,000 said to have been due to the plaintiffs from Mehta and Co., it is necessary to consider the evidence regarding this transaction. We observe in the first place that the defendant Padamraj was admittedly present at the settlement between the plaintiffs and Mehta and Co., and that according to him the plaintiffs gave up Rs. 10 or 12, receiving the balance: thus we have no evidence but that of the plaintiffs to explain this transaction. Amolakchand merely stated that Mehta and Co.'s liability was fully discharged by payment and gave no particulars of the reason why the *hawala* was arranged. Ramkishan was more explicit and deposed as follows:—

"The 1st item of Rs. 7,000 in the account (Exhibit P-9) is for a *hawala* of Rs. 7,000 which the defendant undertook to pay on behalf of D. B. Mehta and Co. to us. We were commission agents for D. B. Mehta and Co. and the defendant was their agent. This *hawala* was given at Calcutta in the office of D. B. Mehta and Co. on Asarh Badi..... .....After the account of D. B. Mehta and Co. had been ascertained, the defendant Padamraj agreed to pay the sum of Rs. 7,000 to us out of the amount due. This *hawala* was entered in D. B. Mehta and Co.'s books. In our books also this sum has been credited to D. B. Mehta and Co. and debited to Padamraj. The sum of Rs. 7,000 must have been credited to D. B. Mehta and Co. in the books, though this is not shown in the account submitted with the plaint. The account of D. B. Mehta and Co. has been settled. We have given them a receipt in full satisfaction. The *hawala* of Rs. 7,000 is mentioned in this receipt."

Ranchoddas in examination-in-chief said:—

"We had to recover about Rs. 36,000 in all from D. B. Mehta and Co. Padamraj had purchased cotton on behalf of D. B. Mehta and Co. and it was on this account that they owed Rs. 36,000."

And in cross examination added:—

"I myself went to D. B. Mehta and Co. Except the Rs. 7,000 for which a *hawala* was taken, the balance due from D. B. Mehta and Co. has been paid. The account was made in D. B. Mehta and Co.'s office. I do not remember whether the money was paid then or later. Padamraj told me that he had overdrawn from D. B. Mehta and Co. to the extent of Rs. 7,000. If I agreed to accept *hawala* of this sum, he said he would get my account settled with D. B. Mehta and Co. The *gumashtas* were present when Padamraj said this."

There is no suggestion from Padamraj that any dispute took place between the

(15) 2 Ind. Cas. 173; 34 B 72; 11 Bom. L. R. 255.
(16) 26 Ind. Cas. 836; 42 C. 225 at p. 233.

plaintiffs and Mehta and Co. at their settlement, and we find it very difficult to believe that Padamraj would have taken over any liability in addition to his own unless it suited the convenience of his firm as a matter of business. In the absence of any documentary evidence for the defence to indicate that Padamraj discharged the firm's debt to D. B. Mehta and Co. by actual payment, we think it a fair conclusion from the plaintiffs' evidence that the *hawala* was given in connection with a debt due by Phulchand-Padamraj to D. B. Mehta and Co. We are not at all impressed by the suggestion offered by the appellants' Counsel that Padamraj's overdraft upon Mehta and Co. represented cash taken by him for his private purposes. As explained by Ramkishan (P. W. No 8), overdrafts occur in the cotton business by reason of the impossibility of knowing the exact amount which should be drawn at a given stage. We would further observe that the defence actually set up, consisting as it does of a wholesale denial of the plaintiffs' story, does not properly admit of the suggestion which has been put before us. We hold then that Radhakishen and the plaintiff Ranchoddas should be taken to have dealt in the matter of *hawala* with Padamraj as representatives of Phulchand-Padamraj.

We have no doubt that Padamraj had implied authority to change the creditor of his firm in the manner alleged by the plaintiffs. Section 25[1], Indian Contract Act, is in the following terms:—

"Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose."

In this way Padamraj should be regarded as having an implied authority to assent to a transfer of a debt due by the firm. Such transfers are exceedingly common in this country and it is not difficult in the present case to assign a motive for Padamraj's act: Mehta and Co. being at Calcutta were favourably situated for pressing their claim, whereas the plaintiffs' firm in Nimar would have more difficulty. In Lindley on Partnership (8th Edition) at page 171, *Lacy* v. *M'Neale* (17) is cited as authority for such an assignment and *Briggs & Co., In re*; *Wright, Ex parte* (18) as authority for a partner's power to assign a debt due to the firm.

With regard to the persistent omission of the defendants to produce their account-books we desire in conclusion to cite the important remarks of their Lordships of the Privy Council in *Muruges.m Pillai* v. *Gnana Sambanda Pandara Sannadhi* (19):—

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough, they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

In that case their Lordships felt free to conclude that if the defendants' account books had contained entries confirmatory of the defence, the defendants would have brought them into Court and we consider that a similar view may properly be taken here.

We hold that the appellant Dharamchand is bound by Padamraj's *hawala*. The result of the appeal then is that the minor appellant Hariram will be wholly discharged from liability on the ground that he is not a member of the firm Phulchand Padamraj. In other respects the appeal is dismissed. The plaintiffs will pay to the minor defendant one-third of the fee for the defendants' Pleader in both Courts and will also bear the costs (Rs. 50) of providing the minor Hariram's guardian *ad litem* with means to conduct his defence. All other scheduled costs in both Courts will be paid by the major defendants.

Decree modified.

(17) (1824) 4 D. & R. 7.

(18) (1906) 2 K. B. 209; 75 L. J. K. B. 591; 95 L. T. 61.

(19) 39 Ind. Cas. 659; 40 M. 402 at pp. 408, 409; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487; 44 I. A. 98 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1042 OF 1919.

January 14, 1920.

Present :—Mr. Justice Beachcroft.

BANAMALI PAUL AND OTHERS —DEFENDANTS NOS. 1 TO 5—APPELLANTS

versus

SATIS CHANDRA DUTT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Batwara *map prepared in partition proceedings between proprietors, admissibility of, as evidence against tenants—Objection as to admissibility, time for taking.*

A *batwara* map prepared in a partition proceeding between the proprietors of an estate is no evidence against tenants of the estate, if it was prepared after their tenancy was created. But where a Commissioner is appointed to make an inquiry with reference to the map and no objection is taken to its admissibility, it is too late to object after he has made his report. [p. 139, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Pabna and Bogra, dated the 22nd of January 1919, reversing that of the Munsif, 1st Court at Pabna, dated the 27th of June 1918.

FACTS appear from the judgment.

Babu *Mohini Mohon Chakravarty* (with him Babu *Bansori Lal Sarkar*), for the Appellants.—The defendants Nos. 1 to 5 are the appellants. The appeal arises out of a suit for establishment of title and recovery of possession. The first Court dismissed the suit, holding that the plaintiff had no possession. The lower Appellate Court decreed the suit. The points are that the Courts ought not to have admitted certain evidence which was inadmissible in evidence according to law. Secondly, there is no finding as to possession. As to my first point, my client was no party to the partition proceedings with the plaintiff's landlord who is also my landlord. These proceedings were initiated after the creation of my tenancy. But I would not be bound by anything done by the landlord. These partition papers were tendered in evidence by the plaintiff against the defendant No. 6 and the other defendants. The case in *Baleswar Bagarti* v. *Bhagirathi Dass* (1) relied on by the learned Subordinate Judge seems to have no bearing on the point. The learned Judge's finding on the question of possession is based on the Commissioner's report, which is also made with reference to the *batwara* papers. Wasilat cannot be decreed unless the Courts find that the plaintiffs were actually dispossessed.

Babu *Dinesh Chandra Roy*, for the Respondents.—The case is one of bondary dispute. The Court below has relied on the Commissioner's report which it has found to be correct. The *batwara* papers were admitted without objection which was, however, taken at a late stage. The report cannot now be challenged in second appeal. As regards mesne profits the decree was that they would be settled at the time of execution when they were applied for. I do not press that point now. The appeal is concluded by the findings of fact.

JUDGMENT.—This appeal is by defendants Nos. 1 to 5 in a suit for title and possession. The plaintiffs claimed that the land in dispute was a part of their homestead in Touzi No. 98. The defendants alleged that the land was situated in Touzi No. 67. They also pleaded limitation and denied that the plaintiffs had ever been in possession and that they had dispossessed them. The Munsif dismissed the suit, but it was decreed on appeal by the Subordinate Judge, who relied mainly on the report of a Commissioner who had been appointed to make a map and report.

Two points have been taken in this appeal. The *first* is that the Subordinate Judge relied on evidence which was not admissible, and *secondly*, that there had been no finding as to the date of dispossession of the plaintiffs and, therefore, the decree for Wasilat which the learned Subordinate Judge gave to the plaintiffs was ineffective.

As regards the first point the evidence which is objected to is a map which was prepared in a *batwara* proceeding, which took place in 1905. That partition proceeding was between the proprietors under whom the respective parties in this suit claimed. The objection is that the tenants were no parties to that proceeding and, therefore, they are not bound by the *batwara* map and in fact that the map is no evidence at all against them. The learned Subordinate Judge held that even though the map might not be conclusive as against the tenants it was at any rate evidence against them, relying on a decision of this

(1) 7 C. L. J. 563; 35 C. 701; 12 C. W. N. 657.

Court reported as *Baleswar Bagarti* v. *Bhagirathi Dass* (1). The case to which the learned Subordinate Judge refers to my mind has no real bearing on the question before me. Generally speaking the argument is correct that this *batwara* map would not be evidence against the tenants because it was prepared after their tenancy was created. But when the facts of this case are looked into, I do not think I can give effect to the first argument advanced. It appears that the commission was issued to the Commissionor on the 2nd February 1918 and he was ordered to make enquiry and relay the land with reference to documents filed by the parties. One of the documents filed by the plaintiffs was this map. At the time when the commission was issued no exception was taken to the instructions given to the Commissioner to make the enquiry with reference to this map. That might perhaps be explained by the fact either that the defendants were not aware of this map or that the map was not filed till late. There seems to be some reason to think that the map was only filed before the Commissioner sometime in March. The Commissioner was examined on the 21st June 1918, and objection to this map was taken for the first time on the 24th June after the Commissioner's examination, and there is an order by the Munsif that the map would be accepted in evidence only as against defendant No. 6 who is not one of the present appellants. It appears, however, that while the Commissioner was carrying on his proceedings, based at least to some extent on this map, no objection was taken at that stage by the defendants who were present, and in fact such an objection could hardly have come from them with good grace, considering that they also at the same proceeding relied on a *batwara* map in a partition made in 1888 in respect of Tonzi No. 67. However, the fact remains that they made no objection while the Commissioner was proceeding on the basis of this map. So I think the objection taken to its admissibility subsequently, when they found that the Commissioner's report was against them, came too late.

As regards the second point it is quite clear that the learned Subordinate Judge has come to no finding as to the date of dispossession by the defendants and the effect of that would ordinarily be that the case would have to go back to the Subordinate Judge for a finding as to that date, because in the absence of it, it is clear that there could be no execution of the decree. That course will, however, now be unnecessary, as the learned Pleader who appears for the respondents says that he gives up all claim to Wasilat.

The result, therefore, is that this appeal is dismissed subject to this that so much of the decree of the Subordinate Judge as directs that the plaintiffs are to get Wasilat will be expunged.

The respondents will get their costs of this appeal.

Appeal dismissed;
Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 377 OF 1919.

April 16, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Sulaiman.

DARBARI MAL—PLAINTIFF—APPELLANT

versus

MOOLA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), O. XXXIV, r. 6—Mortgage suit—Decree for sale unexecuted—Mortgagee, whether entitled to obtain decree over.

A mortgagee who obtains a decree for sale, but fails to execute it, is not entitled to come into Court under rule 6 of Order XXXIV of the Civil Procedure Code, to obtain a decree over, as that rule contemplates that the property should be put to sale in execution of the decree before an application under its provisions can be made. [p. 141, col. 1.]

Second appeal from the decision of the Judge, Moradabad, dated the 7th December 1918.

Mr. *Panna Lal*, for the Appellant.

Messrs. *G. L. Agarwala* and *Radha Kant Malaviya*, for the Respondents.

JUDGMENT.—The facts of this case are very simple. The appellant is a puisne mortgagee. He sued and obtained a decree for the sale on the basis of his mortgage-deed, which was dated the 4th of April 1906, on the 22nd of April 1912. His

suit was brought within six years of the mortgage. He obtained a final decree for sale on the 20th January 1915. He has now made the present application for a decree over under Order XXXIV, rule 6. In the meantime he has not put his decree into execution in any way whatsoever, nor has he attempted to bring the property to sale. The reason for this is that there was a prior mortgage upon the estate. The prior mortgagee sued and obtained a decree on the 21st of January 1913. The whole of the property was sold in satisfaction of the prior mortgage. The present appellant made no attempt to pay off the prior mortgage at any time. He has come into Court, as we have said above, asking for a decree under Order XXXIV, rule 6. Order XXXIV, rule 6, runs as follows:—

"Where the net proceeds of any *such* sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount."

The rule runs immediately after rule 5, clause 2, which says:—

"Where *such* payment is not so made the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold and that the proceeds of the sale be dealt with as is mentioned in rule 4."

Rule 6, therefore, clearly contemplates that the property should have been put to sale in execution of the decree before an application under rule 6 could be made. Both the Courts below have held that in the circumstances the plaintiff is not entitled to a decree as asked for and they have based their decision on a ruling of this Court to be found in *Kanta Prasad* v. *Syed Ahmad* (1). That was a decision of a Division Bench of this Court sitting in Letters Patent Appeal, and the Court upheld the decision of a single Judge of this Court in that case. It will be seen on a perusal of the judgment in that case that Mr. Justice Banerji who delivered the judgment referred to the case of *Muhammad Akbar* v. *Munshi Ram* (2) and also to the case of *Badri Das* v. *Inayat Khan* (3). All those rulings clearly apply to the facts of the present case, which it is impossible to distinguish from the facts of the cases concerned in those judgments. Our attention has been called to certain other decisions of this Court to be found in *Kedar Nath* v. *Chandu Mal* (4) and in *Pirbhu Narain Singh* v. *Amir Singh* (5), and it is suggested that these later rulings have deviated from the rulings in the former decision, but on a careful examination it will be seen that these cases were clearly distinguished from the older cases. In each of these the property for which the decree for sale had been passed had actually been sold and it was after such sale had taken place that an application was made for a decree over under section 90 of the Transfer of Property Act, with which Order XXXIV, rule 6, coincides. Our attention was also called to the decision of their Lordships of the Privy Council in *Jeuna Bahu* v. *Parmeshwar Narayan* (6). That case also does not help the present appellant. Its facts were very different. There a compound decree was given for the sale of the mortgaged property and for the recovery of the balance due thereafter by the sale of other property belonging to the mortgagor. There as a matter of fact the mortgaged property was sold, and it was in execution of the decree as it then stood that an attachment of other property was made and that property was subsequently sold. In a subsequent suit it was contended that the second attachment and sale were null and void because no decree for the balance due could be passed until the mortgaged property had been sold. Their Lordships of the Privy Council pointed out that in such cases where a compound decree had actually been passed and had become final, the attachment and sale in execution of that decree could not be held to be invalid. At the utmost it cannot be more than a decision that a compound

(1) 1 Ind. Cas. 799; 6 A. L. J. 451; 31 A. 373.
(2) A. W. N. (1899) 208.
(3) 22 A. 404; A. W. N. (1900) 132; 9 Ind. Dec. (N S) 1305.
(4) 26 A. 25; A. W. N. (1903) 179.
(5) 29 A. 369; A. W. N. (1907) 83.
(6) 49 Ind. Cas. 620; 17 A. L. J. 207; 36 M. L. J. 215; 23 C. W. N. 490; 25 M. L. T. 278; 29 C. L. J. 443; 21 Bom. L. R. 589; 10 L. W. 26; (1919) M. W. N. 347; 12 Bur. L. T. 80 (P. C.).

decree is binding if final. In the present case we have a decree for sale that has been obtained but has never been executed; no sale has taken place and yet the mortgagee has come into Court under the Order and rule mentioned to obtain a decree over. It is urged that it is very hard lines upon him that he cannot obtain it because the property has been sold in execution of the prior mortgagee's decree. We do not think it is at all hard lines for a foolish man. He took the second mortgage with his eyes open. He could have redeemed that mortgage; he could have obtained a decree on the basis of both mortgages and have put the property to sale and if the sale proceeds were insufficient, he could have applied for a decree under Order XXXIV, rule 6. He might, if he had liked, have dropped his mortgage completely, and brought a suit to recover his decree as against the person of the mortgagor in the beginning. He has done none of these things and he has merely his own foolishness to thank for being in the position in which he now finds himself. We think that it would be quite wrong to differ from the former rulings of this Court which have been consistently followed for many years. Our attention has been called to a ruling of the Oudh Court which is to the opposite effect. We do not think that the reasons therein are sufficiently strong to entice us to strike out a new line and confuse the law as it is well understood in this Court. In our opinion the decision of the Court below is correct. We, therefore, dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 215 OF 1918.

June 24, 1919.

Present :—Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

GOVINDA CHANDRA BHATTACHARJEE—PLAINTIFF—APPELLANT

versus

DINA NATH ACHARJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession between tenants-in-common—Non-participation in rents and profits, effect of.

In order to establish adverse possession by one tenant-in-common against his co-tenants, there must be exclusion or ouster of the co-tenants and the possession subsequent to that must be for the statutory period. What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to adverse possession but such non-participation or non-possession may, in the circumstances of a particular case, amount to adverse possession. Regard must be had to all the circumstances, the most important element being the length of time. [p. 142, col. 2.]

Appeal against the decree of the District Judge, Chittagong, dated the 6th of June 1917, affirming that of the Subordinate Judge, 2nd Court of that District, dated the 28th of February 1916.

Babu *Bepin Behari Ghose* (with him Dr. *Sarat Chandra Basak*, Babus *Khitish Chandra Sen*, *Panchanan Ghose*, *Chandra Sekhar Sen*, *Promotha Chandra Dutt* and *Nripendra Chandra Dass*), for the Appellants.

Babu *Khitish Chandra Chakravarti*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for establishment of the plaintiff's right to, and recovery of possession of a 2-annas share in, a certain estate which originally belonged to one Ram Kishore Bidyabhusan.

It appears that Ram Kishore had two sons, Daibaki Nandan, defendant No. 5, and Ram Lochan. Ram Lochan had four sons of whom Lakhi Bhattacharjee was one. Lakhi left a daughter Udaytara and the plaintiff is the son of Udaytara.

It was alleged by the plaintiff that Lakhi and, after him, Udaytara and, after her death, the plaintiff himself were in joint possession of the property with the defendants. In the plaint it was stated that the plaintiff was born on the 31st

March 1893, that his mother died on the 6th August 1897, and that the plaintiff attained majority on the 31st March 1911. The suit was instituted on the 26th February 1913. There was no express denial of the date of the plaintiff's birth and of his attaining majority in the written statement.

The main defence, so far as it relates to the question raised in this appeal, was that the suit was barred by limitation.

The Courts below have apparently considered the question of limitation on the footing that Article 141 of the Limitation Act applied, and although there was no express denial of the date of the birth of the plaintiff and of his attaining majority as given in the plaint, the learned District Judge went into that question and came to the conclusion that the suit had been instituted more than three years after the plaintiff attained majority.

Now, Article 141 of the Limitation Act would apply only if Udaytara was dispossessed; in that case the plaintiff as the reversioner would have 12 years from the date of the death of his mother and the question whether the suit was brought within three years of his attaining majority would then arise. The plaintiff, however, did not sue on the ground that his mother had been dispossessed. His case was that the properties were joint family properties, that after Lakhi's death his mother was entitled to a 2-annas share and that on her death he was similarly entitled to that share. If the properties were joint, then it would be a case between co-sharers. The learned District Judge says: "There was indeed some mention of the suit being among co-sharers, but how any question of co-sharers will affect limitation in this case, was not made out by any satisfactory argument".

If, however, as stated above, the property was a joint property, it would be a case between co sharers and in such a case it must be shown that there was exclusion or ouster of Lakhi or of his daughter more than 12 years before the suit.

The principle upon which the question of limitation as between co-sharers is to be determined, has been laid down in various cases and we may refer to the case of *Ayennennessa Bibi* v. *Sheikh Isuf* (1), where Jenkins, C. J., observed: "The law on the subject I take to be well settled. In order to establish adverse possession by one tenant-in common against his co-tenants there must be exclusion or ouster and the possession subsequent to that...must be for the statutory period,.....What is sufficient evidence of exclusion...must depend upon the circumstances of each case...Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. Regard must be had to all the circumstances, and a most important element is the length of time." Reference may also be made to the cases of *Lokenath Singh* v. *Dhwakeshwar Prosad Narayan Singh* (2), *Hardit Singh* v. *Gurmukh Singh* (3) and *Chintamani Pramanik* v. *Hriday Nath Kamila* (4).

It has been contended before us by the learned Pleader for the respondent that the defendants' case was that Lakhi himself had no right or possession of these properties.

Now, the questions whether these properties were joint properties and whether Lakhi or Udaytara was in joint possession, have not been gone into by the learned District Judge. He observed in his judgment that the Subordinate Judge's decision on the question whether the properties were joint or not, was not exhaustive and it would probably have been necessary to remand the case for findings on the point had not the question of limitation disposed of the case. There is no doubt that the first thing the Court had to decide was whether the properties were joint and whether Lakhi or Udaytara was in possession as a co-sharer. The learned Pleader for the respondent says that some of the properties were sold away more than 12 years before the suit. None of these questions has been gone into by the Courts below.

(1) 14 Ind. Cas. 722; 16 C. W. N. 843.

(2) 27 Ind. Cas. 465; 21 C. L. J. 253; 20 C. W. N. 51.

(3) 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(4) 51 Ind. Cas. 123; 29 C. L. J. 241.

The decrees of the Courts below must, therefore, be set aside and the case sent back to the Court of first instance in order that the questions mentioned above may be gone into and the case decided according to law.

Costs to abide the result.

Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 609 OF 1916.

May 12, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

UMED ALI—DEFENDANT—APPELLANT

versus

THE MUNICIPAL COMMITTEE, JHANG MAGHIANA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 149, applicability of—Revision converted into appeal—Court-fee made up after expiry of limitation—Appeal, whether barred—Order in Chambers allowing Court-fee to be made up, effect of.

An appeal must be taken to be filed on the date on which the memorandum of appeal is properly stamped. [p. 145, col. 2.]

An appeal was decided by a District Judge on 3rd March 1915. A petition for revision against that decision was filed on 4th June 1915. On 7th February 1916, after hearing both parties, the Judge in Chambers held that an appeal lay in the case and gave time to the appellants to make up the deficiency in Court-fees on the memorandum of appeal. The deficiency was made up on 11th February 1916. On the appeal coming on for hearing before a Division Bench, the respondent objected that the appeal was barred by time:

Held, (1) that the order of the Judge in Chambers must be taken to have been made subject to all just exceptions; [p. 146, col. 1.]

(2) that the memorandum of appeal must be taken to have been filed on the date on which the deficiency in Court-fees was made up, and was, consequently, barred by time; [p. 145, col. 2.]

(3) that section 149 of the Civil Procedure Code was inapplicable to the case. [p. 145, col. 2.]

Second appeal from the decree of the District Judge, Jhang District at Sargodah, dated the 3rd March 1915, affirming that of the Subordinate Judge, 2nd Class, Jhang, dated the 30th March 1914, decreeing the claim.

FACTS.—Plaintiff obtained a decree for possession of a vacant site against the defendant and the latter's appeal to the District Judge was dismissed on 3rd March 1915. Defendant filed a petition for revision in the Chief Court on 4th June 1915. On 20th November 1915 the Judge in Chambers made the following order:—

"MR. MUHAMMAD ALAM, WITH RECORDS.

I sent for the records, though this case is apparently one for appeal and not for revision, as Council now admits, because I wanted to see whether substantial justice had been done. Having seen the records, I have grave doubts as to the soundness of the decision, and petitioner's Counsel asks for leave to pay in Court-fee for appeal. I cannot allow this *ex parte*. I order notice to opposite party and will decide the point at next hearing. Petitioner to be ready with Court-fee. If admitted as an appeal, I will hear the case on the merits at next hearing.

(Sd.) D. C. JOHNSTONE,
20-11-15. *Chief Judge.*"

On 7th February 1916 after hearing both parties the Chief Judge made the following order:—

"The question for me is whether this petition, filed as a revision, should be allowed to be treated as a second appeal subject to payment of necessary Court-fee. Mr. Nanak Chand admits that the case is one for appeal, not revision, and this is quite clear, and as to the question aforesaid I have considered the circumstances and have paid attention to the rulings *Sultan Singh* v. *Nidhan Singh* (1), *Sridharan Somayajipad* v. *Puramathan Somayajipad* (2), *Udai Ram* v. *Court of Wards, Aligarh* (3) (decided by the Board of Revenue, U. P.), with the result that in my opinion the question should be answerd in the affirmative. There is no reason to suppose that the mistake was anything but a *bona fide* one.

(1) 31 P. R. 1899.
(2) 23 M. 101; 9 M. L. J. 350.
(3) 29 Ind. Cas. 678.

Mr. Nanak Chand shall pay in Court-fee within a week. The case will then go before a Division Bench as its value is Rs. 2,110 and respondents ask that it be heard by such a Bench."

The deficient Court-fee was accordingly made up on 11th February 1916. The case came on for hearing on 10th May 1920 before Scott-Smith and Leslie Jones, JJ.

Mr. *Nanak Chand*, for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondent, raised a preliminary objection that the appeal was barred by time.

The lower Appellate Court's judgment is dated 3rd March 1915. A petition for revision was filed in this Court on 4th June 1915. But at the hearing in Chambers the Judge pointed out that an appeal was competent in this case and after notice to the respondent he permitted the petitioner to make up the Court-fees on his petition and admitted the petition as a second appeal. Court-fee was made up on 11th February 1916, long after the limitation for filing the appeal had expired. The appeal must be considered as having been filed on the day on which the memorandum was properly stamped. *Resal Singh* v. *Shadi* (4). It was, therefore, barred by time. In *Ram Tahal Singh* v. *Dubri Rai* (5) a plaint was filed upon insufficient Court-fee and the mistake was discovered after the period of limitation for the suit had expired. It was held that the suit was barred by time.

In *Satto* v. *Amar Singh* (6), a case similar to the present one, Court-fees were not allowed to be paid.

When the petition for revision was filed, the office pointed out to the Counsel for the appellant that an appeal would be more appropriate. He nevertheless persisted in filing the petition. I submit that under the circumstances the appellant is not entitled to any indulgence from the Court and that the appeal should be dismissed as barred by time.

(4) 43 Ind. Cas. 317; 95 P. R. 1917; 174 P. W. R. 1917; 13 P. L. R. 1918.
(5) 28 A. 310; 3 A. L. J. 838; A. W. N. (1906) 21.
(6) 53 Ind. Cas. 256; 62 P. L. R. 1919.

Mr. *Nanak Chand*, for the Appellant.—I admit that a revision was not competent in this case. But the learned Judge who admitted the appeal allowed Court-fees to be made up after hearing the respondent. No objection as to limitation was raised by the respondent and it does not now lie in his mouth to raise this objection. The order was not an *ex parte* one, and is, therefore, binding on the respondent who had full opportunity of being heard. The learned Judge must be taken to have extended the time for paying the Court-fees under section 149 of the Civil Procedure Code and the exercise of his discretion cannot now be called into question. He had jurisdiction to act as he did and to permit the payment of Court fees as on an appeal. *Jhanda Khan* v. *Bahadur Ali* (7) *Ganda Mal* v. *Thakur Harkishen* (8), *Tara Singh* v. *Muhammad* (9).

Ram Tahal Singh v. *Dubri Rai* (5) was quite a different case. It related to a suit and does not apply to the facts of the present case. In *Resal Singh* v. *Shadi* (4) it does not appear whether Court-fee had been allowed to be made up and whether the respondent was heard before the order was made.

As regards *Satto* v. *Amar Singh* (6) your Lordships will observe that in that case Court-fee was not allowed to be made up. Had the Court allowed the deficiency to be made up, the order could not have been objected to. This is the distinction which I want to emphasise: that the learned Judge in Chambers having after hearing both sides extended the time for payment of Court-fees, the respondent cannot now object to that order.

Mr. *G. C. Narang*, in reply :—*Jhanda Khan* v. *Bahadur Ali* (7) is distinguishable. In that case the relief had been undervalued and on the relief being properly valued the Court had power to allow Court-fees to be paid

[SCOTT-SMITH, J.—The learned Judge in Chambers extended the time under section 149 of the Civil Procedure Code and converted the revision into an appeal.]

Section 149 of the Civil Procedure Code does not apply to this case. That section

(7) 3 P. R. 1893.
(8) 3 P. R. 1900; P. L. R. 1900, p. 10.
(9) 74 P. R. 1903.

applies only to cases when a document has been insufficiently stamped. In this case the petition for revision was properly stamped. Subsequently the *character* of the petition was changed and this necessitated levy of additional Court-fees. These were not paid till after limitation had expired and so the appeal is barred by time.

Where a petition for revision is sought to be converted into an appeal, two things must concur. The petition must have been filed within the limitation allowed for an appeal and it must bear the stamp which would be required in the case of an appeal, so that no additional levy of Court-fees would be necessary. In such cases the difference is only one of nomenclature and the revision can be treated as an appeal. Where, however, additional Court-fees become necessary, then unless they are paid within limitation, the appeal must be dismissed as time-barred. *Resal Singh* v. *Shadi* (4) leaves no room for doubt on this point. In that case time must have been extended in the same way in which it has been extended in this case.

[SCOTT-SMITH, J.—We shall send for the record of that case to see what actually happened in that case.]

Great stress has been laid upon the fact hat the question of limitation was not raised before the learned Judge in Chambers. I submit that the objection could not be taken before the learned Judge as he had no power to dispose of the appeal finally. This is a case which under the rules could be heard only by a Division Bench. The appeal could not be dealt with piecemeal, and the learned Judge's order must be taken to have been made subject to all just exceptions. The whole case is now before your Lordships and your Lordships can dispose of it finally.

[SCOTT-SMITH, J.—The record of *Resal Singh* v. *Shadi* (4) shows that the same learned Judge made a similar order in that case and allowed Court-fees to be made up. Nevertheless the objection of the respondent was given effect to at the hearing and the appeal was dismissed as time-barred. That case concludes the matter.]

JUDGMENT.—This is a second appeal from an order decreeing plaintiff's claim against defendant-appellant. Mr. Narang raises a preliminary objection that the appeal is barred by time. The case was decided by the lower Appellate Court on the 3rd of March 1915 and an application for revision was filed in the Chief Court on the 4th of June 1915, *i. e*, within ninety days. When the case came before a Judge in Chambers, he held that no revision lay as the defendant could file a second appeal. After hearing the respondent's Counsel he allowed the petition for revision to be treated as a second appeal subject to the payment of the necessary Court-fees and gave the appellant a week within which to make up the Court-fee on Rs. 2,110, the value of the suit. It is admitted that no revision was competent in the present case, but it is contended that the effect of Sir Donald Johnstone's order allowing the petition for revision to be treated as an appeal was to make it as if the appeal had been filed on the 4th of June 1915, in other words, within time. The Court-fee was, however, not paid until the 11th of February 1916 and *Ram Tahal Singh* v. *Dubri Rai* (5) is an authority for holding that when by a mistake of the plaintiff a plaint was filed upon insufficient Court-fee and this was not discovered until after the period of limitation for the suit had expired, the suit was barred by time. *Resal Singh* v. *Shadi* (4) is exactly on all fours with the present case. There it was held that an appeal was filed on the date on which the memorandum of appeal was properly stamped. We have sent for the paper-book of that case and we find that there also a petition for revision was filed and the Judge in Chambers allowed it to be considered as an appeal and granted the petitioner ten days within which to pay the necessary Court-fee. The Court fee having been paid within that time, the appeal was admitted to a hearing. It was argued here that the Judge in Chambers who allowed the petition for revision to be treated as an appeal in reality extended the time for payment of the Court-fee within the meaning of section 149, Civil Procedure Code. The appeal, however, was one which under the rules of the Court had to be heard by a Division Bench, and we are of opinion that the Judge

who admitted it did not intend to decide any question of limitation He could not admit the appeal at all until it was properly stamped, and his order of admission was of course subject to all just exceptions and to anything which might be urged at the hearing. We see no ground in the present case for holding that there was sufficient cause for presenting the appeal after time within the meaning of section 5 of the Limitation Act. When it was pointed out to Counsel who filed the revision that an appeal lay, he merely stated that he had filed the revision instead of an appeal because he relied mostly on facts and not on law. Even then he had time, if he had chosen, to make up the Court-fee but he did not do so. He knew perfectly well that he ought to have filed a second appeal and still he filed an application for revision. Under the circumstances we do not think sufficient cause has been shown within the meaning of section 5. The appeal was clearly barred by time and we dismiss it with costs.

Appeal dismissed.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 1144 OF 1918.
November 3, 1919.
Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.
P. V. AR. KR. ARUNACHELLAM CHETTIAR—PLAINTIFF—APPELLANT
versus
MADASWAMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Chose-in-action, mortgage of—Mortgagee, right of, to sue Mortgagor, whether necessary party—Liability of mortgagee—Transfer of Property Act (IV of 1882), s. 134.

The mortgagee of a chose-in-action is entitled to institute in his own name a suit to recover the amount due, and he is bound in such suit to implead the mortgagor as a party defendant If the mortgagee, owing to his default, fails to recover the money, he will be liable to the mortgagor to account for his failure [p. p 147, cols. 1 & 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in Appeal Suit No. 10 of 1917, preferred against the decree of the Court of the District Munsif, Tinnevelly, in Original Suit No. 373 of 1915.

FACTS appear from the judgment.

Messrs. *E. S. Chidambaram Pillai* and *P. N. Marthandam Pillai*, for the Appellant.—The mortgagee has a right to sue on the security given to him, for the recovery of the amount due under the Chit. He is even liable to the mortgagor for default of prosecution of the claim. The mortgagor cannot sue the holder but may be impleaded in the mortgagee's suit. *Muthukrishna Aiyar* v. *Veeraraghava Aiyar* (1).

The suit against the holder of the Chit is not barred. Time runs not from the date of the mortgage but from the date when the money accrues due.

Messrs. *A. Swaminatha Aiyar* and *A. Subbarama Aiyar*, for the Respondents.—The suit against the defendants Nos. 1 to 3 having become barred, the claim against 4th defendant is also barred.

JUDGMENT.—The father of the defendants Nos. 1 to 3 mortgaged in 1906 to one Sankaralingam certain immoveable properties and his rights in a Chit transaction. Sankaralingam assigned the mortgage to the plaintiff. The suit is to enforce the mortgage. The 4th defendant is the manager of the Chit Fund. The Munsif gave a decree against defendants Nos 1 to 3 for the sale of the immoveable properties and against the 4th defendant for the amount of the Chit Fund. The Subordinate Judge has reversed the latter portion of the decree. We are unable to agree with him. He has proceeded on the assumption that the Chit transaction was a chose in-action. He seems to be right: however that may be, we shall also deal with the second appeal on that assumption without deciding the point.

The first question for consideration is whether the mortgagee of a chose-in action is entitled to institute in his own name a suit to recover the amount due under it. So far as this Court is concerned, that question is covered by authority. In *Muthukrishna Aiyar* v. *Veeraraghava Aiyar* (1) a Full Bench of thisCourt held that by mortgaging a chose-in-

(1) 21 Ind. Cas. 316; 38 M 297; 25 M. L. J. 356; (1913) M. W. N. 839; 14 M. L. T. 411.

action a complete assignment of it was effected. The learned Chief Justice says that, after the mortgage, the only party who can sue to recover the amount due is the mortgagee. The same view is taken in Bombay; *vide Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan* (2). The decision of the Judicial Committee in *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* (3), although the language of the Committee suggests that the assignments in that case may not have been by way of mortgage, has been understood in the Full Bench in this Court as holding that a mortgage operates as a transfer of the right of action in the chose-in-action. We do not want to refer to English authorities on this subject because, as pointed out is *Durham Brothers* v. *Robertson* (4), the matter was complicated in England to some extent by the conflicting jurisdictions of law and equity although, after the Judicature Acts, the question had been settled. It is clear from the decision of the Court of Appeal in the case referred to by us that, although the mortgagor should be made a party to prevent him from subsequently suing the promisor under the chose-in-action the right to recover on the chose-in action is in the mortgagee. Language of section 134 of the Transfer of Property Act indicates the same conclusion. The section speaks of the transferee of a chose-in action, to whom it has been assigned "for the purpose of securing the existing or future debt," being entitled to recover the amount due under it and as being bound to apply the money in a particular manner, in other words, although there is the duty of accountability on the part of the mortgagee, he is the only person whom the Court of law would recognise as entitled to maintain an action for the recovery of the amount due. That being the position of a mortgagee of a chose-in action, we are wholly unable to understand the somewhat hazy notion which seems to have guided the Subordinate Judge in dealing with this matter. If we understand him rightly, he seems to hold that, if a suit is brought on the chose-in-action against the mortgagor it would be barred by limitation, having been instituted more than six years after the date of the mortgage, the claim against the holder of the Chit is barred. He speaks of a principal right and of a subsidiary right and concludes that as the principal was barred, the subsidiary right cannot be enforced. The learned Vakil for the respondent used similar language before us. We are wholly unable to understand the idea which underlies this contention. As we pointed out, the only person who can sue upon the chose in-action is the mortgagee. No suit by the assignee of a chose-in-action against the assignor to recover money is contemplated, consequently there is not a principal right and an accessory right. If the mortgagee, owing to his default, failed to recover the money, as pointed out by the learned Chief Justice in *Muthukrishna Aiyar* v. *Veeraraghava Aiyar* (1), he will be liable to the mortgagor to account for his failure. It follows that the mortgagor has no right to prosecute his claim against the holder of the Chit. It is for that very reason that the mortgagee is compelled, as was pointed out in *Durham Brothers* v. *Robertson* (4), to implead his mortgagor as a party defendant so that the matter may be settled in his presence.

We must, therefore, reverse the decree of the Subordinate Judge. The learned Vakil for the respondent suggested that there are questions of limitation and that he also intends to raise the question that the Chit right is not a chose in action. We express no opinion upon these contentions. On remand, the Subordinate Judge will deal with them. He must also deal afresh with the necessary objection. Costs will follow the event. Refund of Court-fee allowed.

M. C. P.

Appeal allowed.
Case remanded.

(2) 4 Ind. Cas. 804; 33 B. 610; 10 Bom. L. R. 1146.
(3) 17 Ind. Cas. 627; 37 B. 133; (1912) M. W. N. 1247; 12 M. L. T. 652; 11 A. L. J. 7; 24 M. L. J. 60; 17 C. W. N. 209; 15 Bom. L. R. 9; 17 C. L. J. 162; 40 I. A. 24 (P. C.).
(4) (1898) 1 Q. B. 765 at p. 774; 67 L. J. Q. B. 494; 78 L. T. 438.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 37 OF 1919.

April 9, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

BHAGWAN DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

TEJ RAM AND OTHERS—PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Custom—Pre-emption—Preferential right—Relationship—Burden of proof—Wajib-ul-arz, *entry in, construction of*—Hissadar qaribi, *whether denotes blood relation.*

If a person claims a preferential right of pre-emption over another co-sharer by reason of relationship, it is for him to prove that fact.

The expression "*hissadar qaribi*" in a *wajib-ul-arz* does not necessarily indicate a blood relation.

Appeal from the order of the Subordinate Judge, Moradabad, dated the 22nd January 1919.

Dr. *S. M. Sulaiman* and Mr. *K. N. Katju*, for the Appellants.

Messrs. *Jang Bahadur Lal* and *S. P. Sinha*, for the Respondents.

JUDGMENT.—On the 15th of February 1918 the defendant No. 4 sold certain property to defendant No. 1. On the 25th of February 1918 defendants Nos. 2 and 3, who were co-sharers, sent a notice to the first defendant claiming a right of pre emption in the property, whereupon on the 12th of March 1918 defendant No. 1 re-sold the property to defendants Nos. 2 and 3. After that the present plaintiff brought a suit to enforce the right of pre-emption out of which the present appeal from order has arisen. He claimed that he was own brother of the original vendor defendant No. 4; that he had a right of pre-emption as against the defendant No. 1; that the transfer by defendant No. 1 in favour of defendants Nos. 2 and 3 was a fictitious transaction gone through with the object of defeating his right. In the alternative he pleaded that if it was a genuine transaction, he still had a right of pre-emption as he was nearer in blood to the original vendor defendant No. 4 and had a preferential right to the property as compared to defendants Nos. 2 and 3. The Court of first instance dismissed the suit, holding that the plaintiff's relationship gave him no advantage over the defendants Nos. 2 and 3 and also because the original vendor and the plaintiff and defendants Nos. 2 and 3 were all co-sharers in the same subdivision of the Mahal. The plaintiff appealed and in the lower Court it was held that the custom as set out in the *wajib-ul-arz* gave the plaintiff a preferential right because he was a blood relation of the original vendor defendant No. 4. The custom as set out in the *wajib-ul-arz* gives the first right to "*hissadar qaribi*" and then in case of his refusal to other co-sharers. The lower Court has held that the word "*qaribi*" here denotes blood relation. He does so because further on there is a sentence to the effect that if any person sells to his sons or to his near relations, then nobody else shall have a right of pre emption. This is entirely a separate statement in the *wajib ul arz*. It does not qualify that portion of the document where it states that a near co sharer will have the first right to take property on sale. It seems to us by no means clear that the word "*qaribi*" indicates a blood relation. It is equally open to the meaning of nearness in space as of nearness in blood. If the plaintiff comes into Court claiming a preferential right over another co sharer by reason of relationship, it is for him to clearly prove that fact. A doubtful document such as the one now before us cannot possibly be held to satisfactorily establish his right. We think that the Court of first instance was correct and the lower Court has made an error in interpreting this document. We, therefore, allow the appeal, set aside the order of the Court below, restore the decree of the Court of first instance. The appellants will have their costs in all Courts.

Order set aside.

KESARI SAHAI SINGH *v.* HITNARAYAN SINGH.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 173 OF 1917.
March 11, 1920.
Present:—Mr. Justice Das and
Mr. Justice Adami.
Chaudhury KESARI SAHAI SINGH—
APPELLANT
versus
Babu HITNARAYAN SINGH AND OTHERS—
RESPONDENTS.

Bengal Estates Partition Act (V B. C. of 1897), ss 65, 119—Partition—Deputy Collector, power of, to make order under s. 65—Jurisdiction of Civil Court to disturb.

A Deputy Collector can only pass an order under section 65 of the Bengal Estates Partition Act, during the making of a partition and before he has submitted the same for the sanction of the Collector. [p. 150, col. 1.]

Where a partition has been effected, the Civil Courts have no jurisdiction to disturb the same. [p. 150, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *P. K. Sen*, *C. C. Das*, *Kulwant Sahay* and *Raghunath Sahay*, for the Appellant.

Mr. *Susil Madhab Mullick*, for the Respondent.

JUDGMENT.

DAS, J.—The dispute between the parties relates to two orchards plots Nos. 3090 and 2300, which were in the possession of the plaintiff but which in a Collectorate partition between the parties were allotted to the defendants. The plaintiff's case is that it was agreed between him and the defendants that he should retain possession of these two plots on paying rent for them to the defendants and that the defendants should likewise retain possession of two other plots which were in the possession of the defendants but which were allotted to the plaintiff on paying rent to the plaintiff. Accordingly on the 26th August 1913 a petition to that effect was filed before the Batwara Deputy Collector, who, however, failed to record an order on the petition. After delivery of possession had taken place in pursuance of the partition effected by the Deputy Collector, the parties realised that no order had been recorded on their petition of 26th August 1913, and accordingly on the 10th October 1914 the parties went to the Deputy Collector and asked him to pass the necessary order on their petition. The Deputy Collector on that day passed an order confirming the parties in possession of their respective plots. The plaintiff's case is that this order should have been noted in the Batwara papers under section 65 of the Estates Partition Act. After a decision against him under section 144, Code of Criminal Procedure, the plaintiff moved the Revenue Courts, without success, to have the order of the 10th October 1914 made part of the partition proceedings. He now asks that the compromise between the parties may be given effect to and that his possession over plots Nos. 3090 and 2300 may be confirmed and maintained. The learned Subordinate Judge, being of opinion that the Civil Court has no power to set aside the allotment made by the Revenue Courts under the Estates Partition Act, has dismissed the plaintiff's suit.

In this Court an ingenious attempt was made by Mr. P. K. Sen on behalf of the appellant to get rid of the effect of section 119 of the Estates Partition Act. He argued that the plaintiff in no way challenged the decision of the Revenue Courts, he merely invited this Court to maintain the order passed by the Deputy Collector on the 10th October 1914. In order to appreciate the futility of this argument it is necessary to see whether the Deputy Collector had any power under the Act to pass the order which he did on the 10th October 1914.

It appears that the making of partitions is the duty of the Deputy Collector under the Act. He has jurisdiction to make the partition under Chapter VIII of the Act and in making the partition he is to be guided by the provisions of Chapter IX. Under Chapter IX the Deputy Collector has power, if he finds it necessary to allot gardens and orchards belonging to one proprietor to another proprietor, to provide that the first mentioned proprietor shall retain occupation thereof upon agreeing to pay rent annually in perpetuity to the second mentioned proprietor. This he could do under section 65 of the Act and as part of the partition proceedings. Now it seems to me that once the Deputy Collector has made the partition and has submitted the same for the sanction of the Collector, he loses all control over the partition proceedings except for the purpose of making such

alterations as may be necessary in the partition paper or map in accordance with the decision of the Collector under section 58 of the Act or preparing a new partition paper or map in accordance with the orders passed by the Collector. His further powers under section 59 of the Act are merely for the purpose of carrying into effect the partition already made, not for the purpose of altering anything already done by him. It will be seen that he submitted the partition proceedings to the Collector on the 26th August 1913. The Collector approved of them on the 1st October 1913 and the Commissioner sanctioned them on the 23rd February 1914 and the Board confirmed them on the 5th May 1914 and delivery of possession took place on the 25th September 1914. The only order which the Deputy Collector passed on the petition of the 26th August 1913 was this: "Put up to-morrow for orders." He clearly had no jurisdiction to deal with the matter after he submitted the partition proceedings to the Collector and in my view the order passed by him on the 10th of October 1914 was wholly without jurisdiction.

What does the plaintiff substantially seek in this suit? The allotment has been made and is without reservation of any kind. He now asks this Court to declare that though plots Nos. 3090 and 2300 have been allotted to the defendants, still he is entitled to retain possession of them upon agreeing to pay rent for them to the defendants. In other words, he is asking this Court to disturb the partition already effected between the parties. He relies upon the order passed by the Deputy Collector on the 10th October 1914. His argument is that the Deputy Collector is competent to pass an order under section 65 without limitation of time. In my view this is incorrect. He can only pass an order under section 65 during the making of partition and before he has submitted the same for the sanction of the Collector. In my view the plaintiff is clearly asking the Court to disturb the partition already effected. This Court has no power to do so.

The next argument of Mr. Sen was that the parties having agreed on the 10th of October 1914 that they should be tenants of each other in respect of the plots of which they were in possession, this Court can give effect to that agreement. In the first place it may be pointed out that this is not the suit of the plaintiff. In the second place the agreement between the parties is contained in the petitions which the parties filed before the Deputy Collector on the 6th August 1913. In my opinion no oral evidence is admissible to contradict or vary that agreement as contained in their petitions. The petition of the plaintiff was to this effect: "Your petitioner's two orchards whereof plot numbers are given below have been allotted to the Takhta of Babu Hit Narayan Singh, Malik. If the Takhtas (formed by your honour) be maintained, the rent of the aforesaid numbers (plots), *i. e.*, of both the garden be fixed and proceedings under section 65 of the Estates Partition Act with respect to your petitioner's orchards may be taken and orders may be passed with respect to the same." It is clear, therefore, that the only agreement between the parties was that the Deputy Collector should take proceedings under section 65, which is something quite different from the agreement pleaded in the suit. The validity of that agreement would depend on the question whether the Deputy Collector had at that time power to take proceedings under section 65 of the Act. That question I have already decided. In my view, the plaintiff has not established that there was an agreement between them that they should be tenants of each other in respect of the orchards which are in their possession.

In my view the learned Subordinate Judge has taken an entirely correct view of the matter. I would accordingly dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 33 OF 1916.

December 20, 1918.

Present:—Mr Kemp, A. J. C., and Mr. Raymond, A. J C.

RAMCHAND GURDASMAL—APPELLANT

versus

GOBINDRAM SON OF GURDASMAL AND ANOTHER—RESPONDENTS.

Arbitration Act (IX of 1899), s. 19—Agreement to

RAMCHAND GURDASMAL *v.* GOBINDRAM.

refer suit filed after reference, maintainability of—
—Award after institution of suit—Reference and award, whether bar suit—Stay of suit.

Where the parties to a dispute agree to refer matters in dispute to arbitration, the fact that arbitration proceedings are pending is no bar to the entertainment of a suit relating to the matters referred to arbitration. The defendant's remedy in such a case is to apply for a stay of the suit, and if he fails to do so, the Court can proceed to adjudicate upon the matters covered by the reference and its jurisdiction is not taken away because the arbitrators proceed to make an award after the filing of the suit, even though such award may not have been made before any written statement is filed. [p. 152, col. 2; p. 153, cols. 1 & 2.]

Appeal from the judgment of Mr. Fawcett, Additional Judicial Commissioner, Sind.

Mr. *Rupchand Billaram*, for the Appellant.

Mr. *Isaradas Oodharam*, for the Respondents.

JUDGMENT.

KEMP, A. J. C.—The suit out of which this appeal arises was filed by the plaintiff-appellants against his two brothers and a widow of a pre-deceased brother Gokaldas, praying for a partition and separat possession of his $\frac{1}{3}$rd share in the joint family property of their deceased father Gurdasmal and for a declaration that an award, dated the 4th September 1913, is bad and unenforceable against plaintiff and for further and other relief.

The facts of the case are as follows:—Gurdasmal died in February 1912, leaving two sons (defendants-respondents Nos. 1 and 2) and the widow of a pre-deceased son Gokaldas who is defendant-respondent No. 3. By a reference to arbitration, dated 24th April 1913 (Exhibit 27), the scope of which is a matter of contention between the parties depending largely on the construction of the terms of the writing, plaintiff and his two brothers referred their disputes to the arbitration of three arbitrators. It may here be stated shortly that the plaintiff says that the reference was made in respect of the joint property, and on the assumption that his 1/3rd share in the property was not disputed. Defendants deny this and contend that the terms of the reference covered all the disputes between the parties and provided that whatever award the arbitrators might give would be accepted without demur by the parties.

The arbitrators appear to have interviewed the parties in a desultory fashion up to August 1913, and on some of these occasions in the absence of the opposite party. Ultimately on 26th July 1913 the plaintiff wrote to one of the arbitrators, Mr. Virumal Begraj, the letter Exhibit No. 29, calling upon him to make the award by 1st August 1913 and intimating that in default he would regard the reference as cancelled.

In his reply on 5th August 1913 (Exhibit 28), Virumal promised to expedite the matter. The next day plaintiff wrote (Exhibit 41), saying he did not wish the arbitrators to trouble any further and suggesting that he (plaintiff) might adopt legal proceedings. Mr. Virumal replied on the 18th August 1913 saying the plaintiff could not legally prevent the arbitrators giving their award and hoping to settle the matters with his co-arbitrators next time he went to Shikarpur.

On 27th August 1913, the arbitrators wired for the plaintiff to come to Shikarpur. He says he went there in response to the summons but only for the purpose of objecting to the jurisdiction of the arbitrators. Defendants say there was a proper hearing on that occasion before the arbitrators and that plaintiff was examined regarding his claim. On 2nd September 1913, plaintiff filed his suit against defendants Nos. 1 and 2. On 4th September 1913, the arbitrators purported to give their award (Exhibit 37). On 1st October 1913, defendants Nos. 1 and 2 filed their written statements pleading in paragraph 1 that the suit was barred by reason of the reference and award between the parties and that the 3rd defendant was a necessary party. In consequence on 8th October 1913 plaintiff joined the 3rd defendant as a party defendant in the suit. She filed her written statement on 10th December 1913.

Issues were framed on 19th February 1914 It is to be noted that when defendants filed their written statement, they had not filed along with it the alleged award. They then obtained an order for the examination on commission and on the examination taken on the commission the reference and an award, dated 4th December 1913, on an unstamped paper were

produced. In consequence plaintiff on 9th January 1915 amended his plaint by the addition in paragraph 3 (*b*).

The following issues were raised before the first Court:—

1. Is the suit barred by reference or award, if any, between the parties?

(1*a*) Is the award void or voidable as alleged in paragraph 3 (*b*) of the plaint?

(1*b*) Is the suit maintainable in the present form in view of the alleged agreement set up in paragraph 3*b* (*f*) of the plaint.

The learned Additional Judicial Commissioner dismissed the suit, holding that the reference and the award were a bar to the suit. He further disallowed all objections to the validity of the award. Against that decision the plaintiff has preferred the present appeal.

Now, although the agreement to refer was signed by plaintiff and 1st defendant at Shikarpur and by the 2nd defendant at Sukkur, it relates amongst other properties to an immoveable property at Karachi. By section 2 of the Indian Arbitration Act (IX of 1899) therefore, that Act applies to the arbitration proceedings take under the reference.

The 1st point for our consideration is whether the submission and award can be pleaded in bar of the suit. Now what were the facts here? Before the suit there was a reference. By section 4 (*b*) of the Indian Arbitration Act a 'submission' means an agreement to refer disputes, whether an arbitrator be named or not. A reference is made by a particular arbitrator being appointed under the agreement to refer. An agreement to refer and a reference are only distinguishable as separate transactions, where there is an agreement to refer in which no arbitrators are named and subsequently a reference is made to an arbitrator in pursuance of the agreement. In the present case there was an agreement to refer and a reference in one and the same document, *i. e.*, a submission to named arbitrators. The case falls within the scope of cases to which section 19 of the Act applies. Section 5 of the same Act says a submission is irrevocable except with the leave of the Court. This section, however, has nothing to do with the matters provided for by section 19 of the Act. Section 5 merely takes away a party's rights to revoke a submission. It does not affect the right to apply under section 19 of the Act. Whether an arbitrator has been appointed or not, a defendant can apply under section 19 because it is the existence of the agreement to refer which gives the right to apply under that section. This is very clearly pointed out by Fletcher Moulton, L. J., in *Doleman & Sons* v. *Ossett Corporation* (1). It may be noted that if section 5 were a good answer to plaintiff's suit, there would be no point in enacting section 19 in cases where there is an agreement to refer, whether arbitrators are named in the agreement or not. Section 19 clearly covers the case of a reference. See also the decision of our Court in *Khilloomram Lokuram* v. *Louis Dreyfus & Co.* (2).

Bearing this in mind, the question is whether the award after the suit is a bar to the suit. Now the authorities clearly lay down that the jurisdiction of the Court is not taken away by the existence of arbitration proceedings pending before the suit. It is for the Court to decide whether the suit shall be stayed or not. If the defendant waives his right under section 19, Indian Arbitration Act, by pleading in the suit, or if he applies for a stay order under that section and it is refused, the Court is seized of the matter and an award passed subsequently thereto is invalid. The defendant's remedy when arbitration proceedings are pending when the suit is filed, is to apply under section 19 for a stay of the suit. If he fails to do so, the Court can proceed to adjudicate upon the matters covered by the reference. Its jurisdiction to do so is not taken away because the arbitrators proceed to make an award after the suit, even though such award may not have been made, before any written statement is filed. It is sufficient to refer in support of this proposition to the decisions in *Doleman & Sons* v. *Ossett Corporation* (1), *Khilloomram Lokuram* v. *Louis Dreyfus & Co.* (2), *Appavu Kowther* v. *Seeni Rewther* (3).

(1) (1912) 3 K. B. 257; 81 L. J. K. B. 1032; 107 L. T. 581; 76 J. P. 457; 10 L. G. R. 915.

(2) 52 Ind. Cas 120; 13 S. L. R. 8.

(3) 42 Ind. Cas. 514; 41 M. 115; 33 M. L. J. 177; 6 L. W. 243.

The last mentioned case was decided since the judgment in the present suit. In the present case there was no application by the defendants for stay of the plaintiff's suit and they further pleaded to it in their written statement. The reference before and the award passed after the suit cannot, therefore, in my opinion be pleaded in bar of the suit.

I wish, however, to guard against any suggestion that this decision would cover the case of a valid award having been given before a suit in respect of the matter agreed to be referred to arbitration. In such a case by the reference and award the original rights and liabilities of the parties are extinguished. If a suit were brought on the original cause of action, the answer to it would be that that cause of action has been extinguished before the suit by the award. There would be no necessity to apply under section 19, nor do I think section 19 could be employed by the defendants in such a case.

In this respect if the decision in Revision Application No. 2 of 1915 [*Khillooram Lokuram* v. *Louis Dreyfus & Co.* (2)] is intended to lay down that section 19 can be applied where the award is made before and not after the suit, I must respectfully beg leave to differ from the decision on that point.

Nor is this a case where a reference to arbitration is made a condition precedent to the right of action.

The finding on this point is, in my opinion, sufficient to dispose of the appeal. The appeal should be allowed and the suit ordered to proceed.

Costs of appeal to be costs in suit.

RAYMOND, A. J. C.—I concur. The suit out of which this appeal arises was filed on the 2nd September 1913, and the award which was held to have barred the suit, purports to have been made on the 4th September 1913. The reference is dated the 24th April 1913. Though it is not necessary to determine when the award was actually made, as it is admitted that it was made after the suit was filed, yet I have a strong suspicion that the award has been antedated, and that the respondents in collusion with the arbitrators rushed it through as soon as they had knowledge of the suit being filed. This action of the arbitrators affords a flagrant instance of an attempt to oust the jurisdiction of the Court. However, it being admitted that the award was made subsequent to the commencement of the action, the question that arises for determinatiom is whether the reference or the award can be pleaded in the action in bar to the claim. In *Appavu Rowther* v. *Seeni Rowther* (3) it was stated that the trend of recent legislation showed that the rights of a party to seek the assistance of the properly constituted Courts of the realm are unrestricted, and the right inherent in a suitor to sue is preserved intact. When, therefore, a party to a contract files a suit in respect of any matter that he has contracted to refer to a private tribunal, the Court is not ousted of its jurisdiction to try the suit. It is open to the other party to apply for stay of the suit on the ground of the contracted liabilities to refer the matters in dispute to arbitration; and the Court may in a proper case hold its hand and refuse to proceed with the trial of the case. But in the event of no application being made to the Court for a stay of the suit, the Court which has seizin of the disputes adjudicates upon them and its decision is binding upon the parties.

In the case of *Sheobabu* v. *Udit Narain* (4) the plaintiff, who had agreed to refer to arbitration a dispute between himself and the defendants, brought a suit against the latter in respect of the very dispute and it was held that a plaintiff is not debarred from bringing a regular suit upon his title. It was pleaded in this case that defendants had pleaded the agreement to refer to arbitration as a bar to the suit, but the suit had not been stayed.

In the present case, therefore, as soon as the filing of the suit came to the knowledge of the defendants, they should have applied for a stay of the proceedings under section 19, Indian Arbitration Act of 1899, but beyond pleading the reference and award as a bar to the suit they did not do so. Both section 18 of the 2nd Schedule of the Civil Procedure Code and section 19 of the Indian Arbitration Act are intended to serve the purpose of preventing a plaintiff, who has agreed to abide by the decision of a private tribunal, from the violation of his agreement. But if the remedy given by

(4) 24 Ind. Cas. 490; 12 A. L. J. 757.

these sections is not availed of by the defendants, the Court will proceed with the trial of the suit in the same manner as it would in any ordinary suit.

In *Appavu Rowther* v. *Seeni Rowther* (3), which is a case analogous to the present one, the reference was signed on the 20th August 1912, a suit was filed ignoring the reference altogether on the 25th August 1913, and while the suit was pending, the arbitrators made their award on the 1st October 1913. The main contention raised on behalf of the appellant and upheld by the Court was that on the filing of the suit, the arbitrators became *functus officio* and that consequently their award was *ultra vires.* In arriving at this decision the Madras High Court adopted the view of Fletcher Moulton, L.J., in *Doleman & Sons* v. *Ossett Corporation* (1), where in a unanimous judgment the Lord Justice pointed out that as soon as an action is brought in respect of the subject-matter of the reference, the arbitrators become *functus officio.* Of course in both the cases there is this reservation that if an award is given prior to the suit, then the original rights of the parties have disappeared and it is the award that determines their rights and liabilities.

I may further add that in *Doleman & Sons* v. *Ossett Corporation* (1) the respondent had, as in the present case, referred to the existence of the agreement to refer, and to the award passed, in his written statement; but in the absence of any order for stay of the suit, the mere reference was declared valueless. I am, therefore, of opinion that the reference and award could not be pleaded in bar to the suit. After the conclusion of the arguments in appeal, Mr Isardas for the respondents has drawn our attention to the judgment of Fawcett, A. J. C., in the case of *I. R. Affletrangera* v. *E. D. Sassoon & Co.* Apparently the decision in *Doleman & Sons* v. *Ossett Corporation* (1) and the recent decision of the Judicial Commissioner's Court in the case of *Khilloorrum Loluram* v. *Louis Dreyfus & Co.* (2), where Mr. Crouch's decisions in *Sawyer* v. *Louis Dreyfus & Co.* (5) and *Dhanpatmal* v. *Kishinlal* (6), relied upon by Fawcett, A. J. C., have not been upheld, were not cited in argument. But further it would appear that the gist of the judgment under reference is the following passage:—"But in the present case the Court distinctly showed it and did not intend to repudiate the decision of the dispute entirely in its own hands, by refusing the application for a temporary injunction, and it impliedly hereby gave the arbitrators liberty to proceed." The circumstances of the case in appeal are wholly different. I, therefore, concur with my learned colleague in holding that this appeal should be allowed.

Appeal allowed.

(5) 20 Ind. Cas. 504; 7 S. L. R. 1.
(6) 35 Ind. Cas. 586; 10 S. L. R. 1.

MADRAS HIGH COURT.

REFERRED CASE No. 3 OF 1919.

January 22, 1920.

Present:—Sir John Wallis KT., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

In re SECRETARY TO THE COMMISSIONER OF SALT AND ABKARI AND SEPARATE REVENUE, MADRAS—REFERRING OFFICER.

Stamp Act (II of 1899), s. 5—Sale-deed including mortgage of properties as security for performance of covenants—Stamp duty.

A deed of sale, which includes a mortgage of properties not included in the sale as security for the due performance by the vendor of his covenants, need not be stamped both as a sale and as a mortgage, as the sale-deed is not an instrument comprising or relating to distinct matters within the meaning of section 5 of the Stamp Act. [p. 155, col. 1.]

Palakkunnath Illath Govindan Nambudri v. *Ottathayil Moidin*, 42 Ind. Cas. 943; 41 M. 469; 33 M. L. J. 693, not followed.

Case No. 1 of 1876, 1 M. 133; 1 Ind. Jur. 128; 1 Ind. Dec. (N. S.) 87, distinguished.

Case referred under section 57, Indian Stamp Act (II of 1899), by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras, as to whether the three sale-deeds referred to in his letter are to be treated as relating to two distinct matters and chargeable to stamp duty both as sale-deeds and as mortgages.

Mr. *V. Ramesam* (Government Pleader), for the Referring Officer.

JUDGMENT.—After hearing the learned Government Pleader and considering the authorities cited, we are of opinion that the three sale-deeds in question, in each of which the vendor mortgages lands not included in the sale as security for the due performance of his covenants, need not be stamped both as sales and mortgages by virtue of the provisions of section 5 of the Indian Stamp Act, 1899, as the sale-deeds are not instruments comprising or relating to distinct matters within the meaning of the section. The decision in *Case No.* 1 *of* 1876 (1) is not in point, as the terms of section 14 of Act XVII of 1869, under which it was decided, are different from those of section 5 of the present Act, which was substituted for it in section 7 of Act I of 1879, which again is practically identical with section 4 (*a*) of the English Stamp Act, 1891. *In the matter of a reference from the Board of Revenue under section* 46 *of the Stamp Act* (2), a decision under section 7 of the Act of 1879, it was held that an instrument by which a debtor leased certain lands to his creditor and empowered the latter to apply a portion of the annual rent in satisfaction of the debt was both a lease and a usufructuary mortgage, but only required to be stamped as a mortgage as it did not relate to two distinct matters within the meaning of the section. In *Reference under Act No. 1 of* 1879, (*Indian Stamp Act*), *section* 49 (3) it was held that an instrument by which certain parties took lands on lease and hypothecated other lands as security for the rent did not relate to distinct matters, but only to the terms on which the lessors let the land and the lessees took the holding. In *Reference under Stamp Act, section* 57 (4) a lease which contained a covenant for renewal was held not to relate to two distinct matters, as the option to renew the lease was merely auxiliary to the lease and formed part of the consideration for entering into it. Similarly in *Reference under Stamp Act, section* 57 (5) though it was held that the agreement between the company and each of the ryot who were parties to it constituted distinct matters within the meaning of the section, the agreement with each ryot by which in consideration of a payment of one rupee, he was granted a license to prospect, agreed to sell if required and covenanted to indemnify the company against claims by other persons, was held not to relate to distinct matters so as to require separate stamps. The same test was applied in England in *Price* v. *Thomas* (6), where it was held that an instrument of lease in which both the lessee and a third party covenanted to pay the rent did not require to be stamped both as a lease and as a deed, Littledale, J, observing that the lease was the principal to which the covenants was an accessory and Parke, J., that the covenant was part of the consideration for granting the lease. In *Palakkunnath Illath Govindan Nambudri* v. *Ottathayil Moidin* (7), which was decided without argument, the answer would no doubt have been to the same effect if these authorities had been brought to the notice of the Court, and we think that that decision should not be followed in future cases.

M. C. P.

Reference answered.

(1) 1 M. 133; 1 Ind. Jur. 128; 1 Ind. Dec. (N. S) 87

(2) 8 C. 254; 10 C. L. R. 33; 4 Ind. Dec. (N. S.) 162.

(3) 17 A. 55; A. W. N. (1894) 204; 8 Ind. Dec. (N. S.) 860.

(4) 25 M. 8.

(5) 24 M. 176.

(6) (1831) 2 B. & Ad. 218; 109 E. R. 1125; 36 R. R. 550.

(7) 42 Ind. Cas. 943; 41 M. 469; 33 M L. J. 693.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 143 OF 1918.

August 16, 1919.

Present :—Mr. Justice Atkinson and Mr. Justice Adami.

BRINDABAN CHANDER CHOUBEY—DEFENDANT 1ST PARTY—APPELLANT

versus

Babu GOUR CHANDRA RAY AND OTHERS—PLAINTIFFS—OPPOSITE PARTY—RESPONDENTS.

Government of India Act 1915, (5 *&* 6 *Geo. V, C.* 61), *s.* 167—*High Court, power of superintendence of, extent of—Procedure—Duty of Court.*

It is the privilege and prerogative of a High Court, once a record is before it which is erroneous and so erroneous as manifestly to amount to an injustice,

BRINDABAN CHANDER CHOUBEY v. GOUR CHANDRA RAY.

to exercise its powers of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require. [p. 157, col. 1.]

If the record is not before the High Court, but sufficient materials are before it to induce it to send for the record to correct a gross error apparent on the face of the record, it should accede to the application in exercise of the powers conferred upon it, not under section 115 of the Civil Procedure Code, but under the wider and larger powers conferred upon it under section 107 of the Government of India Act. [p. 157, cols. 1 & 2.]

Appeal against the order of the Subordinate Judge, Purnea, dated the 15th May 1918.

Messrs. *Sushila Madhab Mullick* and *Shiveshwar Dayal*, for the Appellant.

Mr. *Sailendra Nath Palit*, for the Respondent.

JUDGMENT.—The petitioner applied to the Subordinate Judge of Purnea under Order IX, rule 13, to set aside an *ex parte* decree obtained against him in Suit No. 219 of 1917. The *ex parte* decree is dated the 11th June 1917.

The suit was instituted for the recovery of possession of a certain holding of which the defendant No. 1 was in possession. The defendant No. 1 acquired the interest of the defendant No. 2, who was the original tenant of this holding, by purchase; but it is alleged by the plaintiff, that the holding was a non-transferable holding and consequently the defendant No. 1 acquired no title by reason of his purchase from the defendant No. 2, that in effect the holding had been abandoned by the original tenant, and that the defendant was no better than a trespasser, and that the plaintiff was consequently entitled to recover possession of the property in suit.

In addition to the claim for recovery of possession of the aforesaid holding, the plaintiff also claimed to recover mesne profits in respect of the years in suit, and the mesne profits estimated in the prayer to the plaint were stated to be Rs. 5,195 odd. The learned Subordinate Judge disposed of the suit in the absence of the defendant No. 1, who failed to appear, and granted the plaintiff a decree for recovery of possession of the property in suit, and also awarded the plaintiff a decree for mesne profits measured at the sum of Rs. 1,200. The learned Subordinate Judge discarded the evidence adduced by the plaintiff with reference to the claim for mesne profits claimed by him; and as I gather from the observations of the learned Subordinate Judge, he was satisfied that the claim for mesne profits put forward by the plaintiff in his plaint was extravagantly absurd, and of a most suspicious character. The learned Subordinate Judge, however, having discarded the evidence of the plaintiff as to mesne profits, on his own responsibility and apparently without any principle as a guide and without any evidence, assessed the value of the mesne profits per annum at the valuation of the holding. The holding was valued at Rs. 400; consequently the learned Judge assessed the mesne profits for the three years in suit at Rs. 400 per annum, arriving at a conclusive figure of Rs. 1,200 in respect of the entire claim for mesne profits.

This is the history of the *ex parte* decree which was sought to be set aside under the provisions of Order IX, rule 13. The *onus* was no doubt on the plaintiff to establish in the first instance that the plaint or summons was duly served on the defendant. In support of that *onus* the plaintiff called the peon who served the summons, and the identifier who accompanied the peon; and upon their evidence we are satisfied that the plaintiff has discharged the *onus* primarily imposed upon him by law in proving due service of the plaint and summons on the defendant No 1. Once such evidence was adduced on behalf of the plaintiff, the *onus* was immediately shifted on to the defendant to establish that no notice of the plaint or summons was served upon him and that service of the plaint and summons had been fraudulently suppressed.

The main evidence adduced by the defendant in discharge of the *onus* which was cast upon him is the evidence of himself. Contrasting the evidence of defendant No. 1 with the evidence of the peon and the identifier whose reports appear endorsed upon the back of the summons, little doubt is left in our minds that the evidence of the peon as given before the Court, and as embodied in his report endorsed upon the back of the summons, is reliable. The peon tells what seems to me a very natural story, and the learned Judge who saw this witness was satisfied that he

was a witness of credit and of truth, and his evidence brought conviction to the mind of the learned Judge that in fact the plaint and summons had been duly served.

The defendant's evidence as to the non-service of notice of the plaint, and of suppression of such notice, in my opinion, is wholly unconvincing, and weighing with considerable care the evidence on both sides, which is more or less oath against oath, we are satisfied that the evidence of the peon and the identifier deserves credit and carries conviction to our minds, and satisfies as that the plaintiff did in fact serve the summons on the defendants as alleged.

The defendant No. 1 states that he only became aware of the fact that an *ex parte* decree had been obtained against him on the 10th January 1918; although his house and garden and the other property connected therewith had been attached in pursuance of the *ex parte* decree on the 6th December 1917. The defendant No. 1 relates a rather peculiar story as to how he became aware of the fact of the *ex parte* decree; and in support of this version of his case he has to rely upon the evidence of P. W. No. 2, a man by the name of Fakir Chand Lal. The evidence of this witness, in my opinion, on its face, is incredible of belief, and obviously concocted and designed for the purpose of giving some plausible show of pretence to reality in support of the defendant's application. The evidence of this witness is quite unworthy of credence.

The learned Subordinate Judge adopted this view and with his expression of opinion we entirely concur. Accordingly this miscellaneous appeal against the refusal to set aside the *ex parte* decree under Order IX, rule 13, must be rejected.

I turn for a moment to consider the *ex parte* decree of the 11th June 1917. The record is before us and it is our privilege and prerogative, once a record is before us which is erroneous and so erroneous as manifestly to amount to an injustice, to exercise our powers of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require.

If the record were not before us, but sufficient materials were before us to induce us to send for the record to correct a gross error apparent on the face of the record, we should accede to that application in the exercise of the powers conferred upon us, not under section 115 of the Civil Procedure Code, but under the wider and larger powers conferred upon us under section 107 of the Government of India Act.

In this case the record is before us, and it is transparent upon the face of that record that a wrong has been done by the learned Subordinate Judge in assessing the mesne profits payable by the defendant No. 1 to the plaintiff upon a totally wrong and erroneous principle, so erroneous and wrong as to amount to a want of a fair trial of the issue as to mesne profits as between the plaintiff and the defendant No. 1. We think that we should be erring in our duty if we avoided acting as we thought we ought to act.

Although we refuse the defendant No. 1's application as made, we think that in the exercise of our powers we should set aside that portion of the *ex parte* decree which was obtained by the plaintiff relative to the assessment of the mesne profits. This we accordingly do and the order of the learned Subordinate Judge with reference to the assessment of the mesne profits amounting to a sum of Rs. 1,200 is set aside. The rest of the order of the learned Subordinate Judge with regard to the recovery of possession of the holding in suit will stand.

It follows that the case must now be remanded in pursuance of our order to the learned Subordinate Judge for *an enquiry* as to the proper sum to be awarded for mesne profits payable by the defendant No. 1 to the plaintiff and of *such enquiry* the *defendant No. 1 shall have due notice.*

In the circumstances of this case no costs can be awarded to either party.

Case remanded.

In the matter of an application by DHOLAN DAS.

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY APPLICATION No. 20 OF 1918.

December 14, 1918.

Present:—Mr. Fawcett, J. C.

In the matter of an application by DHOLAN DAS AND OTHERS TO DECLARE THE FIRM OF WALBDAS-HOLARAM INSOLVENTS.

Provincial Insolvency Act (III of 1907), ss. 4 (c) (ii), 6 (4) (b —Contracts of sale and purchase—Difference, whether liquidated sum—Act of insolvency—Departure of debtor from dwelling house—Intention.

For the purpose of ascertaining the aggregate amount of debts owing to creditors in respect of an application under section 6 (4) of the Provincial Insolvency Act, the difference between contract rates of sale and purchase under a contract entered into by the debtor constitutes a liquidated sum within the meaning of clause (*b*) of the sub-section. [p. 159, col 1.]

In determining whether the departure of a debtor from his dwelling house or place of business amounts to an act of insolvency within the meaning of section 4 (*c*) (*ii*) of the Provincial Insolvency Act, the *intention* with which the debtor actually departed must be considered The mere fact that he returned having altered his intention would not affect a departure made with the intention to defeat or defraud his creditors [p. 160, col. 2.]

Mr. *Dipchand Chandumal*, for the Applicants.

Mr. *E. Castellino*, for the Opponents.

JUDGMENT.—This is an application by ten firms carrying on business in Karachi to declare the firm of Walbdas Hollaram, also carrying on business in Karachi, to be insolvent.

It is alleged that the applicants are creditors of this firm to the extent of over one lakh, that there are other creditors to the extent of about two lakhs and that the firm has committed an act of insolvency within three months of the filing of this application.

On behalf of Walbdas-Hollaram it is denied that the creditors are entitled to present an insolvency petition. The first objection urged is that there is no proof of there being a debt amounting to Rs. 500 or upwards of a kind specified in section 6, sub-section (4), clause (*b*), of the Insolvency Act, namely, a debt which is a liquidated sum payable either immediately or at some certain future time. This objection can be first considered.

The alleged insolvents are commission agents, who have dealt both on their own behalf and on behalf of constituents in forward contracts in sugar, cotton, wheat, gram, etc. The alleged debts are due mainly in respect of Sind cotton contracts and the greater part of the alleged liabilities is in respect of transactions for cotton deliverable in January 1918, about which disputes have arisen that are still pending decision in the Courts. Apart from these latter transactions it is no doubt the case that there is no proof of ascertained debts amounting to Rs. 500 due from the opponents. Those proved, would amount to only about Rs. 301, namely, Rs. 140 due to the firm of Dholandas-Kishendas in respect of cotton deliverable in July 1917, Rs. 50 due to the firm of Jethanand-Dayaldas in respect of cotton deliverable in May 1917 and Rs 111 due to the firm of Jhamandas Aildas in respect of cotton deliverable in July 1917. But it is urged for the applicants that there are differences payable in respect of cross contracts for sale and purchase of cotton deliverable in January 1918, which total considerably over Rs. 5,000 and which are liquidated sums of the kind required under section 6. Mr. Castellino for the opponents disputes there being any real cross-contracts and contends that these alleged differences cannot be treated as debts of the kind referred to. It is no doubt the case that the amounts of cotton sold and purchased by the respective parties are not exactly equal. Thus in the case of the witness Daryanomal 100 bales were purchased from his firm by the opponents against 500 sold to his firm by the opponents. Similarly in the case of witness Kishendas 75 bales were bought and sold between the parties and opponents sold his firm a further 250 bales, and in the case of witness Dayaldas 175 bales were bought and sold and a further 50 bales were bought from the opponents. But it is stated by witness, Kishendas that it is the practice among both European and Indian firms dealing in cotton at Karachi in such cases to set off the first transactions out of an excess of sales against the equivalent transactions in purchases or *vice versa*. Thus if 100 bales are bought against 50 sold, the first 50 are set off against the 100 sold. I think there is strong presumption that this practice exists. For if *A* has to deliver

In the matter of an application by DHOLAN BAS.

to *B* a thing which under another contract *B* has to deliver to *A*, it is obvious that among rational men the arrangement would be to set off the two transactions and not to go through the unnecessary expense and trouble of delivery from one to the other. In such a case there is obviously an implied term that actual delivery is dispensed with by the parties and even if each contract is treated as a separate one in which damages could be claimed by either party against the other for breach of contract to deliver, the result would mathematically be the same as if the difference of the contract rates were paid, because the same market rate on which the damages are calculated will apply in each case. Accordingly I think there can be no question that in such cases the difference between the contract rates does give an ascertained sum due by one party to the other, which is a liquidated sum within the meaning of clause (*b*), sub-section 4, section 6. There can also be no doubt whatever that in a suit by one party against the other it would be held that an equitable if not a legal set-off existed because the cross-demands if they do not arise out of one and the same transaction, at any rate are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. *Cf. Stephen Clark* v. *Ruthnavaloo Chetti* (1), *Kishorchand* v. *Madhowji* (2) *Dobson & Barlow* v. *Bengal Spinning & Weaving Co.* (3). I, therefore, hold that these differences do constitute a liquidated sum and that they amount to over Rs. 500. According to Exhibit 6 Rs. 697-3 0, according to Exhibit 7 Rs. 500 and according to Exhibit 8 Rs. 1,113-8-0 are so due and this evidence is, in my opinion, reliable.

I now come to the question whether the opponents are proved to have committed an act of insolvency within three months before the presentation of this petition. In my opinion the evidence does establish that the firm of Walbdas Hollaram did lose heavily in respect of the speculation in cotton for January 1918. Thus Hollaram admits that he sold about 8,000 bales of cotton of this delivery at an average contract rate of Rs. 33, whereas the rate settled by arbitrators in June 1918 is Rs. 45-11-0 and the rate which has been claimed and decreed in this Court in some suits is as high as Rs. 59. It is also apparent from the notices Exhibits 10 and 15, which were issued on behalf of the opponents to the dealers claiming against them in respect of these transactions, that they were not desirous of paying unless a considerable lower rate was settled and that they have resorted to the dishonest course of pleading that the contracts were wagering ones. Further it is admitted that shortly after the arbitrators had fixed the rate, the opponent Hollaram reduced his staff from about 6 to 1 and embarrassing demands were made against him by his creditors. One of these by name Parumal had filed a suit against him and obtained an order of conditional attachment of certain debts due to the opponents. Subsequently he obtained a decree against opponents for about Rs. 4,895. There was also a debt due to Messrs. Gill and Co., in respect of which an award was passed for Rs. 77,500 and another one of Rs. 15,000 due to the firm of Tejbhandas-Hotchand. Hollaram sold his house at Karachi for a sum of one lakh on the 14th of September 1918 and settled these two debts out of the proceeds. He also admits having paid these two debts out of the proceeds. He also admits having sold three properties in Sukkur some five months back and to have paid certain creditors out of the proceeds. Hollaram admits he left Karachi on the 18th September 1918 and on the 28th of the same month he was at Calcutta, as is shown by the telegram Exhibit 22. The decree-holder already mentioned then obtained an attachment of Hollaram's moveable property at Karachi and information of this was wired to Hollaram by his friend and neighbour Doulatram on the 29th September. Thereupon he returned to Karachi and arrived here on the evening of the 6th October. A sale of his moveable property was actually commenced on the 5th October, but his Pleader obtained an adjournment to the 8th on which date a settlement was arrived at between Hollaram and the decree-holder and the attachment was withdrawn. The debtor admits that he

(1) 2 M. H. C. R. 296.
(2) 4 B. 407; 5 Ind. Jur. 320; 2 Ind. Dec. (N. S.) 777.
(3) 21 B. 126; 11 Ind. Dec. (N. S.) 86.

took with him when he left Karachi the sum of Rs. 6,500 out of the sale-proceeds of his house, that he also obtained the sum of Rs. 1,200 from debtors in the Punjab which he took with him to Calcutta and that he had left no money with his agent Kishendas at Karachi. This is corroborated by the fact that when his moveable property was attached, no money was found in the safe or elsewhere in his house. It is also proved that the debtor secreted his horse and carriage so that though they had been attached, in execution they could not be taken by the *interim* Receiver. In these circumstances the Court has to consider whether the case falls under clause (*b*), (*d*) or (*e*) of section 4 of the Insolvency Act.

As regards the transfers of immoveable property, I do not think that it can be held proved that they were made with intent to defeat or delay his creditors for at any rate in regard to the Karachi property, the main bulk of the proceeds went to paying off creditors and I see no reason to disbelieve Hollaram's assertion that he also paid creditors out of the sale proceeds of the Shikarpur property. It is also to be taken into account that the debtor has other property at Karachi and Sukkur, which so far as the evidence goes is available for realization. It was contended by Mr. Dipchand for the applicants that the taking away of cash by the debtor amounts to a transfer of that property under clause (*b*), but I think the word "transfer" in that section is obviously used in the ordinary sense of a conveyance or other passing of possession or title to a third party. Nor does the case fall under clause (*c*), for though some of his property was put up for sale in execution of the decree against him none was actually sold. The section must be strictly construed and the mere fact that the garnishees paid into Court the debts attached cannot be held to be a sale of the property of the debtor.

The only real question, therefore, is, whether it is proved that Hollaram with intention to defeat or delay his creditors either departed from his dwelling house and usual place of business or secluded himself so as to deprive his creditors of the means of communicating with him. No doubt this intention must be properly proved, but at the same time it can be inferred from the surrounding circumstances and each case rests on its own facts. In this particular case I feel no doubt myself that Hollaram's departure was with the intention mentioned. The allegation that he went to the Punjab to collect debts may be true, but at the same time the admitted fact that he went to Calcutta where he says he wanted to see if he could start a new business, obviously points to an intention to leave Karachi and but for the fact of his moveable property having been attached, the probability is that he would have remained there. The question is with what intention the actual departure was made and the mere fact that he returned having altered his intention, does not, of course, affect a departure made with the intention to defeat or defraud his creditors. I believe the evidence that has been adduced, that no proper address was left behind by the debtor and that the creditors when they enquired could get no information of his actual whereabouts. The fact that the insolvent's firm is heavily embarrassed and the transfers already referred to support the allegation that his intention was fraudulent. I do not, of course, mean to prejudge in any way the question of the debtor's alleged non-liability for his admitted contracts in cotton of January 1918, but it is sufficient to say that the plea raised for his protection is one that is generally unsuccessful and in itself indicates a dishonest intention.

I accordingly hold that the debtor Hollaram had committed an act of insolvency within three months not only of the actual presentation of the petition but also of the application to amend that petition (so as to state this particular act of insolvency) which was made on the 8th December 1918. I am, therefore, satisfied that the petitioners are entitled to present this insolvency petition and hereby adjudicate the firm of Walbdas-Hollaram to be insolvents. The Official Receiver to take charge of the insolvents' property.

Opponents adjudicated insolvents.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 301 OF 1917.
March 22, 1920.
Present:—Sir Grimwood Meare, Kt., Chief Justice, and Mr. Justice Rafique.
Maulvi NAZIR HASAN—PLAINTIFF—APPELLANT
versus
BAKHTAWAR—DEFENDANT—RESPONDENT.

Malicious prosecution—Damages, suit to recover—Reasonable and probable cause, absence of—Burden of proof.

In order to succeed in a suit to recover damages for malicious prosecution, the plaintiff must prove, among other things, *a* that he was acquitted in the criminal proceedings, *b* that the defendant was actuated by malice in instituting the proceedings, *c* that damage was caused to him as a result of the prosecution and *d* that there was absence of reasonable and probable cause on the part of the defendant. [p. 161, col. 2.]

First appeal against the decree of the Subordinate Judge, Saharanpur, dated the 30th April 1917.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Nihal Chand*, for the Respondent.

JUDGMENT.—This is an appeal by Maulvi Nazir Hasan against a decision of the Subordinate Judge of Saharanpur who dismissed his claim, he having sued one Bakhtawar for damages for malicious prosecution. Contrary to what we think is the general belief, these actions for malicious prosecution are extremely difficult to substantiate. The policy of the law is that a man shall be permitted to bring a criminal complaint against another man without incurring any serious risk if he acts in good faith and without malice or, to put it more accurately, if he acts with reasonable and probable cause and without malice. If every one who had been acquitted by a Magistrate was by the mere fact of that acquittal given a good cause of action against a complainant, complainants would be very shy of going into Court; and charges which ought properly to be preferred against people, would be abandoned for fear of the consequences. Now in this case Bakhtawar filed a complaint under sections 298 and 448 of the Indian Penal Code on the 12th of March 1915. Shortly, he alleged that Nazir Hasan had done acts offensive to his religious feelings in that he had caused bones to be thrown into his compound and had demolished a well. Nazir Hasan was the Zamindar of the village. That village was not ancestral property but he appears to have bought it as the result of a successful practice in law and he appears to have dealt with the villagers in a harsh and overbearing manner. Consequently there was ill feeling on both sides, and when the case came before the Magistrate he found it extremely difficult to come to a conclusion as to whether the charges made by Bakhtawar were proved or not. In the result he acquitted Nazir Hasan. Thereupon Nazir Hasan became the plaintiff in the present suit, and it was incumbent upon him, as he was seeking damages for what he alleged was a malicious prosecution, to prove amongst other things the fact that he had been acquitted, which was of course formally to prove malice which in the circumstances was not difficult, to prove special damage and general damage and also to prove that there was an absence of reasonable and probable cause for his prosecution. Now in all these cases the difficulty that lies in the way of the complainant is to prove that negative. We have given the case very careful attention, and we have considered the evidence given by the plaintiff and his witnesses, and we have also read the decision of the Magistrate and the judgment in the Court below, and we are of opinion that the plaintiff has not been able to show that the defendant in commencing this prosecution and carrying it through was acting without reasonable and probable cause. There may have been exaggeration in Bakhtawar's case when before the Magistrate, but we cannot say that he did not honestly believe that substantially all that he and his witnesses said was the truth. The Magistrate who was making the enquiry could not even say that, and he seems to have regarded the matter as one in which conviction or acquittal was on the border line. Now that is not at all the sort of case which the plaintiff should select who wishes to recover damages for malicious prosecution. Our attention has been called by Mr. Shiva Prasad to the case of *Puttu Lal* v. *Ram Sarup* (1). That case, in our opinion, very accurately sets out what is the state of the law which as regards these actions of malicious prosecution is as well settled as any thing can be. The reason

(1) 43 Ind. Cas. 193; 16 A. L. J. 468.

why in that case the plaintiff was not burdened with the difficulty of proving the absence of reasonable and probable cause was that the lower Appellate Court came to the conclusion that the prosecution story in the criminal case was false to the knowledge of the man who was preferring it, and obviously if it was false to the knowledge of the man who was preferring it, he could not have had any reasonable or probable cause for prosecution. Now that is the position. The result is that without expressing the least view as to the merits or demerits of either side in the original prosecution, we dismiss the appeal on the ground that the appellant (who was the plaintiff in the Court below) has been unable to show the necessary absence of reasonable and probable cause. The appeal, therefore, is dismissed with costs. There being no certificate, we make no order as to the scale of fees.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1544 OF 1919.

April 14, 1920.

Present:—Mr. Justice Wilberforce.

SOHAN SINGH—PLAINTIFF—APPELLANT

versus

MUHAMMAD DIN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 115, 120 *—Suit for return of goods delivered with interest in kind—Limitation applicable.*

Plaintiff sued for 24¾ *manis* of wheat, alleging that the defendant had signed a balance in his favour of 8¼ *manis* with interest payable in kind at the rate of 50 per cent per annum:

Held, that the suit was governed either by Article 115 of Schedule I to the Limitation Act, in which case limitation began to run when payment was demanded and refused, or by Article 120, and that in either case the suit was in time. [p. 16, col. 2; p. 6, col. 1]

Mengha Ram v. *Hassu*, 49 Ind. Cas. 231; 41 P. R. 1918, not followed.

Second appeal from the decree of the District Judge, Lyallpur, dated the 15th April 1919, affirming that of the Munsif, 1st Class, Wazirabad, District Gujranwala, dated the 15th August 1918, dismissing plaintiff's suit.

Mr. *Kanwar Narain*, for the Appellant.

Dewan *Mehr Chand*, for the Respondent.

JUDGMENT.—The plaintiff stated that the defendant had signed in 1912 a balance in his favour of 8¼ *manis* of wheat with interest payable in kind at the rate of 50 per cent. per annum.

He sued for 24¾ *manis* of wheat in 1918 and valued his suit at Rs. 1,000. The suit is within time if the limitation is one of six years. The lower Appellate Court on the authority of *Mengha Ram* v. *Hassu* (1) held the suit to be barred under Article 115. Against this decision a second appeal has been preferred.

Counsel for the appellant argues that *Mengha Ram* v. *Hassu* (1), which contains little discussion of the subject, is a judgment of no value as against him. He contends that neither Article 65 nor 115, as held in that judgment, can apply to the present case. In the present case there was no definite promise of re-payment at any specified time. The implied contract between the parties was that the defendant should pay in kind when he liked, subject to the right of the creditor to demand payment when he wanted it. Counsel, therefore, contends that this implied contract can only be said to be broken when the creditor demanded payment and the debtor refused. Counsel urges that his suit is within time if Article 115 applies to the demand for payment which was made within three years of the suit. He urges otherwise that the only applicable Article can be 120 or 52. He cites a judgment of Rattigan, C. J., published in Lahore Law Journal on page 191 of part III of 1920, in which the facts appear to have been similar and it was held that Article 52 applied. In that case, however, it must be noticed that the plaintiff was suing for a sum of money as representing the price of certain articles sold, while in the present case the plaintiff sues for the return of the goods delivered with interest in kind Counsel for the respondent relies only on *Mengha Ram* v *Hassu* (1), which may be right on its particular facts but does not appear a good authority in the present case. I hold that either Article 115 is applicable and that if so, the case is

(1) 49 Ind. Cas. 231; 41 P. R. 1918.

within time, as the implied contract was broken only shortly before the suit, or else that Article 120 applies, in which case the suit is within time.

I accept this appeal and remand the case to the first Court for a decision on the merits. Costs to follow the result. Stamp on appeal to be refunded.

Appeal accepted.

PRIVY COUNCIL.

APPEALS FROM THE MADRAS HIGH COURT.

December 8, 1919.

Present:—Viscount Finlay, Lord Sumner and Lord Parmoor.

S. D. KRISHNA AYYANGAR

APPELLANT

versus

S. V. NALLAPERUMAL PILLAI AND OTHERS—RESPONDENTS.

Companies Act (VI of 1882), s. 68—Charge in favour of officer of company—Non-registration, effect of—Charge, whether enforceable—"As such," effect of—Appeal—Enlargement of time—High Court, power of—Construction of Statutes—Speech in Legislative Council, whether can be referred to.

An officer of a Limited Company cannot avail himself of a mortgage or charge in his favour, which has not been registered in accordance with section 68 of the Companies Act, 1882. [p. 169, col. 1.]

The words "as such" in the Explanation to section 68 of the Companies Act of 1882 are superfluous. [p. 169, col. 1.]

The lower Court decided that want of registration did not prevent the enforcement of a charge against a Company by one of its officers. The debenture-holders, although bound by the judgment, did not appeal. More than a year after the time for appeal had elapsed, when it was sought to enforce the charge, the debenture-holders, on appeal to the High Court, were allowed by that Court to raise the point of non-registration:

Held, that the High Court had by implication enlarged the time for appeal [p 167, col. 2]

When the construction of an Act is in question, no statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words. [p. 168, col. 1.]

Consolidated appeals from four decrees of the Madras High Court (Sir John Wallis, C. J., and Tyabji, J.), dated the 30th April 1915 and reported as 30 Ind. Cas 286, reversing an order of the District Judge, Tinnevelly, dated the 22nd December 1913.

FACTS of the case sufficiently appear from their Lordships' judgment, when the resolution creating the charge is set out in full. The first four of the present respondents were certain debenture-holders of the Company, and the fifth respondent was the Official Liquidator, who was winding up the Company as such. The 5th respondent had been a party to the proceedings before the District Judge in 1912: the other four respondents were not parties. These four respondents, however, intervened in 1913, when the plaintiff-appellant sought to enforce the order of 1912. The District Judge decided against them.

On appeal the High Court (Wallis, C. J., and Tyabji, J.) reversed this decision. The material part of the Chief Justice's judgment (in which Tyabji, J., concurred) was as follows:—

"The third point is that the charges having been created in favour of officers of the Company—one of them is Secretary and the other had been appointed, by resolusion, manager of the Company's office and not having been registered as required by section 68 of the Indian Companies Act of 1882, were not available to the claimants within the meaning of the Explanation to that section. This objection was taken by the Liquidator in the earlier case and was overruled by the District Judge, now Mr Justice Oldfield. It was again expressly taken in the lower Court in this case, but was apparently not argued in view of Mr. Oldfield's decision at an earlier stage. It is not expressly mentioned in the grounds of appeal to us, but as the facts are such as to bring the case *prima facie* within the terms of the statutory provision, we think that we ought to enforce the provisions of the section if they are applicable. The Companies Act of 1862, whilst providing penalties for failure to register mortgages and charges did not provide that unregistered mortgages and charges should be void, but then there were decisions that it would be inequitable to allow officers of the Company to enforce such charges when created in favour of themselves. The late Sir George Jessel criticised these decisions in several cases, pointing out that they imposed an additional penalty not warranted by the Statute and his view was finally upheld in 1867 by the House of Lords in *Wright v.*

Horton (1). At the time when the Indian Companies Act of 1 82 was being drafted and passed into law, the other view still prevailed and the Legislature endeavoured to give effect to it as nearly as possible in the words used in the decided cases. In *Patent Bread Machinery Company, In re, Valpy & Chaplin, Ex parte* (2) Lord Justice James, after observing that the mortgage was not void for want of registration went on: 'But as it is the duty of the officers of the Company to see that every charge specifically affecting property of the Company is registered, I am of opinion that no director, manager or other officer of the Company can avail himself of a charge which is not registered,' and he applied the doctrine to a person who had acted as solicitor to the Company. The same language was used by the Court of Appeal in *South Durham Iron Company, In re, Smith's case* (3), where Sir George Jessel interpreted the decisions as meaning that a director, manager or officer cannot avail himself of the security. These were all cases in which the officer had taken a charge in respect of advances made by him to the Company and not for arrears of salary due to him.

The Explanation to section 68, which appears to be intended to reproduce the ruling of Lord Justice James in *Patent Bread Machinery Company, In re, Valpy & Chaplin, Ex parte* (2) as far as possible in his own language, is as follows:—

'Omission to register under this section a mortgage or charge does not render it invalid, but the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting the property of the Company and not so registered.' The words 'as such' present some difficulty. If they mean as 'officers of the Company,' it is difficult to see what is meant by the officers of the company availing themselves of a mortgage or charge as officers of the Company, unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is, I think, clear that the Legislature was anxious to reproduce not only the substance but as far as possible the very language of the decisions, and that this must be accepted as the meaning of the Explanation."

Hence this appeal.

Mr. *Kenworthy Brown*, for the Appellant, submitted that the appellant was entitled to enforce his charge. The High Court had misconstrued section 68 of the Indian Companies Act, 1862; instead of considering the terms of the Indian Statute, they had considered the effect of section 43 of the English Act (The Companies Act, 1862) as interpreted by decisions. The words "as such" in the Explanation to section 68 indicate that the disability imposed by the Act applies only so long as the holder is an officer of the Company. In this case, under section 137 of the Act, the appointment of the liquidator discharged all the officers of the Company. The effect of the section is not that the officer cannot take the mortgage, but that while he is an officer he cannot enforce it. The Chief Justice has erred in holding that the Explanation was intended to enact the principle laid down by James, L. J., in *Patent Bread Machinery Company, In re, Valpy & Chaplin, Ex parte* (2).

The view expressed by James, L. J., was strenuously contradicted by the Master of the Rolls in. In *Globe New Patent Iron & Steel Company, In re* (4) and again by the same learned Judge and Bramwell, J., in *South Durham Iron Company, In re, Smith's case* (3), both cases before the enactment of the Indian Companies Act, 1862, and was finally decided to be erroneous by the House of Lords in *Wright* v. *Horton* (1).

Further, the words of the Explanation to section 68 do not accurately follow the language used by James, L. J. The assumption that it was intended to express his view is erroneous. Secondly, and apart from the merits, the present question is *res judicata*. The debenture-holders left the liquidator to represent them in the proceedings before the District Judge who had this very point before him. They are stopped by Explanation VI to section 11 of the Code of Civil Procedure from raising the point again. The object of the winding up proce-

(1) (1887) 12 A. C. 371; 56 L. J. Ch. 873; 56 L. T. 782; 36 W. R. 17; 52 J. P. 179.

(2) (1872) 7 Ch. App. 289, 26 L. T. 228; 20 W. R. 347.

(3) (1879) 11 Ch. D. 579; 48 L. J. Ch. 480; 40 L. T. 572; 27 W. R. 845.

(4) (1879) 48 L. J. Ch. 295; 40 L. T. 580; 27 W. R. 424.

dure is that all matters should be disposed of quickly, and under section 144 of the Act the official liquidator represents the creditors.

Madras Irrigation and Canal Company, In re, Wood v. *Madras Irrigation and Canal Company* (5).

The District Judge was right not only under section 11 but because the application giving rise to this appeal was merely an application for execution of a previous order. *Ram Kirpal* v. *Rup Kuari* (6).

On the present application the question of priority was open to the debenture-holders: the question of the validity of the charge was not.

Thirdly, the appeal to the High Court was incompetent. Notice of appeal was not given within three weeks of the order as required by section 169 of the Act in winding up proceedings. There is no order of the High Court extending the time.

Messrs. *Clauson K. C.*, and *Dube*, for the Respondents.—The High Court are right. The Explanation to section 68 prevents appellant from availing himself of the unregistered charge. The construction he urges involves substituting for "as such" the words "while being an officer of the company." We submit that the true construction is to refer the words "as such" to the words mortgage or charge: the person who has the charge cannot avail himself of it "as such", but he still has his rights as an unsecured creditor. The language of the Explanation substantially reproduces that of James, L. J., in *Patent Bread Machinery Company, In re, Valpy & Chaplin, Ex parte* (2) and it was intended to enact the principle laid down in that case, *viz.*, that an officer of the Company whose duty it was to register the charge cannot avail himself of it if unregistered. This will be clear on reference to the proceedings in the Legislative Council on its enactment.

[Mr. *Kenworthy Brown*: No reference to such proceedings is admissible.

Craies on Statute Law, 2nd Edition, pages 133, 134; *Administrator-General of Bengal* v. *Premlal Mullick* (7)].

Those proceedings may be inadmissible to ascertain the intention of an enactment, but they are relevant to show the sense in which particular words, like the words "as such" here, are used.

(The Board ruled that the proceedings could not be referred to at all.)

The decision in 1912 did not constitute a *res judicata* against respondents, for they were not parties to the proceedings. They were entitled to intervene and appeal. The High Court had power to extend the time for appealing, and must be taken to have done so. The present appellants did not raise this objection in their memorandum of appeal to the High Court: and under Order XLI, rule 2, could not be heard on it without leave.

Mr. *Kenworthy Brown* replied.

JUDGMENT.

VISCOUNT FINLAY.—The question in the present case is whether a charge given to the Secretary of a Limited Company upon unpaid calls can be enforced by him although not registered as required by section 68 of the Act of 1882 (the Indian Companies Act). The difficulty in the case is occasioned by the Explanation appended to the section, which otherwise is on the same lines as the corresponding section in the English Act. It was held by the High Court of Madras that the terms of the Explanation rendered the charge not enforceable. Apart from the effect which the Explanation in the Indian Act may have in the case of a mortgage or charge to an officer of the Company, it is clear that a mere failure to register does not under either the English or the Indian Act render a mortgage or charge on the property of the Company unenforceable.

Section 68 of the Indian Act requires registration of all mortgages and charges specifically affecting property of the Company, and imposes a penalty upon any official of the Company who knowingly and wilfully authorises or permits the omission of such entry on the register. The performance of the duty to enter the mortgage or charge on the register may be compelled by order of the High Court. There is appended to this section in the Indian Act an Explanation in the following terms:—

"*Explanation*—Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves as such of a mortgage or charge

(5) (1883) 23 Ch D 248 at 252; 49 L. T. 225.

(6) 11 I. A. 37 at 41; 6 A. 259 (P. C.); 4 Saraswati's P. C. No. 489; 3 Ind. Dec. (N. S.) 718.

(7) 22 I. A. 107; 22 C. 788 (P. C.); 6 Sar. P. C. J. 603; 11 Ind. Dec. (N. S.) 522.

specifically affecting property of the Company and not so registered."

The appellant contends that the judgment of the High Court is erroneous, and that the question of construction has been conclusively settled in his favour by an order of the District Judge in 1912 which stands unreversed.

The appellant was the Secretary of the Swadeshi Steam Navigation Company, Limited. On the 27th June 1910 a resolution creating the charge in question was passed by the managing directors in the following terms :—

"*Resolution III.*—Resolved that, in consideration of the fact that the Honorary Secretary Krishna Ayyangar has worked for the Company without any salary, foregoing his own source of income, and of the fact that he has borrowed and advanced moneys to meet the urgent needs of the Company, the unpaid calls due to the Company from the share-holders are mortgaged for the amount advanced by the aforesaid person to the Company and for interest thereon, and for the money advanced to the Company by the late manager Kandasami Pillai and for the deposit money due from the Company to the late cash-keeper Gopalakrishna Pillai ; that the Secretary be authorised to collect the unpaid calls through Court if necessary under the power already given to him, and that out of the amounts collected the deposit money due to Gopalakrishna Pillai be paid first, and that the Secretary Krishna Ayyangar and the said Kandasami Pillai Avergal shall appropriate the balance amount in the proportion of the amounts due to each of them."

This charge was never registered.

An order was made on the 4th July 1911 that the Company should be wound up by the Court, and in the course of the winding up a petition was presented by the appellant to the District Judge, Mr. Oldfield, asking for an order recognising the validity of the charge. The liquidator relied on section 68, and contended that the charge not having been registered was not enforceable by the appellant, as he was an officer of the Company when it was taken. The District Judge rejected this contention on the ground that the Explanation refers to the contingency of the officers of the Company desiring to avail themselves as such of a charge, and that it was not as secretary but as an individual that the appellant sought to avail himself of this charge, and made an order on the 27th April 1912 allowing the claim for the reasons set out in his judgment on pages 8—10 of the Record. The liquidator further attacked the charge before the District Judge as a fraudulent preference, but the District Judge by the same order decided in favour of the appellant on this point also. No appeal was ever presented against this order. On the 25th September 1913 the appellant applied to the District Court for an order directing the official liquidator to pay to the petitioner the amount collected or to be collected for unpaid calls. This was opposed by debenture-holders and by the liquidator on the grounds (*a*) that the charge was void as a fraudulent preference; (*b*) that it had not been registered; and (*c*) that it was not entitled to priority over debentures previously issued. The District Judge, Mr. Waller, refused to entertain grounds (*a*) and (*b*) as they had been decided by the order of the 27th April 1912 but heard argument on ground (*c*), and on the 22nd December 1913 decided that the appellant was entitled to priority over the debenture-holders. On appeal against this decision to the High Court at Madras the judgment now under appeal was delivered on the 30th April 1915. The judgment deals with two points. The first was as to the claim of the debenture-holders to priority over the charge. On this the High Court decided in favour of the present appellant and against the debenture holders. The second point was that of non-registration, which the Court allowed the debenture-holders to raise on this appeal. The Chief Justice, in delivering judgment, referred to the conflict on the interpretation of section 43 of the English Act which had arisen between Sir George Jessel and James, L. J., as to mortgages and charges to officers of the Company, and said that the Explanation appeared to be intended to reproduce the ruling of James, L. J., in *Patent Bread Machinery Company, In re, Valpy & Chaplin, Ex parte* (2). He then proceeded as follows:—

"The words 'as such' present some difficulty. If they mean 'as officers of the Company,' it is difficult to see what is meant by officers of the Company availing themselves of a mortgage or charge as officers of the Company, unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is, I think, clear that the Legislature was anxious to reproduce not only the substance, but as far as possible the very language of the decisions and that this must be accepted as the meaning of the Explanation."

It is undoubtedly true that the very point which has now been argued before their Lordships was argued before the District Judge in 1912 and then decided in the appellant's favour, and there has been no appeal against that decision. Ought this, as the appellant contends, to make an end of the matter? The point is of considerable importance as a matter of practice. The order of the 27th April 1912, which was made after argument on behalf of the appellant and the official liquidator, decided that the want of registration did not prevent the enforcement of the mortgage. Their Lordships think that the official liquidator must be regarded as having represented on that application the debenture holders and creditors as well as the Company, and that so long as the decision stands it is conclusive in the winding up on all parties so represented. The official liquidator did not appeal. If any debenture holder or other person interested desired to attack the decision, it was open to him to ask that he should be made a party and should have leave to appeal. No such application was made. But when the appellant applied on the 28th September 1913 for enforcement of the order made on the 27th April 1912, the debenture-holders, on their appeal from the order of the 22nd December 1913, were allowed by the High Court to raise the point of non-registration which had been decided against them in 1912. (See the judgment now under appeal, Record, pages 96 & 97.) The proper course to have taken in order to raise this point would have been to get leave, notwithstanding the lapse of time, to appeal from the judgment of the 27th April 1912. But the matter is merely one of practice. The High Court could have regularised the proceedings by extending the time, and giving leave to appeal from the 1912 decision, and they considered the point without going through this process. Their Lordships are not prepared to reverse the decision of the High Court merely because the proper course in point of practice was not taken, and they propose to deal with this appeal on the footing that the respondents were entitled to raise in the High Court their objections under section 68. Whether leave should have been given to appeal would have been a matter of discretion, but the High Court appear to have had no doubt that they should allow the point to be raised. Their Lordships have, therefore, dealt with the case on this basis, and now proceed to consider the appeal on its merits.

The question of the effect of non-registration in cases where the charge was taken by an officer of the Company must be decided upon the terms of the Explanation to section 68, but in order to make the judgment of the Chief Justice intelligible it is necessary to refer shortly to the English decisions which he quotes in his judgment.

The English section—section 43 of the Companies Act of 1862—corresponds to section 68 of the Indian Act *minus* the explanation. In 1872 in *Patent Bread Machinery Company In re, Valpy & Chaplin, Ex parte* (2) (*supra*), James, L. J., held that, as the unregistered charge had been taken by a person acting as solicitor to the Company, he could not avail himself of it, and in 1876 in *Native Iron Ore Company, In re* (8) a mortgage in favour of directors of the Company was held not enforceable as the registration was defective, there being no description of the property. These decisions proceeded on the supposed principle that, as it is the duty of officers of the Company to see to registration of mortgages, if they fail to do so in the case of mortgages to themselves they cannot be permitted to enforce them. But in 1878 in the *Globe New Patent Iron &*

(8) (1876) 2 Ch. D. 345; 45 L. J. Ch. 517; 34 L. T. 777; 24 W. R. 503.

Steel Company, In re (4) Sir George Jessel expressed his dissent in the strongest terms from these two decisions, and in 1879 in the *South Durham Iron Company, In re, Smith's case* (3) Sir George Jessel and Bramwell, L. J. (*dissentiente* Baggallay, L. J.), adhered to the view that these two cases had been improperly decided. The whole Court, however, held that they were binding authorities, but distinguishable on the facts of the case then before the Court.

This was the state of the authorities when the Indian Companies Act became law. The High Court in the present case took the view that the Explanation was intended to reproduce the ruling of James, L.J., and must be construed accordingly. The construction of the Explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. The controversy was terminated, so far as the English Courts are concerned by the decision of the House of the Lords in 1887 in *Wright* v. *Horton* (1), which is an express and final decision that Sir George Jessel's view was right. Of course this decision can have no effect upon the present case. If the effect of the Explanation in the Indian Act of 1882 was to adopt as law in India the view of James, L.J., there is an end of the matter in the absence of further legislation. If the Explanation has this effect it must be carried out, and the fact that the enactment was passed in consequence of what the subsequent decision of the House of Lords showed to be a misconception of the English Law would be quite irrelevant. The question is, What does the Explanation mean? No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

The question really narrows itself to this: What effect should be given to the words "as such" in the Explanation?

The appellant contended that the words "as such" relate to the words "the officers of the Company" and that the effect is to enact that the officers cannot avail themselves as such officers of unregistered mortgages or charges taken by them in their capacity of officers of the Company. This is the most natural meaning of the words; it was adopted by Mr. Oldfield, the District Judge, in his decision of the 27th April 1912 and in his judgment (Record, page 9) he suggested circumstances in which he thought the words so read would take effect. The contingency referred to by Mr. Oldfield was the retention by the company of redeemed debentures or charges in the name of an officer. Such a contingency, however, is remote even if possible and it appears to their Lordships that it would be a mistake to read the words as directed to it.

The respondents contended that the words "as such" refer entirely to the following words "of a mortgage or charge," and that their effect is that the officers of the Company cannot avail themselves of a mortgage or charge as such unless it has been registered. It was suggested that the words were introduced in order that it might be open to the officer of the Company to avail himself of the instrument as evidence of a debt or for some other purpose of that kind.

Their Lordships are unable to accept this construction. It seems to them to be at variance with the language of the Explanation The structure of the sentence is such that the words must be read as referring to what precedes and not to what follows them. To hold otherwise would be to put an unjustifiable strain upon the clause, which must be read according to the ordinary usages of the English language. Indeed, the intervention of the word "of" between the words "as such" and the words "a mortgage or charge" appears fatal to this theory.

Yet another construction has been put forward, *viz.*, that "as such" means "while such" and prevents the enforcement of the security by an officer of the Company while he remains such officer. If this view be correct, the appeal would succeed, as, owing to the winding up of the Company, the appellant had ceased to be an officer of the Company before the claim was put forward. Their Lordships do not see their way to construing the words in this sense as relating merely to time.

There is a fourth possible construction of these much debated words and it is

that which after much consideration their Lordships adopt. It is this. The words "as such" should not be read as denoting the capacity in which the officers take the mortgages or charges. They are introduced simply as giving the reason for the inability to take advantage of the securities. The reason underlying the judgments, which the Explanation appears to have been intended to crystallise into the form of an enactment, was that officers entrusted with a duty as to registration could not take advantage of a security to them as to which this duty had been neglected by them. The words "as such" relate simply to the prohibition under which they are as officers. The officers are forbidden as such because they are officers and were, therefore, bound to see to registration, to avail themselves of unregistered securities. The words in this sense are unnecessary but not insensible. The drafting is bad, but having regard to the extreme improbability that it was intended to meet such a contingency as that put by Mr Oldfield in his decision of the 27th April 1912, and to the fact that the construction now suggested would, as the Chief Justice in the Court below points out, embody the effect of the judgments of the Court of Appeal, which were in 1882 when this clause was enacted recognised as of binding authority, their Lordships think that this last construction should be adopted. The language of the Explanation is to some extent taken from these judgments, as the Chief Justice remarks, and this strengthens the probability that it was intended by the language used to reproduce their effect.

Their Lordships, therefore, are of opinion that the judgment of the High Court of Madras is right and will accordingly humbly advise His Majesty that these appeals should be dismissed with costs.

Appeals dismissed.

Solicitor for the Appellant.—Mr. *John Josselyn.*

Solicitor for the Respondent.—Mr *H. S L. Polak.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2610 OF 1919.

April 5, 1920.

Present:—Mr. Justice Chevis, Acting Chief Justice.

BALAK RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

KAURA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession between co-sharers—Sole possession and non-payment of rent, whether enough, effect of—Burden of proof.

In order to establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile act on the part of the co-sharers setting up adverse possession with notice to the others, and mere non-participation in the profits by one party and exclusive occupation by the other party is insufficient. [p. 170, col. 2.]

Plaintiffs sued for a declaration that certain land belonged to them and that the entry in the revenue records showing defendants as owners of 1/3rd of this land was wrong. It appeared that the plaintiffs had been long in possession of the land in suit and had paid no rent:

Held, that the fact that the plaintiffs had held sole possession and had paid no rent was not sufficient to prove that defendants were not co-sharers, nor was it sufficient to establish the plaintiffs' adverse possession. [p. 170, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Mianwali, dated the 31st October 1919, reversing that of the Munsif, 2nd Class, Bhakkar, District Mianwali, dated the 13th May 1919, dismissing the claim with costs.

Lala *Amar Nath Chona*, for the Appellants.

Lala *Fakir Chand* for Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—The plaintiffs are recorded as owners of 2/3rds of the land in suit and defendants as owners of 1/3rd. The defendants having applied to the Revenue Authorities for partition, the plaintiffs seek a declaration that they are sole owners of the land.

The first Court dismissed the suit, holding that plaintiffs had failed to prove any error in the Revenue Records. The learned District Judge on appeal decreed the claim, holding that the fact that plaintiffs had exercised sole possession over the land in suit for a period exceeding 12 years was, in the peculiar circumstances, sufficient to prove their claim.

The defendants appeal to this Court,

GIRINDRA CHANDRA SEN v. MAHESH RAM DEB.

In the first Regular Settlement plaintiffs are shown as holding 60 shares, the other 30 being held by

Khota	... 10	Shares
Niazi, etc.	... 12	"
Hasna	... 4	"
Isa	... 4	"

The entries in the last Settlement shew ownership thus:—

Plaintiffs	... 60	Shares
Ahmad, son of Isa, (defendant No. 6)	... 4	"
Balak Ram, etc., (defendants Nos. 1—5)	... 26	"

So the entries are the same as in the first Regular Settlement, except that the shares of Khota, Niazi and Hasna have now come to defendants Nos. 1—5. How this change came about is not known.

Six witnesses for plaintiffs say plaintiffs and their ancestors have always been in possession and have paid no rent. This may be true but is not sufficient reason for holding that defendants are not co-sharers. In the case of joint land it sometimes happens that some of the co-sharers leave the management and income of the land to their co-sharers. The plaintiffs allege that they are sole owners, and that the mistake has arisen because plaintiffs are only 2/3rds owners of some land on an adjoining well. This is plausible, but something more definite must be shewn before we can regard the entries made at Settlements as incorrect. It is easy enough for plaintiffs to be owners of 2/3rds of this and also of other land. In the absence of any proof of a mistake in the records I hold the entries in the records to be correct.

As to adverse possession or abandonment, I note that in the first Court plaintiffs seem to have relied simply on title. And in the next place I can find no proof of adverse possession, unless perhaps it be in a private partition made in 1913. That partition is recorded in the Revenue Records as a partition of 2/3rds only, but I do not understand how 2/3rds could be partitioned unless the 2/3rds were first separated from the 1/3rd. So I will assume that the plaintiffs partitioned the whole land in 1913, but this was only 6 years prior to suit. Before 1913 I can find no evidence of any overt act of adverse possession. That the plaintiffs held sole possession and paid no rent to their co-sharers is not sufficient to establish adverse possession. There are several rulings to this effect, and this rule holds good not only in the case of relations but in the case of co-sharers generally. So the learned District Judge has wrongly distinguished these rulings on the ground that plaintiffs are Muhammadan cultivators and the defendants Hindu shopkeepers. For the plaintiffs-respondents reliance is placed on *Ahmad-ud-din Tamijud-din* v. *Amir-ud-din* (1), but this judgment merely states that there have been cases where there has been long possession and the Court has come to the conclusion that the evidence in the circumstances warrants the finding that there has been an ouster of a co sharer without any express evidence of such ouster. I note too that in this case the Court held that there had not been any ouster. So this ruling does not help the plaintiffs. Over and over again it has been laid down that in order to establish adverse possession as between co-sharers there must be evidence of an open assertion of a hostile act on the part of the co-sharers setting up adverse possession with notice to the others and that mere non-participation in the profits by one party and exclusive occupation by the other party is insufficient; see cases cited in Rustomjee's Limitation, 2nd Edition, page 511. As to abandonment there is no proof whatever.

I accept the appeal and setting aside the District Judge's order, I restore the decree of the first Court dismissing the suit. The plaintiffs will pay costs in all Courts.

Appeal accepted.

(1) 44 Ind. Cas. 216.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2351 OF 1918.

January 5, 1920

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

GIRINDRA CHANDRA SEN—PLAINTIFF—APPELLANT

versus

MAHESH RAM DEB AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES DASARATH CHANDRA DEB (DHAR) AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of—Intention of testator—Estates taken by devisees.

GIRINDRA CHANDRA SEN v. MAHESH RAM DEB.

A testator by his Will gave full *maliki* rights in his estate to his sons and grandsons, but placed certain restrictions on their powers of alienation, and the question was what was the interest the sons got under the Will:

Held, that upon a construction of the Will as a whole the intention of the testator was to grant an absolute interest to the sons and grandsons. [p. 172, col. 1.]

Appeal against the decree of the Additional District Judge, Sylhet, dated the 29th of May 1916, affirming the decree of the Officiating Subordinate Judge, 2nd Court of that District, dated the 11th of May 1915.

FACTS material to the report will appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babus *Hemendra Kumar Das* and *Benoyendra Nath Palit*), for the Appellant.—The plaintiff is the appellant before your Lordships. The case of the plaintiff is that under the Will of his grandfather the sons of the testator had only a life interest in the property in dispute while the absolute interest was conferred upon the grandson. The expression used with reference to the sons is * * * * * (*Futrogan Sattyadhukari Haiben*) while the expression used with reference to the grandsons is * * * * (*Poutrogan Nirburha Sathya Paibe*). The intention of the testator must be gathered from the whole Will and not from a portion of it. Although the first portion of a Will may appear to have conferred an absolute interest, subsequent portions of the Will may qualify that interest. See *Somasundara Mudaliar* v. *Ganga Bissen* (1). The use of the word "*Malik*" is not sufficient to show that an absolute interest was meant. Reads the Will in Bengali.

See *Amarendra Nath Bose* v. *Shuradhany Dasi* (2).

Babu *Brojolal Chuckerbutty* (with him Babu *Paresh Lal Shome* and Babu *Panchanan Ghose* for Babu *Biraj Mohan Mojumdar* for Deputy Registrar), for the Respondents.—The nature of the estate conferred upon the sons is the same as that conferred upon the grandsons. Although the words * * * (*Maliki Sattya*) are used in the case of the sons and the words * * * (*Nirburha Sattya*) in the case of the grandsons, the same restriction is imposed on the power of alienation of either. The sons and the grandsons are, therefore, placed in the same category. If only a life-interest was intended to be given to the sons, appropriate words to convey that interest might have been used by the testator. If the gift is a limitable one, the restriction on alienation is void. See *Sulochana Debi* v. *Jagattarini Debi* (3), *Kanhia* v *Mohin Lal* (4). Refers also to *Lala Ramiewan Lal* v. *Dal Koer* (5) and *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (6). I do not dispute the correctness of the decisions cited by my learned friend.

The general intention of the testator is that an absolute interest is given both to the sons and the grandsons, but restiction is imposed on the power of alienation by the legatees and the restriction is that there should not be unnecessary alienation. Reads the Will. The testator died in 1892. There were alienations by the sons of the testator between 1892 and 1904. It was only in 1904 that the daughter-in-law of the testator (mother of the plaintiff) took Probate of the Will and now the alienation by the father of the plaintiff is challenged.

Dr. *Sarat Chandra Basak*, in reply.—My learned friend's argument is based on the assumption that there is the same restriction imposed on the power of alienation by both the sons and the grandsons. I submit that although there are restrictions imposed on the power of alienation by either, the nature of the restrictions is not the same in both the cases.

JUDGMENT.—The question involved in this appeal is—what was the interest which the sons of Golak, the testator, got under his Will.

The Courts below have come to the conclusion that an absolute interest was given to them under the Will.

It appears that although there is some difference in the expressions used with reference to the right granted to the sons and to the grandson after the death of the sons, respectively, both the sons and the grandson were given full *maliki* right. It is true that restrictions were imposed on the

(1) 28 M. 386.
(2) 5 Ind. Cas. 73; 14 C. W. N. 458.
(3) 53 Ind Cas. 602; 30 C. L. J. 51.
(4) 10 A. 495; A. W. N. (1888) 181; 6 Ind. Dec. (N. S.) 333.
(5) 24 C. 406; 12 Ind. Dec. (N. S.) 938.
(6) 31 C. 111; 7 C. W. N. 688.

power of alienation, but these restrictions appear not only in the case of the sons, but also in the case of the grandson. We do not think, upon a construction of the Will as a whole, that the testator intended to give a life-estate to the sons and confer an absolute estate on the grandson, as contended for on behalf of the appellant. It seems to us that the intention of the testator was to grant an absolute estate to the sons and the grandson, though an attempt appears to have been made to restrict the power of alienation in the case of both.

On the whole, we are not satisfied that the Courts below have come to a wrong conclusion as regards the construction of the Will. The result is that the appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 357 OF 1917.

April 15, 1920.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Syed SHAH MAHDI HASAN—

PLAINTIFF—APPELLANT

versus

Syed ISMAIL HASAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Mortgage suit—Final decree—Sale not held—Mortgagor, right of, to redeem, whether extinguished.

The mere passing of a final decree in a mortgage suit does not extinguish the mortgagor's right to redeem, until a sale has actually taken place in pursuance of the decree. [p. 172, col. 2.]

First appeal from the decree of the Subordinate Judge, Aligarh, dated the 26th of June 1917.

Dr. *S. N. Sen* and Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—In our opinion the decision of the Court below refusing to decree the plaintiff's claim for redemption is erroneous. A mortgage was made on the 17th of February 1895 in the form of a *zarpeshgi* lease in favour of Muhammad Siddiq. The mortgagee paid a portion of the *zarpeshgi* money and took possession of three of the mortgaged villages, namely, Imamnagar, Rahmatpur and Bhasaura Khurd. The mortgage was in respect of the whole of Imamnagar and shares in the other two villages. The present suit is one for redemption of the three villages and it is alleged that the mortgage money has been discharged by the usufruct.

The Court below has dismissed the suit on the ground that the plaintiff's right of redemption in regard to all the three villages has become extinct. As regards Imamnagar the Court finds that a 2/5ths share has already been sold and the plaintiff does not own that share. As regards the remaining 3/5ths the learned Subordinate Judge was of opinion that the plaintiff's right of redemption had become extinct because a final decree for sale had been obtained by another mortgagee and that the said decree was in the course of execution in the Collector's Court. As for the two remaining villages, that Court was of opinion that the plaintiff had transferred his rights as regards one and in regard to the other such rights as he owned had also been transferred.

As regards Imamnagar we think the view taken by the learned Subordinate Judge is erroneous. The fact that a final decree for sale has been obtained by another mortgagee in respect of a 3/5ths share does not extinguish the rights of the mortgagor completely with regard to the aforesaid 2/5ths share. In Order XXXIV, rule 5, it is not provided, as was provided in section 89 of Act IV of 1882, that after the passing of a final decree or "order absolute" as it was called under section 89 of the Act of 1882, the right of the mortgagor to redeem becomes extinct. Even under section 89 of the Transfer of Property Act of 1882 the right became extinct only in regard to the mortgage the holder of which had obtained a decree for sale. If that decree is paid off, it cannot be said that the mortgagor's right has become extinct. Under the present Code of Civil Procedure which repeals section 89, the mere passing of a final decree does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree. In the

present case it is admitted that no sale has taken place, and we are informed that the amount of the mortgage upon which the decree was obtained has been paid off by the plaintiff. In any case the plaintiff's right as regards the remaining 3/5ths in Imamnagar not having ceased to exist, he has the right of redemption as regards at least that share. If the plaintiff is entitled, as we hold he is, to redeem a part of the mortgaged property, he is entitled to redeem the whole upon payment of the whole of the mortgage money or if he can prove that the whole of the mortgage money has been realised by the mortgagee from the usufruct of the mortgage money.

As regards the remaining two villages we express no opinion on the question whether the plaintiff's right has or has not become extinct, inasmuch as by reason of our decision that he still owns a 3/5ths share in the village of Imamnagar, he is competent to sue for redemption of the mortgage.

We accordingly allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause, and the costs in this Court will include fees on the higher scale.

Appeal allowed.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 12 OF 1919.

April 20, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

Sardarni DATAR KAUR—JUDGMENT-DEBTOR—APPELLANT

versus

RAM RATTAN AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, 47—Execution of decree—Order made in execution proceedings, whether decree—Order negativing decree-holder's right to proceed against certain property, nature of—Appeal, whether lies.

It is not every order made in execution proceedings which is a decree. [p. 173, col. 2.]

An order granting or refusing a process for the examination of witnesses or an order merely determining a point of law arising incidentally or otherwise in the course of execution proceedings and not refusing or granting relief is not a decree and is, therefore, not appealable. [p. 173, col. 2.]

An order finally negativing the right of the decree-holder to proceed against the land of the judgment-debtor comes within the purview of section 47 of the Civil Procedure Code and is appealable. [p. 173, col. 2.]

Letters Patent Appeal against the order of Mr. Justice Bevan-Petman, passed on the 12th June 1919 in Miscellaneous Second Appeal No. 3169 of 1918 and printed as 52 Ind. Cas. 356.

Mr. *Nand Lal*, for the Appellant.

Lala *Tirath Ram*, for the Respondents.

JUDGMENT.—The Full Bench has already decided the question that the agricultural land belonging to a member of an agricultural tribe can be alienated temporarily in execution of a decree passed against him, and the only other points, which Mr. Nand Lal for the appellant urges, are: —

(1) That the order passed by the Court of execution against the respondents did not amount to a decree, and consequently no appeal lay from that order to this Court: and

(2) that the decree holders did not, in their application for execution, expressly ask for a temporary alienation of the judgment-debtor's land, and are, therefore, not entitled to ask this Court to order a temporary alienation in their favour.

In support of his argument as regards the first point, Mr. Nand Lal has cited certain judgments, none of which is parallel to the present case. We fully recognise the principle that it is not every order made in execution which is a decree, and that an order granting or refusing a process for the examination of witnesses, or an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding and not refusing or granting relief, is not appealable. But in the present case the Court of execution finally negatived the right of the decree-holders to proceed against the land of the judgment-debtor. We consider that that order finally determined the question relating to the execution of the decree against the land. It comes within the purview of section 47 of the Civil Procedure Code and cannot be

treated as an interlocutory order. We are consequently of opinion that the single Judge rightly overruled the objection that no appeal lay to him.

As regards the second question, the application for execution fulfils all the requirements of Order XXI, rule 11, and expressly mentions the mode in which the assistance of the Court is required, namely, by the attachment and sale of the judgment-debtor's land. It is to be observed that Order XXI, rule 11 (2) (*j*), makes no mention of a temporary alienation of land, the reason probably being that the Court of execution, when refusing to order the sale of the property, is expected to direct instead a temporary alienation thereof without any specific prayer to that effect. Be that as it may, it is quite clear that this objection was not raised in the Court of first instance, and there can be no doubt that if an objection had been taken the Court would have, under Order XXI, rule 17, asked the decree-holders to amend their application, and that they would have complied with the order of the Court. Further, we find that an application was, as a matter of fact, made in which relief by way of a temporary alienation was expressly sought.

In these circumstances we consider that there is no substance in either of the contentions raised on behalf of the appellant. We accordingly dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 401 OF 1917.

April 8, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

MATHURA PRASAD—PLAINTIFF—APPELLANT

versus

HARDEO BAKSH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Pre-emption—Shafi-sharik—*Imperfect partition—Complete separation of rights—Co-sharer*—Pattidar, *right of, to pre-empt.*

Where a plaintiff claims a right to pre-empt under the Muhammadan Law as a co-sharer, he must, in order to succeed, prove that he is one of the class of co-sharers within the meaning of that law. [p. 175, col. 1.]

In the case of an imperfect partition of a village, where there is a complete separation of all rights, the owner of a *patti* in that village cannot be regarded as a co-sharer and consequently he has no right to pre-empt. [p. 175, col. 1 & 2.]

First appeal from a decree of the Subordinate Judge, Shahjahanpur, dated the 9th May 1917.

Messrs. *Lakshmi Narain Tewari* and *Haribans Sahai*, for the Appellant.

Dr. *S. N. Sen* and Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff is a co-sharer in Patti Raghubir Singh in the village of Ainthpur. The defendants Nos. 5 to 7 were the owners of Patti Nityanand, and defendant No. 8 was the owner of Patti Shib Lal. Defendants Nos. 5 to 8 sold the whole of these two Pattis Nityanand and Sahib Lal and a house to the defendants Nos. 1 to 4, who were complete strangers, for the sum of Rs. 6,600. The plaintiff claimed a right of pre-emption on the basis of custom recorded in the *wajib-ul-arz*. Admittedly, none of the incidents of the custom are set out in the *wajib-ul-arz*. The plaintiff in his plaint distinctly stated that the rules of Muhammadan Law applied and that in accordance with those rules he made the two demands as laid down by the Muhammadan Law, the defendants vendees refused to return the land to him; hence the suit. There was a dispute as to the amount of consideration, but that has been settled by the decision of the Court below and is not challenged before us. We may mention that the learned Pleader is unable to point out to us anything which was jointly held by the parties. The six separate Pattis constitute the twenty *biswas* and the owners of the plaintiff's Patti have no right whatsoever in any of the other Pattis in the *mahal*. There is complete separation of all rights, but the partition being what is known in the Revenue Law as imperfect, there remains a joint liability to Government for revenue The Court below accepted the evidence proving that the plaintiff had made the necessary demands, but it dismissed his claim on the ground that he was neither a *shafi i-sharik* nor a *shafi i khalik* nor had any right as a *shafi i jar*. In the Court below the

MADHORAO v. KESHEORAO.

plaintiff's Pleader made a distinct statement which is to be found printed at page 3 R of the printed record, in which he clearly stated that his client was not a co-sharer in the holdings sold, hence he had not brought his suit as a *shafi i-sharik fi nofsie mubee*, (that is as a pre emptor being a partner in the substance of the thing sold) but that he based his right as being a *shafi-i-khalik* or a *shafi i-jar mulasik*. The Court below has held that the plaintiff is none of these three classes of co-sharers within the meaning of the Muhammadan Law, and he has dismissed his suit.

Before us it is urged that the plaintiff's Pleader had no right whatsoever to make any such admission as he did make, and that the appellant is not bound by such an admission. As a matter of fact there is nothing in the plaint to show in what capacity the plaintiff claimed to pre empt, that is, whether as *shafi-i-sharik* or a *shafi i khalik* or a *shafi i jar*. That point was cleared up by the statement of his Pleader. It is pleaded before us that the plaintiff is a *shafi-i-sharik* inasmuch as the partition of the village is an imperfect partition and not a perfect one. The learned Pleader for the appellant is unable to point out to us that any portion of the village was jointly held or used by the owners of the various Pattis or that anything was left as the joint property of the owners of the various Pattis. He claims that as the Pattis constitute one *mahal* and there has not been a perfect partition, the plaintiff must be a *shafi-i-sharik*. In Muhammadan Law, *vide* Tyabji's Principles of Muhammadan Law, paragraph 541-A, by the word *sharik* or co-sharer is meant the owner of an undivided share in the property of which the subject of pre emption forms a part or share. Clearly on the facts of the present case the plaintiff is not the owner of an undivided share of the property which forms the subject of pre emption. He has no share in it whatsoever of any sort. Our attention is called to the decision of this Court in *Munna Lal* v. *Hajira Jan* (1), but if that judgment is carefully read, it is by no means in favour of the present appellant; in fact, it is dead against him. It is perfectly true that in that case there had been what is known in Revenue Law as a perfect partition and the two estates were entirely separate. In that case attention was called to certain decisions in cases of imperfect partitions of villages, but in each of those cases it was distinctly noted that there was still some portion of property which had been left joint and undivided. It is clear that within the meaning of the Muhammadan Law the plaintiff in the circumstances of the present case is not a *shafi i sharik*. His contention that he was a *shafi-i khalik* depended upon the oral evidence of one Kahar whose evidence was rejected by the Court below, and we consider rightly rejected. As for his claim on the basis of being *shafi-i jar* that is clearly defeated by the very ruling quoted by him in *Munna Lal* v. *Hajira Jan* (1), where it was distinctly held that in the case of Zamindaris and large landed properties pre-emption on the ground of vicinage was never allowed. On these findings the appeal must fail. We may note that we should find it very difficult indeed to agree with the Court below on the evidence which it accepted of the performance of the two demands according to the Muhammadan Law. If it were necessary for us to come to a finding on that point, that finding would be in favour of the opposite party.

The appeal fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

(1) 7 Ind. Cas. 404; 7 A. L. J. 879; 33 A. 28.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 60 OF 1916.

February 24, 1919.

Present:—Mr. Batten, A. J. C.

MADHORAO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KESHEORAO AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law—Parbhus in Central Provinces, law applicable to—Daughters, estate taken by.

The Parbhus of the Central Provinces, who originally immigrated from the Bombay Presi-

dency, are governed by the Bombay School of Hindu Law as now known and judicially ascertained, and not by that law as it existed at the date of their immigration.

In those parts of the Bombay Presidency where the Mayukha Law is paramount authority, as well as in those parts governed by the Mitakshara Law, daughters succeed to an absolute estate.

Appeal against the decree passed by the Divisional Judge, Hoshangabad, in Civil Regular Appeal No. 60 of 1915, dated the 16th October 1915, arising out of Civil Suit No. 77 of 1914, decided by the District Judge, Chhindwara, dated the 10th May 1915.

Mr. *M. Gupta*, for the Appellants.

Messrs. *H. S. Gour* and *M. B. Khinkhede*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs. The plaintiffs and defendants Nos. 1 and 2 are Prabhus resident in the Sausar Tahsil of the Chhindwara District. The plaintiffs are the sons of Sakkubai, the daughter of Anandrao, who died on 8th November 1893. The 1st defendant Kesheo Rao is the grandson of Anandrao's uncle Kashirao and defendant No. 2 is the widow of Khanderao, grandson of Anandrao's other uncle Trimbakrao. On the 6th December 1893 Sakkubai executed a deed of release in favour of Khanderao and Kesheorao, under which she gave up all claim to a certain specified portion of the property left by Anandrao. The plaintiffs pleaded that Anandrao was separate from Khanderao and Kesheorao, that Sakkubai under the ordinary rule of Hindu Law succeeded to a woman's life interest in the whole of the property, and that her sons, the plaintiffs, are entitled to succeed to it on her death. They sue for a declaration that the deed of release executed by their mother will not affect their rights after her death. The other defendants are transferees from Khanderao and Kesheorao. The pleas of the defendants that Anandrao was joint at his death and that Anandrao had executed an oral Will before his death in favour of Khanderao and Kesheorao were overruled. The defendants further pleaded that the parties are Parbhus who have migrated from the Bombay Presidency and that under the School of Hindu Law by which they are governed Sakkubai, as Anandrao's daughter, succeeded to the whole of his property absolutely and that her relinquishment of a portion of the property so inherited cannot be questioned by the plaintiffs. The following issue was framed :—

'Is the family of Anandrao governed by the Bombay School of Hindu Law as pleaded by the defendants and if so, what effect has this on the suit?"

On this issue the learned District Judge wrote as follows concerning the facts:—

"A number of leading members of the Parbhu community have been examined as witnesses by the defendants (D. W. No. 1, D. W. No. 2, D. W. No. 3, D W No. 7 and Mr. A. L. Dighe, who was examined on commission), from whose depositions the following facts emerge. The first Parbhus migrated to these Provinces about 200 years ago. There are now not more than about (*sic*) Parbhu families in the Central Provinces and these keep up intimate relations with the members of their community in the Bombay Presidency. The Central Provinces Parbhus still observe the basic customs of their community and worship the same family gods, marriages between the Central Provinces families and those of the Bombay Presidency frequently take place and migration is still going on. Cases of adoption by widows after the deaths of their husbands have been fairly numerous, but in no case can it be definitely affirmed that the husband had not given his consent to the adoption before his death. No case in which a daughter has succeeded absolutely to her father's estate has been cited. One witness quotes an instance in which a daughter took a life-interest only in her father's estate, and her husband put forward no objection to the succession of her father's relations on her death (*vide* D. W. No. 1). Some local customs have been adopted by the Central Provinces Parbhus, but these are mainly of minor importance. Of the witnesses the most prominent are Mr. S. M. Chitnavis, Deputy Commissioner (D. W. No. 7), and Mr. A. L. Dighe, District Judge. The statements of these gentlemen indicate that the Central Provinces Parbhus do not form a community apart, but are only a portion of one undivided Parbhu community, the bulk of which is still resident in the Bombay community and which is governed by the school of law prevalent there....." This evidence indicates that the Parbhus

domiciled in these Provinces have not allowed themselves to become assimilated with other Hindus, but have continued to regard themselves as belonging to the same community as their caste follows who have continued to reside in the Bombay Presidency."

On these findings of fact the learned District Judge held that all Parbhus, whether domiciled in the Central Provinces or in Bombay, should be considered as governed by the same school of law, that of the Mayukha. The suit was accordingly dismissed. The learned District Judge held that the principle generally applicable is that laid down in *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (1), namely, that if Hindu families migrate from one part of the country to another, the presumption is that they carry with them the laws and customs as to succession prevailing in the Province from which they come.

On appeal the learned Divisional Judge took the same view, saying that the parties are admittedly Parbhus coming from the Bombay Presidency and that the Calcutta ruling cited by the first Court was applicable. He quotes the following passage from Trevelyan's Hindu Law (2nd Edition, page 467):—

"In the Bombay Presidency, whether in places where the 'Mitakshara' or in places where the 'Mayukha' is paramount, property inherited by a woman from a male.....is her absolute and several property. She can deal with the property *inter vivos* or by Will;"

and he cites *Gulappa* v. *Tayawa* (2) where this rule has been applied to a woman inheriting as a daughter. He used the same ruling to dispose of the argument that the rule applies only to Gujarat and the Island of Bombay.

It was further argued before him that as the immigration took place 200 years ago, the custom and law applicable are those of the date of immigration and not the subsequent interpretation of the High Courts. Reference was made to the ruling of Drake-Brockman, Judicial Commissioner, in *Narayan Vithal* v. *Govind Narayan* (3) in which it was held that among Maratha Brahmins, also immigrants from the Bombay side, a daughter does not inherit an absolute estate from her father, and it was remarked: "the parties admittedly migrated to Chanda about the year 1800 and it is highly improbable that their family has ever been influenced by the Bombay decisions of 1859 and onwards." In *Dawlatrao* v. *Govindrao* (4) Skinner, Aditional Judicial Commissioner, quoted the above remark but held as regards Berar that the Bombay School of Hindu Law had always been followed and should be applied there. The learned Divisional Judge sums up the case of the appellants as follows:—

"So far then the thesis would appear to be that the customary law of the country of origin must be presumed to govern a migrating Hindu family, but that customary law would be the law as it existed at the time of migration, seeing that the family would not be influenced by the interpretations and rulings subsequently given effect to in the country of origin but it might be expected rather to be influenced by the customs of the Hindus amongst whom it has come to live. We are to presume in this case that the customs of 1700 continued, but we are to be receptive of evidence that these customs were assimilated to the customs of the surrounding Hindus, and we are to remember that the influence of rulings of the land of origin will be *nil*." The learned Divisional Judge goes on:—

"It seems to me that such a thesis goes a good deal beyond the more or less *obiter dicta* of the High Court of these Provinces, that it reduces to very little the Privy Council ruling quoted, and that it tends to conceal the fact that if we have to go back to 1700 for our customs, we must throw over the ruling of 1905 equally with that of 1909, and it places an almost impossible task on the parties of ascertaining the customs of 200 years ago.

"In this case there is no need to do either. The evidence produced by the defence is clear on the point of the close relations of the Parbhus of the Central Provinces with those of Bombay, and the

(1) 29 C. 433 (P. C.); 29 I. A. 82; 6 C. W. N. 490; 4 Bom. L. R. 365; 8 Sar. P. C. J. 205.
(2) 31 B. 453; 9 Bom. L. R. 834.
(3) 1 N. L. R. 154.
(4) 1 Ind Cas. 243; 5 N. L. R, 13.

failure of the Parbhu caste on the whole to assimilate itself to the customs of surrounding Hindus. It seems to me to make little difference that the witnesses are unable to cite an instance of a Parbhu daughter in the Central Provinces inheriting an absolute estate from her father. With a community of 50—200 families this is natural enough. What is important is that the Parbhu community has always remained apart and always kept up its Bombay connections. This being the case, it is not possible to say that the Bombay decisions of recent years have not been known to or influenced the Central Provinces Parbhus. The vast majority of the fellow caste people, *viz.*, those who have retained their Bombay residence are governed by these laws of inheritance, and with these they have constant communion and intermarriage."

In an earlier part of his judgment the learned Divisional Judge says that on the law as laid down in the Calcutta case cited there is a presumption that the Parbhu immigrants in the Central Provinces keep up their laws and usages as to succession prevalent in Bombay, that the evidence on the record is consistent with the presumption, and that the criticisms on and shortcomings in the evidence merely touch the fringe of the evidence, which on the whole supports the presumption.

The grounds of appeal to this Court call in question the findings of fact and law of the lower Courts. I will deal with the arguments advanced. It is first of all urged that it is not proved that this particular family came from the Bombay Presidency, or when they came. No alternative history is suggested, and the only inference that can be drawn from the evidence is that this family like other Parbhu families migrated from the Bombay side not more than about 200 years ago. I regard the summary given by the District Judge as a correct account of the facts to be deduced from the evidence.

The main arguments are a repetition of the arguments put forward in the lower Appellate Court, and are to the effect that no distinction can be drawn between Parbhus and Maratha Brahmins who are also immigrants from Bombay, and that in any case, the Bombay law, whatever that may have been at the time of immigration, should be applied and not the present Bombay law which is of recent growth. As to the first part of this argument I consider that the case of Parbhus is clearly different from that of Maratha Brahmins and that the ruling in *Narayan Vithal* v. *Govind Narayan* (3) has no application to the Parbhus of the Central Provinces. The conditions of the two communities are different. The Maratha Brahmins of the Central Provinces are a large and self-contained community, who may now be regarded as an integral part of the population of the Central Provinces. The Parbhus of the Central Provinces on the other hand are a small community, who still regard themselves as forming a branch of the Bombay Parbhus, and whose interests are still connected with those of the Bombay Parbhus. The Maratha Brahmins can well be regarded as not coming within the scope of the ruling in *Parbati Kumari Debi* v. *Jagadis Chandra Dhabal* (1), while I consider that the Parbhu families in the Central Provinces certainly come within its scope. There is no course of rulings in the Central Provinces applying the *lex loci* to Parbhus, the contrary being the case as regards Maratha Brahmins. As regards the second part of the argument, I agree with the line of reasoning adopted by the learned Divisional Judge. The question is what is the law applicable to Parbhus, as to whom there is a living law in Bombay. As to what that law is the Bombay High Court is the proper authority, and we are concerned not with what their view of the law was in the past, but what it is now. If the Parbhus are governed by the Bombay School of Law, we must look to the decisions of the Bombay High Court to ascertain what that law is, according to the latest lights.

It is finally argued that the view that daughters succeed to an absolute estate prevails only in the Island of Bombay and in Gujarat. I am unable to accept this contention. The passage already cited from Trevelyan I consider to embody a correct description of the law as expounded by the Bombay High Court. Both in *Bhan* v. *Roghunath* (5) and in *Gulappa* v. *Tayawa* (2) this view of the law was not confined

(5) 30 B. 229; 7 Bom. L. R. 936.

to those parts where the Mayukkha is the supreme authority, but was held to be the correct view throughout the Presidency under the Mitakshara Law. The second case was from Dharwar which is not in Gujarat.

For all these reasons I consider that the lower Courts have decided the case correctly, and I dismiss the appeal with costs. Counsel's fee Rs. 150.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 5 OF 1918.

April 13, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

LALTA PRASAD—APPELLANT

versus

NASIR KHAN AND ANOTHER—RESPONDENTS.

Pleadings—Gift, validity of, not questioned in trial Court, whether can be questioned in Court of Appeal—Procedure.

In a pre-emption suit the defendant produced a deed of gift showing that, as against him, the plaintiff had no right of pre-emption. The validity of the gift was not questioned in the trial Court and the plaintiff's suit was dismissed. On appeal the plaintiff challenged the validity of the gift deed on the ground that it was not properly attested and that attestation had not been proved. The Appellate Court allowed the objection and decreed the claim:

Held, that the plaintiff, having practically admitted the validity of the deed of gift in the trial Court, ought not to have been allowed to challenge it in appeal, and that the Appellate Court ought not to have entertained the objection without affording the defendant an opportunity of proving the due attestation of the deed. [p. 120, col. 1]

Second appeal from the decree of the District Judge, Shahjahanpur, dated the 13th September 1917.

Mr. *Umashanker Bajpai*, for the Appellant.

Mr. *Lakshmi Narain*, for the Respondents.

JUDGMENT.—This is a defendant vendee's appeal arising out of a suit for pre-emption. One of his defences to the suit was that prior to the institution thereof and after the sale deed in dispute he acquired a share in the *mahal* by a deed of gift which made him a co-sharer in the *mahal* on the same footing as the plaintiff and, therefore, the plaintiff had no right of pre-emption as against him. He produced the deed of gift of the 29th of June 1916. The only exception taken by the plaintiff to this document was that it was not really a deed of gift but a deed of sale. No objection was taken that this document had not been duly attested as a deed of gift ought to be attested. One of the attesting witnesses was called to prove the deed. He proved its execution and stated that he had attested it at the request of the donor. Not a question was put to him as to whether the attestations of the witnesses were made at the time the document was executed and in the presence of the executant or whether the witnesses signed the document subsequently on an acknowledgment by the executant of his signature thereon. The point was not raised. The Munsif held on the basis of the decision in *Bhagwan Das* v. *Mohan Lal* (1) that the defendant vendee having become a co-sharer with equal rights with the plaintiff, the latter was not entitled to pre-empt in respect of the sale in question. The plaintiff, appealed. The Court below held that the evidence on the record did not establish the due attestation of the document and that, therefore, the deed of gift was invalid and the defence failed. It accordingly decreed the plaintiff's claim.

On behalf of the defendant it is urged before us that he was taken entirely by surprise by this plea of the plaintiff in the Appellate Court; if any such objection had been raised, he could easily have proved the due attestation of the document, the genuineness and validity of the document were not challenged in the first Court. Furthermore it is pleaded that the gift was a gift by a Muhammadan, and as such under section 29 of the Transfer of Property Act, the Muhammadan Law applied to the gift and no document was even necessary. We think that the pleas raised on behalf of the appellant have force and must prevail. The gift, being a gift by a Muhammadan, required no reduction to writing or if it was reduced

(1) 25 A. 421; A. W. N. (1903) 83.

there is nothing to show that it was not duly attested. The validity and the genuineness were practically admitted in the Court of first instance and we do not think it was fair for the lower Appellate Court to allow the point to be raised without giving the defendant further opportunity of proving the due attestation of the document. We must allow this appeal. The defendant having become a co-sharer with equal rights with the plaintiff prior to the institution of the suit, the plaintiff had no right of pre-emption as against him on the day on which he instituted the suit. We set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The appellant will have his costs in all Courts.

Appeal decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 970 OF 1919.

January 20, 1920.

Present:—Mr. Justice Walmsley.

NABIN CHANDRA NATH—DEFENDANT—APPELLANT

versus

Srimati TIRTHABASI BHOWMIK, WIDOW OF SHAN CHANDRA BHOWMIK, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Suit for possession by landlord Defendant setting up tenancy Land, whether comprised in tenancy—Burden of proof

A landlord brought a suit for declaration of title to, and recovery of possession of, some land from his tenant on the ground that the land in suit was not included in the tenancy The defendant alleged a tenancy under the plaintiff in respect of the land claimed It was found that the land claimed was not an encroachment, nor was it contiguous to the land forming the tenancy of the defendant:

Held, that the onus of proving that the land was included in the tenancy of the defendant lay on the defendant. [p. 181, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, 1st Court, Tipperah, dated the 7th of February 1919, affirming that of the Munsif, 1st Court at Comilla, dated the 21st of December 1917.

FACTS appear from the judgment.

Babu *Sasadhar Roy* (Sr.), for the Appellant.—The appeal arises out of a suit for recovery of *khas* possession of a small plot of land forming a portion of the bank of a tank, on declaration of plaintiff's *dar taluki* right thereto. The defendant admitted the title of the plaintiff to the land, but disputed his right to *khas* possession on the ground that the land was included within his *kayemi jote* bearing a rental of Rs. 31. The learned Munsif found that the defendant had failed to prove that the land in dispute was included in the tenancy set up by him. The plaintiff in course of the trial admitted the existence of a *jote* bearing a rental of Rs. 31 in the name of a cousin of the defendant, who said that he was paying rent to his cousin. The first Court on these grounds decreed the suit. The defendant thereupon appealed and on appeal the learned Judge confirmed the decree of the first Court. Hence the present appeal by the defendant. My submissions are two. The plaintiff having admitted the existence of a *jote* bearing a rental of Rs. 31, the onus lay upon him to prove that the disputed land was not included within the said *jote*. [Refers to *Rajendro Kumar Rose* v. *Mohim Chandra Ghose* (1).] The learned Judge has wrongly placed the burden of proof on the defendant. My next point is that the lower Appellate Court ought to have accepted the rent decree that was produced before him as additional evidence in support of the defendant's case and instead of commenting on its merits, should have remanded the case for re-trial on the additional evidence to the Court of first instance. I would pray for a remand.

Babu *Upendra Kumar Roy*, for the Respondents.—I submit the case is concluded by the findings of fact of both Courts. Having regard to those findings the principle laid down in the case in *Rajendro Kumar Bose* v *Mohim Chandra Ghose* (1) does not apply. The defendant, it has been found, had no land contiguous to the land in dispute. The case put forward by him is not one of encroachment upon land. The case in *Rajendro Kumar Bose* v. *Mohim Chandra Ghose* (1) has been considered and reconsidered in several later decisions reported as *Protap*

(1) 8 C. W. N. 768.

Chandra Roy v. *Judhister Das* (2), *Gopini Debi* v. *Lokenath Tewari* (3), *Sheoleni Roy* v. *Chattoorbhuj Roy* (4), *Rutnessur Sen* v. *Kali Kumar Bidyabhusan* (5). Applying the principles laid down in those cases, the Courts below were right in placing the onus on the defendant. No case has been made out for a remand.

Babu *Sasadhar Roy* replied in brief.

JUDGMENT.—This appeal is preferred by the defendant. It arises out of a suit for declaration of title to and recovery of possession of some land. The lower Appellate Court has dealt with the case on the footing that the defendant has a tenancy under the plaintiffs, although the Munsif seems to have entertained some doubt as to whether there was such a tenancy at all. Assuming that there was a tenancy, both the Courts below have held that the burden of proof was upon the defendant to show that the land which is the subject-matter of this suit is comprised within the defendant's tenancy. This view forms the first object of attack by the appellant. It is contended on his behalf that the Courts below should have followed the case of *Rajendro Kumar Bose* v. *Mohimi Chandra Ghose* (1). That case has been considered frequently in later judgments. I shall refer to only two of them, namely, the cases of *Protab Chandra Roy* v. *Judhister Das* (2) and *Gopini Debi* v. *Lokenath Tewari* (3). In those cases it is shown that the general principle enunciated in the earlier case must be subject to certain limitations. Two of the limitations mentioned are that where the case is not one of encroachment or where the land is not contiguous to the land forming the tenancy of the defendant, the burden of proof does not lie upon the landlord. The lower Appellate Court has noticed these points and it says that this is not a case of encroachment and that the defendant has not any land contiguous to the disputed land. In view of this finding it appears to me that the Court below was right in saying that the onus was upon the defendant. If the onus was upon the defendant, the plaintiffs were bound to succeed. One other objection raised was that the learned Subordinate Judge should have remanded the case to the Munsif for a decision upon all the points. It appears to me that that was wholly unnecessary. Both the arguments advanced on behalf of the appellant fail and I dismiss the appeal with costs.

Appeal dismissed.

(2) 23 Ind. Cas. 69; 19 C. W. N. 143; 19 C. L. J. 408.
(3) 11 Ind. Cas. 696; 19 C. W. N. 140.
(4) 8 Ind. Cas. 785; 12 C. L. J. 376.
(5) 15 Ind. Cas. 701; 16 C. W. N. 693.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 126 OF 1919.

April 14, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

RADHE LAL—OPPOSITE PARTY—APPELLANT

versus

Musammat BINDO—APPLICANT—RESPONDENT.

Succession Certificate Act (VII of 1889), s. 19—Order granting certificate—Appeal, whether lies—Remedy, proper.

Under section 19 of the Succession Certificate Act, an appeal lies from an order granting a certificate, and it is not absolutely incumbent on the appellant to move the Court granting the certificate to revoke it. [p. 182, col. 1]

Appeal from an order of the District Judge, Aligarh, dated the 15th March 1919.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—On the death of one Matra Mal his widow *Musammat* Bindo applied for a succession certificate for the collection of certain debts. She named two persons, Radhe Lal and Bhikari Das, as brothers of the deceased; but we note that Radhe Lal is described as son of Hulas Rai and Bhikari Das as son of Durga Das. She also named one Thakur Das as paternal uncle of the deceased. Notices issued to Radhe Lal and Bhikari Das went to Bombay for service, and eventually the Court recorded an order expressing its opinion that the service effected was sufficient and proceeded to deal with the case *ex parte*. The application was not opposed and a certificate was granted as prayed. Radhe Lal now comes to this Court in appeal. He says he has a defence on the merits, the fact being that Matra Mal was his brother and died as a

member of a joint undivided Hindu family with himself. He says moreover that, while his residence is at Hathras in the Aligarh District, he carries on business in Bombay and was, at the time when attempts were made to serve him with notice in Bombay, travelling about the country on his business. He denies that any notice ever reached him at Bombay. There is really no evidence that he was properly served. The Court of Small Causes at Bombay, to which notice was twice sent for service, twice returned the notice with an affidavit by the serving officer to the effect that he could not find Radhe Lal at the address given. Another notice was sent by registered cover and this came back with the word "refused" endorsed on the said cover. There is really no evidence as to who wrote this word "refused," and we cannot agree with the Court below that it raises any definite presumption that this registered cover was tendered to Radhe Lal and was refused by him. We do not think that he had any possible motive for refusing it, if it had really reached him. We think that in view of the question raised by Radhe Lal's objection this case ought to go back for enquiry. With reference to an objection that has been raised by the respondent we are content to say that we are satisfied that an appeal lies under section 19 of Act VII of 1889, and it was not absolutely incumbent upon Radhe Lal to make an application to the Court below to revoke the certificate itself. We set aside the order under appeal and send the case back to the Court below for disposal on the merits, after Radhe Lal has been given an opportunity of supporting his objection. Incidentally we note that Radhe Lal now gives his address as "in the town of Hathras" but that Mr. Gulzari Lal, who has represented him in this Court, undertakes to accept service on his behalf of any notice that may be issued.

Order set aside; Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2100 OF 1919.

April 15, 1920.

Present:—Mr. Justice Wilberforce.

KANSHI RAM—PLAINTIFF—APPELLANT

versus

LAL CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Memorandum of partition, whether requires registration—Admissibility in evidence.

A memorandum in an account-book of a partition which has already taken place does not require registration and is admissible in evidence. [p. 182, col 1.]

Second appeal from the decree of the District Judge, Attock District at Campbellpur, dated the 21st June 1919, reversing that of the Munsif, 1st Class, Pindigheb, dated the 8th January 1919, decreeing plaintiff's claim.

Lala *Fakir Chand*, for the Appellant.

Mr. *B. R. Puri*, for the Respondents.

JUDGMENT.—One Buta Mal had three sons, Hari Chand, Lal Chand and Prem Das. He died in 1899. In 1918 the son of Hari Chand sued for $\frac{1}{3}$rd of some house property left by Buta Mal. The defendants Lal Chand and Prem Das pleaded that Hari Chand had been separated 30 or 35 years ago and that they remained joint with Buta Mal. Their pleas have been held correct in an exhaustive and careful judgment by the District Judge. Against this decision the plaintiff has preferred a second appeal, his grounds being that no partition took place and that it is not proved that Lal Chand and Prem Das remained united with Buta Mal.

An important piece of evidence regarding the factum of Hari Chand's separation from his family was an entry in an account book regarding this partition. The first Court held it inadmissible on account of want of registration, but the lower Appellate Court considered it merely a memorandum of a partition that had already taken place and did not require registration. There is evidence supporting this view of the lower Appellate Court, as witnesses stated that the memorandum was drawn up some two years after the partition. This decision of the District Judge being based on evidence cannot, therefore, be questioned on second appeal. In addition

to this memorandum there was much other evidence that the partition took place and this has been well considered by the lower Appellate Court. I uphold this finding, therefore, that Hari Chand separated from the family in about 1885.

As for the fact whether Buta Mal and his two sons, Lal Chand and Prem Das, remained united after the separation of Hari Chand, the District Judge did not deal specifically with the point. He found, however, that the plaintiff was not entitled to any share in the ancestral property of Buta Mal and noted that although Buta Mal died 20 years ago, neither Hari Chand nor his son had made any claim to his inheritance and that Lal Chand and Prem Das had lived together with their father. As against this Counsel for the appellant points out that the family land is still recorded as joint. Counsel also refers to *Nihal Devi* v. *Kishore Chand* (1) and *Bhola Devi* v. *Mohkam Chand* (2) as authorities that where a partial partition takes place in a family, there must be an affirmative proof that the remaining members remained united. He also relies upon the original memorandum of partition, which shows that separate shares were allotted to all the members of the family. As for the last point Counsel for the respondents correctly points out that in effecting the partition it was necessary to fix the ratio of the shares of the various members. As for the revenue entries he points out that though the land is entered as joint, it is proved that Hari Chand used only to receive $\frac{1}{4}$th of the produce. As against the judgments cited by Counsel for the appellant he relies upon the evidence of re-union, as noted by the District Judge, and also calls my attention to the fact that at the time of the separation of Hari Chand his brothers Prem Das and Lal Chand were mere children.

After a careful consideration of the case I do not think that the learned District Judge, who is an authority on Hindu Law, in any way misunderstood the law on the subject and if he did not enter into the question of the continued union or the re-union of the members of the family, it was because this point was not seriously contested before him. I do not find, therefore, that there is any ground for interference on second appeal and I dismiss the appeal with costs.

Appeal dismissed.

(1) 8 Ind. Cas. 999; 97 P. R. 1910; 142 P. W. R. 1910; 11 P. L. R. 1911.

(2) 48 Ind. Cas. 784; 121 P. R. 1918.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 115 OF 1918.

April 8, 1920.

Present :—Mr. Justice Tudball and Mr. Justice Rafique.

SAMHER SINGH—PLAINTIFF—APPELLANT

versus

SHER SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption—Wajib-ul-arz, *interpretation of*—Bhai bhatija, *meaning of.*

Where in recording a custom of pre-emption in a *wajib-ul-arz*, the first right is given to "*bhai bhatija sharik hakiyat*," this does not mean that an own brother has a preference over a cousin. [p. 184, col. 1.]

Plaintiff claimed a preferential right of pre-emption against the vendee on the ground of being the own brother of the vendor, and it was found that the vendee and the two brothers were descended from the same common great-grandfather:

Held, that the plaintiff had not a preferential right under the terms of the *wajib-ul-arz*. [p. 184, col. 1.]

First appeal against the decree of the Subordinate Judge, Mainpuri, dated the 11th January 1918.

Mr. *S. K. Dar*, for the Appellant.

The Hon'ble Dr. *T. B. Sapru* and Mr. *R. K. Malaviya*, for the Respondents.

JUDGMENT.—This a plaintiff's appeal, who came into Court claiming a preferential right of pre-emption as against the vendee. The vendor is the own brother of the pre-emptor. The vendee and the two brothers are descended from the same common great-grandfather. According to the custom alleged by the plaintiff, assuming that the custom does exist, the first right of pre-emption was given to *bhai bhatija sharik hakiyat*. The lower Court has held that the words "*bhai bhatija*" have the

wide meaning commonly given to them in the villages of the district, and that this does not mean that an own brother has a preference over a cousin. The second set of pre emptors are co sharers in the *patti* which might include non relatives : and the third set of pre emptors are co sharers in the village. The plaintiff came into Court alleging a custom which gave him a right of preference. He produced a *wajib-ul-arz* the meaning of which on this point is by no means clear. The words *bhai bhatija* in the vernacular have a far wider meaning than the words "brothers" and "nephews" in English. We think that the Court below is perfectly correct in its interpretation. There is no force in this appeal. We dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 161 OF 1917.

March 23, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

KUMAR PREMATHA NATH MALIA—DEFENDANT—APPELLANT

versus

A. J. MEIK—PLAINTIFF AND HARGOBIND GOSWAMY AND OTHERS—DEFENDANTS—RESPONDENTS.

Grant, construction of—Minerals, whether pass by grant—Adverse possession of minerals, what constitutes—Leases of sub-soil rights, grant of, effect of—Constructive possession—Possession of part, whether possession of whole—Trespasser, position of—Surface working, whether gives title to sub-soil rights—Estate, separate, what constitutes—Cess, direct payment of, effect of.

Where a *zemindar* grants a tenure in lands within his *zemindari* and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee. [p. 187, col. 2.]

The mere grant of leases by the tenure-holder which purport to grant sub-soil rights will not in itself give to the tenure-holder a title to the sub-soil rights by adverse possession. What must be considered, in order to decide the question of adverse possession, is the evidence of actual working. [p. 187, col. 2: p. 188, col. 1.]

Although possession of a part is constructive possession of the whole if the whole is otherwise vacant, this constructive possession is an incident of ownership and results from title. The doctrine of constructive possession is not applicable to a case where the occupant defends himself on the ground of his possession only without proving any title. [p 188, col. 2.]

A wrong-doer's rights by adverse possession must be confined to the land of which he is in actual possession. [p. 188, col. 2: p. 189, col 1.]

Where an owner of land sells it reserving to himself the minerals, he retains possession of the minerals in the same way as if he had not sold the surface Non-user is not an abandonment of possession. Consequently, no matter how long mines remain unworked by the owner, his right is not barred so long as they are not worked by some one else. [p 189, col. 1.]

There may be cases in which a title by adverse possession can be made out in respect to minerals, but it does not follow that by working a part of the minerals or opening up particular quarries possession over a continuous field of minerals or of quarries of which the portion worked forms part can be obtained. [p. 189, col. 1.]

A mere surface working cannot give any claim by adverse possession to the whole of the coal seam or to any portion of it beyond that which is actually extracted. [p. 189, col. 2.]

Direct payment of cess in respect of rent free lands is by no means conclusive that the lands constitute a separate estate. [p. 186, col. 1]

Appeal from a decision of the Aditional Subordinate Judge, Manbhum.

Messrs. *P. K. Sen* and *L. M. Ganguli*, for the Appellant.

The Government Advocate, for the Respondents.

JUDGMENT.—This appeal arises out of a decision of the Additional Subordinate Judge of Manbhum in favour of the plaintiff in a suit brought in respect of the sub soil rights of a certain Mauza Kapasara. The plaintiff in the suit, Mr. Barton, is the manager of the Pandra encumbered estate, Kismats 2 and 4, which belong to Babu Sanker Narain Singh, Babu Bejoy Narain Singh, and Babu Gobinda Narain Singh who may conveniently be designated the Pandra Babus. These two Kismats make up 3 annas of the whole Pergarna Pandra. The other 8 annas belong to the Raja of Pandra and consist of Kismats 1 and 3. Mr. Barton is the manager of the whole estate.

The plaintiff's case is that Mauza Kapasara is one of the Mauzas included in Kismats 2 and 4, the estate of the Pandra Babus. In the year 1736 the Raja of Pandra, who was at that time the proprietor of the whole of Perganna Pandra, granted a *patta* of Mauza Kapasara to

KUMAR PREMATHA NATH MALIA *v.* MEIK.

Sri Kishori Das Mohant Goswami, the ancestor of the present Goswami defendants. The Goswamis remained in possession of the Manza for a very long time, but from the year 1888 they began to grant leases both of the soil and the sub soil rights and some coal has been extracted. The plaintiff first knew of coal being extracted in the year 1912. He contends that under the *patta* which was granted to the Goswami in 1736, no sub soil rights passed and that neither they nor the person to whom they have transferred those rights were entitled to grant leases of the sub-soil or to extract coal. He accordingly brought this suit for a declaration that the right to the sub-soil coal in Manza Kapasara is vested solely and exclusively in the proprietors of Kismats 2 and 4, that the defendants be called upon to produce an account of coal raised, that damages for coal extracted during three years be allowed to the plaintiff and that he be granted a permanent injunction restraining the defendants from extracting coal from the sub-soil of Kapasara. The learned Subordinate Judge by his decree granted the relief claimed and on the defendants failing to produce accounts, awarded damages for three years amounting to Rs. 8,197-8-0. From this decree the defendant No. 3, heir to Srimati Bhaba Sundari Devi who was the transferee of an 8-annas share in the Manza from the Goswami defendants, has appealed.

The points taken in appeal are (1) that by virtue of the *patta* of 1736 the Goswamis acquired a separate estate of which they have been in possession since the time of the Permanent Settlement; (2) that even if it be found that this is not so, the plaintiff has not established his title to Manza Kapasara inasmuch as he has not shown that the Manza is within Kismats 2 and 4; (3) that the grant of 1736 passed the sub-soil rights; (4) that the defendants have acquired a title by adverse possession and (5) that the plaintiff is not entitled to a declaration or an injunction nor to more than two years' damages, if any.

In support of his first contention Mr. Sen, the learned Counsel for the appellant, relied principally on the provisions of Bengal Regulations I of 1793 and XIX of 1793. By Article VIII, sub-clause (3) of Regulation I of 1793 it is enacted that "The Governor General in Council will impose such assessment as he may deem equitable on all lands at present alienated and paying no public revenue which have been or may be proved to be held under illegal or invalid title." He then refers to Regulation XIX of 1793, which provides "for trying the validity of the titles of persons holding or claiming a right to hold lands exempted from the payment of revenue to Government under grants not being of the description of those termed *badshahi* or royal; and for determining the amount of the annual assessment to be imposed on lands so held which may be adjudged or become liable to the payment of public revenue." Reliance is placed principally on clause 2 (1), which runs as follows:—

"All grants for holding land exempt from the payment of revenue made previous to the 12th August 1765, the date of the Company's accession to the *Diwani*, by whatever authority and whether by a writing or without a writing shall be deemed valid, provided the grantee actually and *bona fide* obtained possession of the land so granted previous to the date above mentioned, and the land shall not have been subsequently rendered subject to the payment of revenue by the officers or the orders of Government."

"If it shall be proved to the satisfaction of the Court, that the grantee did not obtain possession of the land so granted previous to the 12th August 1765, or that he did obtain possession of it prior to that date but that it has been since subjected to the payment of revenue by the officers or the orders of Government, the grant shall not be deemed valid."

It is contended that the grant in the present case is one of the kind contemplated by the first part of this clause and that consequently in 1793 Manza Kapasara became a separate estate. The appellant also relies on certain certificate demands in respect of cess made direct to the Goswamis and certain receipts for payment of cesses which were paid direct by the Goswamis apparently pursuant to these demands. Now, by the *patta* of 1736 no rent is reserved, but this does not necessarily imply that by it a revenue free estate was granted and the circum-

stances seem to show that it did not grant such an estate. In order to obtain the benefit of Regulation XIX of 1793 even if the grant had been a revenue free grant, the holder would have had to register his claim under section 24 of the Regulation and even that registration would not be proof of the right of the person registered to the property or of his title to hold the lands exempt from the payment of Government revenue (section 28). There is no affirmative evidence that Kapasara is a revenue free estate, but it is contended that the *patta* of 1735 entitled the Goswamis to have the estate separately assessed to revenue and that it must have been so registered as a revenue paying estate. In our opinion the grant to the Goswamis was, on the face of it, nothing more than a rent free grant which would not have entitled the Goswamis to have the Mauza registered as a separate revenue paying estate, and this view is supported by the fact that Kapasara never has been registered either as a revenue free or a revenue paying estate and that neither the Goswamis nor the appellant have ever paid revenue to Government. It is true that claims for cess have been made direct on account of Kapasara to the Goswamis, but there are many reasons why this may have been done. Kapasara is certainly a rent free tenure and under the provisions of the Cess Act, cess is ordinarily paid for rent free lands by the proprietor. By the Board's rules, however, it is provided that if "doubt exists as to the estate or tenure to which such lands appertain or if for any other valid reasons direct assessment appears desirable, the Collector may exercise his discretion in adopting the latter course," and various circumstances which may be considered valid reasons for direct assessment are enumerated. Direct payment of cess on account of rent free lands then is by no means conclusive that these rent free lands constitute a separate estate and if the Goswamis held a separate estate which paid revenue to Government, it would have been easy for them to have produced their receipts for such payments. Not a single receipt, however, has been produced. Admittedly Kapasara is not entered as a separate estate in the register of revenue paying estates and there is nothing to show that it is or ever has been a separate estate.

The next point is whether the plaintiff has proved that Kapasara is within the Pandra Babus' estate, that is, within Kismats 2 and 4 of Perganna Pandra. It appears that up to the time when argument in the case was being heard, Kapasara was entered in the register of revenue paying estates as within Kismats 1 and 3, which appertain to the Zemindari of the Raja of Pandra. At the time of argument this was apparently discovered and Mr. Burton made an application to the Deputy Collector to have the register corrected and the Mauza placed within Kismats 2 and 4. He apparently produced papers to show that there was a mistake in the register and notice was issued to him as manager of the Raja of Pandra's estate to show cause why the correction should not be made. On behalf of the Raja he admitted the mistake and after the case had been gone into by the Deputy Collector and the Deputy Commissioner, the latter ordered that the change should be made. It is contended on behalf of the appellant that there was in fact no mistake and that the change was obtained by Mr. Burton for the purposes of the present case. It is abundantly clear, however, that there was a mistake. There is no dispute that the Pandra Babus are the proprietors of Kismats 2 and 4 and it is not in controversy that the predecessors-in-interest of the present Pandra Babus were Sib Narain Singh and Ananta Narain Singh. In the year 1861 Sib Narain Singh and Ananta Narain Singh, in obedience to a *parwana* issued by the Deputy Commissioner evidently for the purpose of preparing his registers of revenue paying and revenue free estates in accordance with Regulation VIII of 1860, filed a list of the Mauzas in their Zemindari. In this list Mauza Kapasara appears. Again in 1871 apparently on account of certain disputes Sib Narain and Ananta Narain decided to divide their Zemindari and to have it recorded that each was entitled to a half, that is, that each was entitled to a 4 annas of the whole estate of Pandra. In pursuance of this agreement they prepared a list of all the Mauzas within their Kismats, and again in this list the name of Mauza Kapasara appears;

It is clear then that since 1861 the proprietors of Kismats 2 and 4 have been claiming that Kapasara was within their Zemindari and there is nothing to show that it was claimed by anyone else. The Mauza was, however, not entered in the register as within Kismats 2 and 4 but it was entered within Kismats 1 and 3. This was not discovered until the trial of the present suit had almost come to an end and when it was discovered, Mr. Burton at once applied for a rectification of the register. On behalf of the Raja who was the only other interested person, he admitted the mistake and the Collector after a full enquiry made the correction asked for. It is true that Mr. Burton was manager of both the estates, but there is no reason to suppose that he was favouring the Pandra Babus at the expense of the Raja and in view of the lists of 1861 and 1877 and of the fact that the Collector after enquiry placed Kapasara within Kismats 2 and 4, we are satisfied that a genuine mistake had been made and that Kapasara is really within Kismats 2 and 4 of which the Pandra Babus are the proprietors.

The question of what rights passed by the *patta* of 1736 remains to be considered. The original *patta* by which the grant was made, if it is in existence at all, must be in the possession of the appellant. It has not been produced, however, and the only evidence as to the contents of the *patta* are two copies which were produced by the plaintiff. These were made under the following circumstances. In 1901 after Mr. Burton became manager, he called on the Goswamis, under section 14 (*a*) of Act VI of 1876, to produce their title deeds. They produced a *patta* which was copied. This copy is Exhibit 1. Subsequently another *patta* was prepared for the Legal Remembrancer. This is Exibbit 1a. There are certain slight differences in the two copies but they are immaterial for the purposes of this case. Exhibit 1, which may be taken as more favourable to the appellant and about which we have the evidence of Mr. Burton that he compared it with the original, runs as follows:—

"Sri Kishori Das Mahanta Goswami.

Patta in remembrance of an agreement granted by the most powerful Raja Sri Narendra Sinha and the most powerful Raja Sri Sri Bir Sinha.

This *patta* is executed in respect of a village. Village Kapasara in Perganna Tundi, Tappa Pandra, is given to you to perform the services of Sri Sri (*sic*). There is no difference of opinion as to this. We relinquish that which is customary to the country. You confer your blessing on me (us) and cultivate (*jote abad*) and enjoy (the same) in great felicity. To the above import the *patta* is granted. Dated the 17th of Asarh 1658 (Sakabda)."

Considerable stress has been laid by Mr. Sen on the word "relinquish" in the *patta*, and he contends that the word indicates that not only surface but sub-soil rights were granted. We cannot accept this contention. The word "relinquish" has no special signification, and all that the sentence in which it occurs means is that the grant was of "that which is customary to the country." Now what passed by grants of this kind has been the subject of many decisions. The latest case on the point is that of *Raghunath Roy Marwari* v. *Durga Prashad Singh* (1). The case was one from the same district as the present case, the grant was of very much the same character and the decision at which their Lordships of the Privy Council arrived was that where a Zemindar grants a tenure in lands within his Zemindari and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee. This appears to conclude the matter. In the present case it certainly does not appear by the terms of the grant that a right to the minerals is included and in our opinion no right to the sub-soil passed by the *patta*.

This brings us to the question of whether the defendants have acquired any right by adverse possession and, if so, what the extent of that right is. The evidence of adverse possession is that leases which included sub soil rights have been granted and that under some of these leases coal has been worked. The mere grant of leases which purport to grant sub-soil rights will

(1) 50 Ind. Cas. 849; 23 C. W. N. 914; 17 A. L. J. 597; 36 M. L. J. 660; 1 U. P. L. R. (P. C.) 43; 26 M. L. T. 76; 30 C. L. J. 160; 21 Bom. L. R. 895; 10 L. W. 347 (P. C.).

not in itself give a title by adverse possession and what we must consider is the evidence of actual working. The evidence of working is of a very scanty description. It appears that in 1898 half the Mauza was transferred by Hargobind Goswami to Srimati Bhaba Sundari Devi. In May 1899 the latter granted a sub-lease of the underground rights in 87 *bighas* to Nafar Chandra Kuer and in January 1900 a similar lease of 27½ *bighas* to Hari Dass Gokuldas. She also granted small areas, varying from 5 to 25 *bighas*, to certain other persons between 1899 and 1905 There is no evidence that any of the latter were worked. There is evidence, however, that Hargobind and Bhaba Sundari Devi used to dig some coal for their own use but how much or when is not stated, and it may safely be assumed that the quantity taken by them was merely surface coal required from time to time for domestic purposes. Nafar Chandra's son Hari Prasad Kuer was called and said that from 1899 coal was being raised off and on from Kapasara and that he had quarries and inclines and that one quarry was 100 feet square and about 25 feet deep. This is all the evidence about working the mines, except such as may be gathered from certain account books put in by the defendants showing the receipt of rent and royalties and cesses from Nafar Chandra Kuer between 1889 and 1904 and again in 1911 and 1912 and a payment of Rs. 267 from Hari Das Gokuldas in 1901. The rent payable by the latter was Rs. 412 per annum whether he raised coal or not, and the only evidence of any payment by him is that up to Chaitra 1308 B. S. a sum of Rs. 267 was received for rent and cesses. It is impossible from this to draw an inference as to how much, if any, coal was worked by him The other receipts appearing in the account books show sums received from Nafar Chandra Kuer on the dates above mentioned. According to his lease he was to pay a royalty at the rate of 3 annas 9 pies per ton of a steam coal, 2 annas per ton of rubble, 1 anna per ton of dust and 4 annas 6 pies per ton of coke and burnt coal, with a stipulation that the minimum royalty should be Rs. 100 in the second year, Rs. 200 in the third, Rs. 300 in the fourth, Rs. 400 in the fifth and Rs. 800 from the 6th year. The lease is dated the 29th May 1899. The second year would, therefore, begin in 1900. The total receipts from this tenant, as far as can be gathered from the accounts which nobody has been called to explain, would appear to be between Rs. 600 and Rs. 700 up to the end of 1901. It would appear, therefore, that during these years a certain quantity of coal had been extracted. In 1902 and 1903 sums amounting to Rs. 586 were received from the same source which would point to the same conclusion, but between the latter date and 1911 there is nothing to show in the accounts that anything was paid. In 1911 a sum of Rs. 500 was received and again in 1912 a further sum of Rs 540 was credited. During the latter years the minimum royalty was Rs. 800, and it is very difficult from these accounts to arrive at any conclusion as to the actual quantity of coal raised. Nobody has been called to explain them, and it would be impossible on this evidence to accept the contention of the appellant that there had been extensive working of the coal under this lease. Since 1912 there is really nothing to show that any coal has been extracted at all and so far from the evidence indicating any extensive working over a long period up to the present day as we are asked to assume by the learned Counsel for the appellant, it seems to point to the conclusion that really only a small portion of the surface coal has been taken. It is impossible to find on this evidence that any right by adverse possession has been acquired by the holder of the sub soil rights of Mauza Kapasara which has an area of about 1,000 *bighas*. No Indian authorities have been called to our attention on the question of how far the rights to the underground minerals can be acquired by adverse possession, but it is settled law both in England and in India that although possession of a part is constructive possession of the whole, if the whole is otherwise vacant, this constructive possession is an incident of ownership and results from title. The doctrine of constructive possession is not applicable to a case where the occupant defends himself on the ground of his possession only without proving any title. It is likewise recognised both in India and in England that a wrongdoer's rights by adverse possession must be confined to

the land of which he is in actual possession. In *Mirza Shamsher Bahadur* v. *Kunj Behari Lal* (2) the question was elaborately discussed. That was a case of land but the principle applies equally to mines and the decision clearly supports the principle just enunciated. The effect of the English decisions dealing with the acquisition of title to minerals by adverse possession is to the effect that where an owner of land sells it reserving to himself the minerals, he retains possession of the minerals in the same way as if he had not sold the surface. Non user is not an abandonment of possession. Consequently no matter how long mines remain unworked by the owner, his right is not barred so long as they are not worked by some one else. The case of *Rich* v. *Johnson* (3) was a suit for ejectment in the case of mines. The plaintiff as lord of the manor was entitled to the mines and had been in actual possession of the manor. The defendants had been in possession of the mines for over 20 years. It was held that there having been no entry within 20 years upon the mines which were a distinct possession and might be a distinct inheritance, the Statute of Limitations was not avoided. It thus appears that there may be cases in which a title by adverse possession can be made out in respect to minerals, but it does not follow that by working a part of the minerals or opening up particular quarries possession over a continuous field of minerals or of quarries of which the portion worked forms part can be obtained. See *M'Donnell* v. *M'Kinty* (4). Again in the case of *Ashton* v. *Stock* (5), where the plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance made in the reign of Elizabeth, wherein the grantor reserved to himself and his heirs male a rent charge of 7*s.* 8*d.* and which contained a proviso that the grantee and his heirs could not dig or get coal upon the lands for sale but only such as should be burned or employed thereon and the defendant who claimed title under a demise from the descendant of the grantor had for more than 20 years worked from mines of his own on adjacent lands into the coal fields under the plaintiffs' lands, it was held that the defendant had not acquired any title to the mine by possession under the Statute of Limitation and that the plaintiffs were entitled to an injunction with an account for 6 years. Hall, V. C., in the course of his judgment in that case remarked:—

"I can well understand that there might be cases in which from the manner of working coal a person who began to work it and was a mere wrongdoer and trespasser might have acquired title to a certain seam or area of coal, and that by the mode of driving the levels and opening a certain area of coal there might have been possession acquired to the whole thing as a mine or as a seam of coal, and not merely to the particular quantity of coal that was actually shown and gotten. That, however, is not this case and it is not necessary for me to say more than that such a case might exist."

This decision indicates how title by adverse possession might be acquired in minerals but the case there supposed is certainly not the case now before us. In the present case the utmost that can be said to have been done is that a certain quantity of surface coal has been taken, the extent of which can be gauged from the fact that in one instance a quarry about 100 feet square by 25 feet deep was dug. This, in our opinion, is mere surface working and could not give any claim by adverse possession to the whole of the coal seam or to any portion of it beyond that which has already been taken. In the recent case of the *Lodna Colliery Co.* v. *Bepin Behary Bose* (6) decided by a Division Bench of this Court on the 30th January 1920, it was held that a trespasser wrongfully working a vein of coal from an adjacent mine acquires possession only of the coal worked but cannot be said to be in possession of the mine itself. We see no reason to differ from the opinion there expressed, which is supported by the authority of *Ashton* v. *Stock* (5) and *Thompson* v. *Hickman* (7). In our

(2) 7 C. L. J. 414; 12 C. W. N 273; 3 M. L. T. 212.
(3) (1740) 2 Stra. 1142; 93 E. R. 1088.
(4) (1847) 10 Ir. L. R. 514.
(5) (1877) 6 Ch. D. 719; 25 W. R. 862.
(6) 55 Ind. Cas. 113; 1 P. L. T. 84.
(7) (1907) 1 Ch. D. 550; 76 L. J. Ch. 254; 96 L. T. 454; 23 T. L. R. 311.

opinion the defendants have acquired no right by adverse possession to anything more than the coal already extracted.

The last question for consideration is to what relief the plaintiff is entitled. He has asked for 3 reliefs, (1) that it be declared that the right to the sub soil coal in Mauza Kapasara is vested solely and exclusively in the proprietors of the Pandra encumbered estate.

(2) That the defendants may be called upon to produce accurate accounts of their raisings and despatches of coal out of the sub soil of the said Mouza during the last three years and a decree may be given to the plaintiff for the value thereof.

(3) That a permanent injunction may be issued against the defendants restraining them from working or winning or appropriating the coal from and out of the sub soil of Mauza Kapasara.

The plaintiff has been granted both the reliefs (1) and (3) and he has been granted a sum of Rs. 2,732-8-0 a year for three years as damages.

In regard to the first prayer it was contended by the appellant that a suit for a declaration is barred after six years from the time when the right to sue accrued under Article 120 of the Limitation Act and that the right to sue accrued more than six years before the institution of the suit. In our opinion this contention cannot prevail, as the appellant acquired no prescriptive right to the minerals beyond the quantity actually removed at any particular time. It follows that a fresh cause of action arose when any particular portion of the coal was removed. The defendants according to the evidence were working the coal up to within nearly three years of the institution of the suit, and it does not appear to us that the right to claim a declaration is barred. We think, however, that an injunction should not be granted. According to the findings come to the title to the minerals of Mauza Kapasara is in the plaintiff. The defendants appear to have been under a *bona fide* belief that they were entitled to the sub soil, but there is nothing to show, now that it has been established that they have no right to the sub-soil, that there is any fear that they will infringe the plaintiff's right, nor indeed is there anything to show that they have worked the coal from the estate during the last three years. If in future they continue to do so, a fresh cause of action will arise.

The last question is one of damages. The learned Judge awarded damages for the three years preceding the suit and on the defendants failing to produce any accounts he assessed the damages at Rs. 2,732-8-0 a year, on the ground that this sum was realised by the defendant No. 3, the heir of Bhaba Sundari Devi, under the subleases granted by that lady. This, however, does not appear to us to be any criterion of the actual damage suffered by the plaintiff. It is for him to show that coal has been raised during the period for which he claims damages. The only evidence on this point is that since 1889 coal has been raised from Kapasara off and on but as already pointed out, there is nothing to show that during the three years preceding the suit any coal at all has been taken. The plaint was filed on the 27th September 1915. The last payment of rent or royalty according to the accounts produced was on the 21st March 1912 and as the plaintiff has failed to show that any coal has been appropriated by the defendants since that date, in our opinion he has failed to establish his right to damages. It is, therefore, unnecessary for us to determine the question whether the limitation period is three years under Article 48 or Article 49 as the respondents contend or two years under Article 36 according to the contention of the appellant.

In the result the decree of the learned Subordinate Judge must be varied and in lieu thereof it will be decreed and declared that the right to the sub-soil in Mauza Kapasara is vested solely and exclusively in the proprietors of the Pandra encumbered estate, Kismats 2 and 4, Collectorate Tauzi Nos. 22 and 24, and at present in the duly notified manager thereof and that the defendants have no right to work or appropriate the coal lying in the sub-soil of the said Mauza. The plaintiff is entitled to half his costs in the Court below and each party will bear their own costs of this appeal.

Decree varied.

VIR SINGH *v.* HARNAM SINGH.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3096 OF 1918.

June 4, 1919.

Present:—Mr. Justice Bevan-Petman.

VIR SINHG—PLAINTIFF—APPELLANT

versus

HARNAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Admission, effect of—Specific Relief Act (I of 1877), s. 42—Declaration, suit for, by reversioner of lunatic that certain property acquired by defendant belongs to lunatic, maintainability of.

What a party himself admits to be true may reasonably be presumed to be so, and, until the presumption is rebutted, the fact admitted must be taken to be established. [p. 192, col. 1.]

A suit by the immediate reversioner of a lunatic for a declaration that a mortgage acquired by the manager of the lunatic's estate in his own name belongs to the lunatic is maintainable. [p. 192, col. 1.]

Second appeal from the decree of the District Judge, Ferozepore, dated the 21st August 1918, affirming that of the Munsif, 1st Class, Ferozepore, dated the 2nd April 1918, dismissing the claim.

Mr. *Durga Das*, for the Appellant.

Mr. *Brij Lal*, for the Respondents.

JUDGMENT.—The facts necessary to be stated for the purposes of this second appeal are that one Faujdar Singh had three sons, Vir Singh (plaintiff), Punjab Singh, the father of Harnam Singh and Viriam Singh (defendants), and Dana, a lunatic. Harnam Singh was appointed the manager of the estate of his uncle Dana, the lunatic. Faujdar Singh left property and Dana succeeded to one-third, whilst Harnman Singh and Viriam Singh succeeded to one-third jointly through their father Punjab Singh. Harnam Singh and Viriam Singh advanced money on a mortgage in their own names and Vir Singh instituted a suit in which he prayed for a declaration that Dana, his brother, was entitled to a half share in the mortgage rights in the mortgage so entered into, on the ground that the money was advanced out of the income of the ancestral property held jointly by the defendants and their uncle Dana, and he further alleged that his reversionary right to this property of Dana, a childless lunatic, was affected prejudically. Incidentally the accounts of Harnam Singh were attacked. The defendants denied the claim and asserted that the money was their own and they were solely entitled to the rights under the said mortgage. The defendants also pleaded that the plaintiff had no *locus standi*. The first Court held that plaintiff could maintain the suit if it could be shown that Dana had a share in the mortgage rights, but that plaintiff had failed to prove this condition and that a previous admission of Harnam Singh was insufficient because it was not supported by evidence and did not amount to an estoppel. The Court, therefore, dismissed the suit. The lower Appellate Court, which had already expressed an opinion on the matter in the course of the lunacy proceedings, suggested that the appeal should be transferred and, stating that no further evidence had been produced since his previous decision, dismissed the appeal on the ground that the plaintiff had failed to prove that Dana had any share in the mortgage. I find, however, that neither in the previous proceedings nor in the appeal did the lower Appellate Court consider the effect of the admission of Harnam Singh which is an essential point in the case.

For the respondents a preliminary objection is raised that the appellant has no *locus standi* to maintain the suit because under section 42 of the Specific Relief Act a plaintiff is entitled to sue for a declaration in respect of his own title or right, and not that of a third party as in this case, that such right must relate to a present subsisting right and that a plaintiff is not entitled to ask for an opinion as to title. For the appellant it is contended that any friend of a lunatic can sue when the estate of the latter is being shown less than it is by the manager of the estate and that, in the present case, the plaintiff is suing in his own interests as a reversioner.

On the merits the appellant contends that the lower Appellate Court has ignored a previous admission of Harnam Singh to the effect that Dana had a half share in the mortgage, and that it should not have been presumed that the money was solely that of the defendants in view of the fact that the defendants and Dana lived together and that their property was managed jointly, that the income of Dana was equal to that of the two defendants jointly and that Harnam Singh was not showing what had become of Dana's

income. It is further pointed out that Dana had practically no expenses whilst the defendants had families to support.

In my opinion the first Court did not realise the effect of an adimission and the judgment of the District Judge is vitiated by his having totally ignored the admission. Their Lordships of the Privy Council in *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1) have explained the effect of an admission as being that what a party himself admits to be true may reasonably be presumed to be so and, until the presumption was rebutted, the fact admitted must be taken to be established.

The judgment in *Lal Shah* v. *Hira Lal* (2) is to the same effect. I hold, therefore, that the burden of proof, at least so far as Harnam Singh is concerned, was on him to prove that the income from Dana's share of the property had not been advanced on the mortgage to the extent of half, as previously admitted by him. He has totally failed to prove this. Though this admission is not evidence against Viriam Singh, it is clear that he has all along been taking a minor part in the transactions of the family and such evidence as exists must be received and judged in the light of Harnam Singh's admission. I hold, therefore, that Dana has a half share in the mortgage.

The contention that any person can institute a suit to vindicate the rights of a lunatic has not been argued. In the present case the plaintiff is asking for a declaration to safeguard his own rights as a reversioner to Dana. His right is a subsisting present one. The test is the present capacity of the plaintiff to take possession, if the possession were to become vacant by the death of Dana, and he certainly would be entitled to immediate possession of his share.

For the above reasons, I accept the appeal, set aside the decree of the lower Appellate Court and grant the appellant the relief claimed with costs throughout.

Appeal accepted.

(1) 29 A. 184 (P. C.); 9 Bom. L. R. 267; 2 M. L. T. 109; 17 M. L. J. 103; 5 C. L. J. 115; 11 C. W. N. 321; 4 A. L. J. 102.

(2) 41 Ind. Cas. 163; 106 P. R. 1917; 119 P. W. R. 1917.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 57 OF 1919.

April 9, 1920.

Present:—Justice Sir P. C. Banerjee, KT.

ABDUL RASHID—PLAINTIFF—PETITIONER

versus

THE SIZING MATERIAL CO., LTD.,—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Place of suing—Goods, purchase of, at one place to be delivered at another—Cause of action, accrual of, at place of delivery.

Where upon the purchase of goods, it is agreed between the parties that payment for, and delivery of, the goods would be made and taken at a place other than the place where the purchase is effected, a suit arising out of the transaction on account of non-delivery of a portion of the goods may be brought in a Court exercising jurisdiction in the place where delivery and payment were to be made. [p 193, col. 1]

A purchased certain goods from *B*. at Bombay, who agreed to deliver and receive payment at Cawnpore: after taking delivery *A*. sued *B* at Cawnpore for the price of certain of the goods not received by him:

Held, that the cause of action accrued at Cawnpore, and the Cawnpore Courts had jurisdiction to try the suit. [p. 193, col. 1.]

Civil revision against the order of the Judge, Small Cause Court, Cawnpore, dated the 26th March 1919.

Mr. *Jang Bahadur Lal*, for the Petitioner.

Dr. *K. N. Katju*, for the Opposite Party.

JUDGMENT.—The plaintiff in this case is a dealer in chemicals and scientific instruments at Cawnpore. He went to Bombay and ordered goods to be sent to him by the defendant. He alleges that he made an advance of Rs. 300. The invoice of the goods and the railway receipt were to be sent by the defendant to the Punjab National Bank at Cawnpore and the plaintiff was to pay the Bank and take delivery. These facts are not disputed. The defendant sent three invoices to the Bank and duplicates to the plaintiff. The plaintiff took delivery, but he says that all the goods mentioned in the invoices were not in the parcel which contained the goods. The plaintiff thereupon asked the defendant for a refund of the price of such of the articles as he states had not been supplied. There was some correspondence between the parties. The defendant offered to make some payment, but as nothing was done the

present suit was instituted for the price of the articles, which according to the plaintiff had not been supplied. The Court below has returned the plaint, holding that it had no jurisdiction to entertain it and that the plaintiff's cause of action accrued in Bombay and he should have brought the suit in the Court in Bombay. The reason which the learned Judge of the Small Cause Court has assigned for holding that opinion does not commend itself to me. It is true that the charges were to be paid by the plaintiff for the despatch of the goods to Cawnpore, but the goods were agreed to be delivered to him at Cawnpore upon payment of the price to the Punjab National Bank at Cawnpore. The plaintiff could not get delivery unless he made that payment. As payment had to be made at Cawnpore, delivery of the goods was to be obtained at Cawnpore, and as all the goods, according to the plaintiff, were not delivered at Cawnpore, his cause of action for the present suit accrued within the jurisdiction of the Cawnpore Court. The Court below should, in my opinion, have entertained the suit and tried it on the merits. I accordingly allow the application, set aside the order of the Court below and remand the case to that Court with directions to re-admit it on its list of pending cases and dispose of it according to law. Costs of this application will be costs in the cause.

Application allowed;
Case remanded.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 520 OF 1918.

January 27, 1920.

Present:—Sir Henry Drake Brookman, KT., J. C.

PYARELAL - DEFENDANT No. 5—APPELLANT

versus

Seth PANNALAL AND OTHERS—PLAINTIFFS AND DEFENDANTS Nos 1 TO 4 AND 6 TO 9—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, applicability of—Failure to raise a point in previous suit—Res judicata—*Transfer of Property Act (IV of 1882), s. 63—Mortgage—Redemption—Accessions, payment for.*

Explanation IV to section 11, Civil Procedure Code, applies even where the matter in dispute was not heard and finally decided in the former suit [p. 195, col .]

The determination of the question whether a person ought to have raised a point in a suit so that his failure to raise it should preclude him from raising it in a subsequent suit, must depend on the particular facts of the case. [p. 195, col. 2.]

Where one of several mortgagees acquires tenancies while in possession and claims the cost of such acquisitions upon redemption, it is unnecessary, under section 63 of the Transfer of Property Act, to invoke the doctrine of merger The sectiondoes not require the accessions to have been made by the mortgagee by availing himself of his position as such, nor can it be urged that the acquisitions might have been made even if the mortgage had not been taken. [p. 196, col. 2.]

Appeal against the decree of the Additional District Judge, in Civil Appeal No. 1 of 1918, decided on the 31st July 1918.

Mr. *V. Bose*, for the Appellant.

Mr. *Ram Das*, for the Respondents.

JUDGMENT.—Pannalal and Jamnadas, the plaintiffs in the suit out of which this second appeal arises, are the sons of one Chhotmal, who had a full brother Deokishan and a near relative named Gauridas whose exact position in the family tree has not been ascertained. On the 19th September 1876 Chhatarsing and Sardar Singh mortgaged their inferior proprietary rights in Mauza Mathani to these three persons, the mortgagees to have possession for 5 years and to foreclose if the mortgage debt was not satisfied.

On the 16th March 1885 the same mortgagors gave a simple mortgage of the same property to Jagannath Prasad, his brother Prem Narain and one Nanhelal.

On the 12th September 1893 the plaintiffs with Deokishan and Gauridas obtained a conditional decree for foreclosure on the mortgage of 1876 in Suit No. 13 of 1893 to which the subsequent mortgagees were not parties. The decree was made absolute on the 9th May 1894 and the decree holders, after obtaining possession on the 5th December following, remained in possession of the village till the 20th December 1913 when they were ousted by Amarchand Kalar and his son Gaurilal. In 1910 Jagannath Prasad, Prem Narain and Nanhelal sued on their mortgage both

to redeem the prior mortgage and to foreclose their own. They obtained a combined decree on the 28th November 1911 and in due course foreclosed after redeeming the earlier mortgage. While possession under the mortgage of 1876 continued, a number of occupancy and absolute holdings were acquired from the respective tenants by sale and one occupancy holding by foreclosure of a mortgage. Details of these acquisitions are furnished by a table in the twelfth paragraph of the first Court's judgment in the present case.

The object of the present litigation is to recover possession of the holdings so acquired, the plaintiffs claiming to be tenants of all the fields which had been obtained from the original tenants as aforesaid. The plaint was filed on the 12th August 1916. The defendants include Chironji Bai, the widow of Nanhelal, Jagannath Prasad, Prem Narain and Amarchand. Of the remaining defendants Balaram No. 6, Kanhaiyalal No. 8 and Kishandas No. 9 are in possession each of one or two of the fields in dispute, while Manoharlal No. 7 is said to have bought the village from Chironji Bai, Jagannath Prasad and Prem Narain.

Before passing to the pleadings it should be mentioned that the defendants Amarchand and Pyarelal have been joined by the first three defendants as partners in the village and in 1915 took proceedings against the plaintiffs under section 145, Criminal Procedure Code, claiming to be in possession of the plots now in suit. On the 3rd December 1915 they obtained from the Magistrate an order declaring them to be in possession and protecting them from interference except with the permission of a competent Civil Court.

The claim was opposed by all the defendants, the principal contestants being Amarchand and Pyarelal. The trial Judge dismissed the claim in its entirety, holding that the tenancies acquired during the possession of the mortgagees of 1876 merged in the inferior proprietary rights, the fields becoming *khudkasht*.

In their pleadings the plaintiffs contended that, if not entitled to possession, they should at any rate be awarded a sum of money covering the cost of acquisition, but the trial Judge (on the authority of an *obiter dictum* at the end of the judgment in *Dwarka Pershad* v. *Tulsee Ram* (1) refused this relief also.

The plaintiffs appealed to the District Court and the Additional District Judge ordered the defendants to deliver possession of the land, but directed that on the defendants' paying Rs. 3,766 to the plaintiffs by the 31st May 1919 the defendants should be re instated in their possession as inferior proprietors. In the event of default in payment the plaintiffs were to be the owners of the land by foreclosure.

The defendant Pyarelal has preferred this second appeal and on his behalf one point only has been urged, namely, that the plaintiffs' claim for the cost of their acquisitions should have been put forward in Suit No. 19 of 1910 and that by reason of Explanation IV to section 11, Civil Procedure Code, it is not now tenable. The plaintiffs have put in cross-objections, the principal object of which is to secure possession of all the fields as tenants.

The question of *res judicata* raised by the appellant needs decision only if it be taken that the plaintiffs are not tenants of the land in dispute. It is urged on his behalf that the claim for redemption of the prior mortgage advanced in Suit No. 19 of 1910 impliedy included a claim to redeem the land now in dispute as *khudkasht*. It is contended that section 63, Transfer of Property Act, under which the cost of acquiring accessions to the mortgaged property is recoverable by the plaintiffs, contemplates final settlement of all the equities and accounts arising out of the mortgage which is put in suit and that the plaintiffs, under the rule laid down by their Lordships of the Privy Council in *Kameswar Pershad* v. *Ruttan Koer* (2), both might and ought to have advanced their claim in the suit of 1910. It is said that no confusion could have been caused if this course had been taken and *Guddappa* v. *Tirkappa* (3) is relied on as supporting the view that if a possible matter of attack could give

(1) 10 C. P. L. R. 103.
(2) 20 C. 79 (P. C.); 19 I. A. 234; 6 Sar. P. C. J. 241; 10 Ind. Dec. (N. s.) 53.
(3) 25 B. 189; 2 Bom. L. R. 572.

rise to no confusion, the duty of advancing it is not to be avoided. The decision of the Privy Council in *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (4) is referred to as indicating that in a suit for redemption all questions as to who will enjoy the benefit of accessions made by the mortgagee should be dealt with. *Mahabir Pershad Singh* v. *Macnaghten* (5), *Vinayak Shivrao* v. *Dattatraya Gopal* (6), *Kashi* v. *Bajrang Prasad* (7) and *Satyabadi Behara* v. *Harabati* (8) are also relied upon.

For the plaintiffs, who are the only respondents appearing in this Court, it is contended in the first place that Explanation IV to section 11, Civil Procedure Code, has no application where the matter in dispute in the latter suit was not heard and finally decided in the former suit, a view which finds support in *Kailash Mondul* v. *Baroda Sundari Dasi* (9) and *Woomesh Chandra Maitra* v. *Barada Das Maitra* (10). This contention I would at once dispose of adversely to the plaintiffs on the authority of *Sri Gopal* v. *Pirthi Singh* (11), *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (12) and *Bommidi Bayyan* v. *Surayanarayana* (13), the second of which is a decision of a Privy Council. Moreover, the view in the Allahabad case was approved and adopted by the Privy Council on appeal in the same case: see *Sri Gopal* v. *Pirthi Singh* (11). In *Guddappa* v. *Tirkappa* (3) (above cited) at page 197 Jenkins, C. J., pointed out that in *Kailash Mondul* v. *Barola Sundari Dasi* (9) the Privy Council decision in *Kameswar Pershad* v. *Ruttan Koer* (2) was not referred to.

There is much more force in the plaintiffs' contention that the mortgage of 1876 (Exhibit P-19) does not specify any field as either *sir* or *khudkasht*, that the plaint in the suit of 1910 upon the mortgage of 1885 similarly omitted to claim redemption of any particular fields as *khudkasht* and that it could not reasonably be regarded as essential for the present plaintiffs to raise any question as to what individual fields might be foreclosed as *khudkasht* in the event of foreclosure, when the subsequent mortgagees themselves raised no specific issue covering the point.

It is plain that the question what fields would constitute *khudkasht* in the event of foreclosure might conceivably have been raised in the Suit of 1910, but according to the rule laid down by the Judicial Committee in *Kameswar Pershad* v. *Ruttan Koer* (2) it must depend on the particular facts of the case whether the plaintiffs ought to have raised that point. In *Dinobundhoo Chowdhry* v. *Kristomonee Dosses* (14) Garth C. J., remarked as follows:—

"The state of the law in India upon the subject of land tenures and inheritance is exceedingly difficult and complicated. It is quite impossible that the great mass of the people can properly comprehend its details and it must constantly happen that, until the differences between contending parties have been ventilated and discussed in a Court of law, the litigants themselves are entirely ignorant of what their legal rights and position may be. I do not believe that the Legislature of this country, nor the Lords of the Privy Council, in interpreting the language of the Legislature, ever intended to impose upon a people, who are for the most part uneducated and imperfectly advised, a more stringent rule upon this difficult subject than has obtained for centuries past in civilised Europe."

These remarks seem to me to have particular force in the present case. Exhibit P-17 is a copy of the *jamabandi* for 1911-12 and shows that the fields in dispute were still being shown as tenancy holdings. It appears from the Settlement Officer's order (Exhibit 4 D-9), dated the 25th April 1914, that the Deputy Commissioner as far back as 1902 and again in 1903

(4) 5 C. 198; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. s.) 737.

(5) 16 C. 632; 16 I. A. 107 (P. C.); 5 Sar. P. C. J. 345; 13 Ind. Jur. 133; 8 Ind. Dec. (N. s.) 451.

(6) 26 B. 661; 4 Bom. L. R. 492.

(7) 30 A. 36; 4 A. L. J. 763; A. W. N. (1907) 281.

(8) 34 C. 223; 5 C. L. J. 192.

(9) 24 C. 711; 1 C. W. N. 565; 12 Ind. Dec. (N. s.) 1143.

(10) 28 C. 17.

(11) 20 A. 110 at p. 113; A. W. N. (1897) 216; 9 Ind. Dec. (N s.) 431.

(12) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.).

(13) 17 Ind. Cas. 445; 37 M. 70; 12 M. L. T. 500; 23 M. L. J. 543; (1913) M. W. N. 1.

(14) 2 C. 152 at p. 171; 1 Ind. Dec. (N.s.) 393.

declared that the holdings till then acquired must be regarded as having merged in the proprietary rights of the *malguzars*: but from Exhibit 4 D 17, an order by the Commissioner of the Nerbudda Division disposing of an appeal preferred by the present plaintiffs, it is also clear that conflicting orders on the subject had been passed from time to time and that even as late as 1913 the parties were still disputing as to their real positions The plaint in the suit of 1910 is Exhibit P-10 and in it the foreclosure of "the mortgaged property" is asked for without any indication of the dispute which had been going on for years, while the claim for redemption was expressly described as relating to the mortgage deed of 1876 in respect of Mauza Mathani together with all rights mentioned in that deed. The plaintiffs' mortgage (Exhibit P-19) makes no mention of *khudkasht* as such and altogether the circumstances seem to me to have justified the plaintiffs in considering it unnecessary to claim the cost of acquisition when the subsequent mortgagees had not made it clear that they desired to take possession of the lands now in dispute. It might, in my opinion, be argued with more reason that the then plaintiffs should have indicated the lands of which they expected to receive possession and that their failure to do so led the present plaintiffs to assume that their possession would not be interfered with. It is not suggested that the subsequent mortgagees did not know of the dispute, nor does it appear from the record that the present plaintiffs were deprived of possession by way of executing the final decree for foreclosure obtained by he mortgagees of 1885.

Looking to all the circumstances I do not see my way to holding that the present plaintiffs ought to have raised any question as to their rights in respect of the holdings acquired by any of the mortgagees of 1876 while in possession under the mortgage of that year. Both parties appear to have been responsible for the failure to make the suit of 1910 all inclusive and the rule of *res judicata* should not be applied against the then defendants. The appeal accordingly fails and is dismissed with costs.

The plaintiffs have preferred objections to the lower Appellate Court's decree, the principal object of which has already been stated. Alternatively it is contended that they should be allowed a larger sum than Rs. 3,776 as the cost of acquisition, the actual cost having been Rs. 4,116-12-6.

The main objection is not pressed in respect of the four holdings which figure in the first three and the fifth entries in the trial Judge's table aforesaid. These holdings were acquired by all the mortgagees of 1876 together and it is conceded by the plaintiffs' Counsel that they must be taken to have been purchased for the benefit of the mortgagor so as to enhance the value of the mortgaged property. The tenancies did not determine by virtue of clause (*d*), section 111, Transfer of Property Act, inasmuch as they existed for agricultural purposes and therefore are excluded by section 117 of the Act from the operation of section 111. But the Privy Council decision in *Raja Kishandatt Ram* v. *Raja Mumtaz Ali Khan* (4), which was reached before the Transfer of Property Act came into force, shows that even then the principle of merger might be applied as being in accordance with the principles of equity, justice and good conscience. Under section 63 of the Transfer of Property Act it is unnecessary to invoke the doctrine of merger and I do not think that any distinction can be drawn between a single mortgagee and the entire body of mortgagees, where there is more than one and all act together. The section does not require the accessions to have been made by the mortgagee by availing himself of his position as such: it would, therefore, be idle for the plaintiffs to urge that the acquisitions might have been made even if the mortgage had not been taken

With regard to the other acquisitions which were made otherwise than by the entire body of mortgagees and in all cases without the ostensible participation of Deokishan, it is urged that the lower Appellate Court was wrong in treating the act of more than one mortgagee as tantamount to the act of the entire body of mortgagees. Reliance is placed on the principle now well-settled in this Court that one member of a joint family may

become a tenant without the other members being his co tenants: see *Anant Ram* v. *Takit Singh* (15), *Gulabrao* v. *Sitaram* (16) and *Deochand* v. *Moti* (17).

For the defendant-appellant it is urged that the position of Chhotmal and his descendants as mortgagees in possession put them in a specially favourable position for obtaining land from tenants, that in the plaint and the oral pleading of the plaintiffs' Pleader recorded on the 13th February 1917 their case was rested on acquisition by Chhotmal alone and that both the Courts below have held the mortgagees to have constituted a joint family in 1876, since when no partition is shown to have been effected.

Chhotmal died on the 22nd March 1896 and five of the nine acquisitions now under consideration were made after that date. The first Court held that the acquisitions are not shown to have been effected out of the separate funds of Chhotmal or his descendants and the correctness of this conclusion is not questioned here. Against this must be placed the fact that in 1894 or 1895 Chhotmal alone obtained a *patta* from the Settlement Officer in respect of all the holdings which had been acquired up to that time. An explanation of this was offered in the concluding sentence of the third paragraph of the present appellant's written statement, and in this connection it is necessary to mention that from 1891 to the end of 1894 the mortgagees of 1876 were out of possession, having been wrongfully ejected by the mortgagors. The lower Appellate Court's view is that, inasmuch as clause (*e*), section 76, Transfer of Property Act, prohibits a mortgagee in possession from committing any act which is destructive or permanently injurious to the property, it follows that he must hold for the mortgagor any purchase of a tenant's right he may make, whether he is sole mortgagee or one of a body of mortgagees. The learned Judge expressly laid down that the mortgagee in possession is a trustee for the mortgagor of any accession, but for this position there appears to be no authority and the most that can be said appears to be that the position of such a mortgagee is in some ways analogous to that of a trustee. I do not think that one of several mortgagees in possession can reasonably be regarded as holding a worse position than one of several co-sharers in an unincumbered village. In *Jairam* v. *Balaji* (18) it was held by Ismay, J. C., that a co-sharer who purchases the holding of an absolute occupancy tenant, becomes himself an absolute occupancy tenant. There is no evidence or suggestion in the present case that the mortgagors suffered any loss by the substitution of Chhotmal for the original tenants and it is important to remember that the holdings now in view were all acquired after the mortgage of 1876 was foreclosed and before the subsequent mortgagees obtained any decree. That Chhotmal and his descendants have consistently treated the so called accessions as tenancies acquired for their exclusive benefit appears not only from the settlement *patta* (Exhibit P-3) but also from their persistent contention before the Revenue Authorities that the lands should not be treated as *khudkasht*. Until the mortgage of 1876 was redeemed by Jagannath Prasad, Prem Narain and Nanhelal, there could be no question of their declining to accept Chhotmal or his descendants as tenants of the entire proprietary body. I find from the record of Suit No. 19 of 1910 that the mortgagees of 1855 could have sued for foreclosure on that mortgage in May 1893. They, however, delayed their suit for 17 years and so far as the acquisitions made in 1878 (Exhibit P-26), 1883 (Exhibits P-28) and (P-40), 1889 (Exhibit P 41), 1897 (Exhibit P-29) and 1902 (Exhibit P-39) are concerned, the present proprietors have no sort of equitable claim to interfere with the plaintiffs' occupation as tenants. By their co owners for the time being the plaintiffs were admittedly recognised as tenants and they remained in possession as tenants for over 12 years. I hold, therefore, that they are entitled to retain possession of these lands as tenants representing the original tenants from whom they were acquired.

With regard to the acquisitions of 1908 (Exhibit P 31), 1909 (Exhibit P-30) and

(15) 4 C. P. L. R. 57.
(16) 8 C. P. L. R. 11.
(17) 1 N. L. R. 178.

(18) 14 C. P. L. R. 9.

1911 (Exhibit P-7), the question is whether the plaintiffs' position is weaker by reason of their possession having extended over less than 12 years. This I would answer in the negative. In any other view it would seem essential to hold that the power of the other co-owners to accept the plaintiffs as tenants of the entire proprietary body depended on their obtaining the approval of the mortgagees of 1885, although the latter did not redeem the property from the mortgage of 1876 until 1912 or later. As already remarked, it is not shown that by substitution of the plaintiffs for the original tenants the interests of the proprietary body have been in any way injured.

It is unnecessary now to consider whether the plaintiffs can properly be allowed the sum of Rs. 4,116-12-6 for their acquisitions as against Rs. 3,776 allowed by the lower Appellate Court. In respect of the lands acquired by Exhibits P-23, P-24, P-25 and P-27 the plaintiffs will be paid Rs. 1,200 only, their claim for possession of the connected lands being dismissed. For the other holdings acquired the plaintiffs will be given a decree for possession as tenants. The lower Appellate Court's decree is set aside and a fresh decree in accordance with the foregoing conclusions will be drawn up. Costs of the plaintiffs' objections will follow this result. The defendants will bear their own costs in both the Courts below. The plaintiffs' costs in the lower Courts will be paid by all the defendants.

Appeal dismissed.
Decree varied.

LAHORE HIGH COURT.
SECOND CIVIL APPEAL No. 2306 OF 1919.
April 10, 1920.
Present:—Mr. Justice LeRossignol.
Musammat ASA DEBI—DEFENDANT—APPELLANT
versus
BASHI RAM—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Maintenance—Right of residence—Widow, whether bound to liquidate husband's debts.

Ordinarily, a Hindu widow has a right of residence in the family house and she may not be ousted except to satisfy claims which are paramount to her right of residence, which is a part of her right to maintenance. [p. 199, col. 1.]

The widow of an undivided member of a Hindu family can set up her right of residence against a purchaser for value, unless the alienation was for a family purpose, but the widow of a divided member is bound to liquidate any debt which was binding on her husband unless it was incurred in fraud of her right. [p. 199, col. 1.]

Where, however, the husband loses the property in his lifetime, there is nothing to which his widow can succeed as his heir or from which she can derive maintenance. [p. 199, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Lahore, dated the 25th August 1919, reversing that of the Subordinate Judge, 1st Class, Lahore, dated the 31st March 1919, dismissing the claim with costs.

Mr. *Manohar Lall*, for the Appellant.

Dr. *Gokal Chand Narang*, for the Respondents.

JUDGMENT.—The facts of this case are that the plaintiff in execution of his own decree against one Ratan Chand purchased Ratan Chand's half share in a house and now sues for possession by partition of that share.

Ratan Chand has died and the claim to partition is accepted by the other co-sharer, the brother of the late Ratan Chand, but is contested by Ratan Chand's widow, who sets her right of residence against plaintiff's claim.

The trial Court dismissed the suit on the ground that Ratan Chand was a wastrel and the moneys advanced to him by the plaintiff were not for necessity or family purposes and consequently the debt incurred by him was not binding on his widow.

The learned District Judge decreed for the plaintiff on appeal, on the ground that though Ratan Chand was addicted to drink, there was no evidence that the particular debts with which the case is concerned were tainted with immorality.

This second appeal was then preferred and it is urged that the onus of proving that the debts were binding on the widow lay upon the plaintiff, who had not proved their nature.

For the respondent it was contended that

the right of residence enjoyed by a widow was a right which was liable to postponement to the satisfaction of any of her husband's debts, moral or immoral, and that in this case her husband had lost this property, *i.e.*, his half share in the house, in his lifetime and nothing was left to which his widow could succeed as his heir, or from which she could derive maintenance. A Hindu widow under ordinary circumstances has a right of residence in the family house: Hindu Law, by Mulla, page 437; Trevelyan's Hindu Law, page 76, and she may not be ousted except to satisfy claims which are paramount to her right of residence, which is a part of her right to maintenance.

I have been referred to a host of authorities; *inter alia* to:—

Mulla's Hindu Law, paragraph 468, *Ramanadan* v. *Rangammal* (1), *Venkatammal* v. *Andyappa Chetti* (2), *Jaswanti* v. *Tej Narain* (3), *Talewand Singh* v. *Rukmina* (4), *Jayanti Subbiah* v. *Alamelu Mangamma* (5), *Gauri* v. *Chandramani* (6), *Valu* v. *Ganga* (7), *Rajah Pirthi Singh* v. *Rani Raj Kower* (8) and *Manilal* v. *Bai Tara* (9).

From a perusal of these authorities it appears that a distinction must be drawn between the case of the widow of a divided member of a Hindu family where the widow is her deceased husband's heir, and the widow of an undivided member who on her husband's death does not succeed him but retains a lien for maintenance on the property of the undivided family. In the latter case she can set up his right of residence against a purchaser for value, unless the alienation was for a family purpose. In the former, as she is not a creditor of her husband's estate but represents him, she is bound to liquidate any debt which was binding on her husband [*Cf. Jayanti Subbiah* v. *Alamelu Mangamma* (5) and Mulla's Hindu Law, paragraph 468] unless incurred in fraud of her right.

In this case the debt was due by the husband and the property was lost by him in his lifetime. Had it been necessary to decide whether the debt was for a necessary purpose, I should have held that that had not been established.

For the above reasons, I dismiss the appeal with costs.

Appeal dismissed.

(1) 12 M. 260 (F. B.); 4 Ind. Dec. (N. s.) 531.
(2) 6 M. 130; 7 Ind. Jur. 127; 2 Ind. Dec. (N. s.) 369.
(3) 41 Ind. Cas. 192; 120 P. W. R. 1917; 10 P. R. 1918.
(4) 3 A. 353; 5 Ind. Jur. 601; 2 Ind. Dec. (N. s.) 166.
(5) 27 M. 45.
(6) 1 A. 262; 1 Ind. Dec. (N. s) 177.
(7) 7 B 84; 7 Ind. Jur. 251; 4 Ind. Dec. (N. s.) 56.
(8) 12 B. L. R. 238; 20 W. R. 21; 3 Sar. P. C. J. 259.
(9) 17 B. 398; 9 Ind. Dec. (N. s.) 259.

MADRAS HIGH COURT.

CIVIL APPEAL No. 173 OF 1918.

August 28, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

VENGANAT RAJA VASUDEVA RAVI VARMA RAJA AVERGAL
DEFENDANT No. 1—APPELLANT
versus
NAITHILATH MATATHIL RAMAN KUTTY MENON AND OTHERS—
PLAINTIFF AND—DEFENDANTS 2 TO 7—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—Res judicata—*Appeal, disposal of, on points independent of those decided by trial Court, effect of*—*Malabar Law*—Tarwad—*Agreement by* karnavan *for benefit of* tarwad—*Junior member not consulted*—*Agreement, whether valid.*

Where an agreement is entered into by the *karnavan* of a Malabar *tarwad* for the benefit of the *tarwad*, the fact that a junior member was not consulted about it is not a legal ground for invalidating the agreement. [p. 201, cols. 1 & 2.]

When an appeal is filed and admitted, the matters decided by the lower Court cease to be *res judicata* and are left open between the parties for argument before, and decision by, the Appellate Court. If the Appellate Court disposes of the appeal on points independently of those on which the lower Court rested its decision or in terms of a compromise between the parties, the findings of the lower Court do not operate as *res judicata* in regard to the matters dealt with by it. [p. 203, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in Original Suit No. 39 of 1916.

Messrs. *C. V. Ananthakrishna Aiyar* and *P. S. Kalyanasundara Aiyar*, for the Appellants.

Messrs. *C. Madhavan Nair*, *P. Appa Nair* and *S. Eacharan Kutti Nair*, for the Respondents.

VENGANATH RAJA VASUDEVA *v.* NAITHILATH MATATHIL.

This appeal coming on for hearing on the 18th, 19th and 21st of August respectively and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The 1st defendant, the Valia Nambidi of Kollengode, is the appellant before us.

The suit was brought by the last surviving member of a Nair Tarwad for an injunction against the 1st defendant's (Nambidi's) exercising the irrigation rights secured to him under the registered compromise deed, Exhibit XIV (dated 6th July 1904), signed by the plaintiff's deceased elder brother (the then Karnavan of the plaintiff's Tarwad), by the 1st defendant and by the members of the 2nd defendant's family (who might be called shortly 'the Pandarams") and intended to define clearly and "for ever" by agreement the respective rights of the three families to the use of the water flowing in certain channels taking off from the Meenkara river by the help of an anicut called the Kotta Katavu anicut constructed by the plaintiff's Tarwad.

The disputed agreement Exhibit XIV, dated 6th July 1904, between the above interested three families was entered into in supersession of the prior agreement Exhibit A, dated 9th March 1897, executed between two only of the three parties, namely, the plaintiff's Tarwad and the Pandarams.

The plaintiff's case is (see paragaphs 5, 8, and 9 of the plaint):—

(*a*) that "the 1st defendant cunningly gained over late Gopal Menon" (the plaintiff's elder brother and then Tarwad Karnavan) "and through him" the Pandarams, that "the 1st defendant made Gopal Menon to believe that he" (the 1st defendant) "would cause one of his younger brothers to marry one of his (Gopal Menon's) daughters and (thus) got the Karar." (Exhibit XIV) "executed" without necessity "fraudulently" and that the 1st defendant's younger brother afterwards married a daughter of Gopal Menon;

(*b*) that the said Karar was highly detrimental to the plaintiff and to his Pallam Nilam and Netuvanchira Nilam "and great trouble, loss and ruin are likely to happen to many of the holders of the anicut lower down thereby," and it is opposed "to the stipulations made in respect of the anicut and channel by the Government and the plaintiff's Karnavan Gopala Menon."

The Pandaram defendants (Nos. 2 to 7) remained *ex parte* The principal Pandaram defendant (2nd defendant) gave evidence in support of the Karar Exhibit XIV, which is attacked by the plaintiff. The contest is thus between the plaintiff and the 1st defendant whose familes are (according to paragraph 11 of the plaint) "ancient enemies." One further allegation of the plaintiff is that he knew of his Karnavan's fraudulent and collusive action only after January 1914, when the 1st defendant for the first time (according to the plaintiff) attempted to enforce his rights of irrigation under Exhibit XIV though the Karar had been executed in July 1904.

The issues raised by the lower Court on the 1st defendant's contentions are (among others) the following:

"2. Is the Karar referred to in paragraphs 7 and - of the plaint invalid as alleged by the plaintiff?"

"7. Whether the dispute as to the *cha* and anicut referred to in the plaint has not been finally settled by the decision in Original Suit No. 30 of 1900 and Appeal Suit No. 59 of 1903 (High Court) and is not the 1st defendant's claim barred by *res judicata* by reason of the said decision?"

I propose to deal only with these two issues because if they are decided against the plaintiff his suit ails. I think that the lower Court would have done well to have raised (having reference to the allegations of the parties) three clear and distinct issues on the points involved in the second issue. I shall accordingly expand the issue thus:

(2*a*). Did the 1st defendant, by promising to make one of his brothers marry Gopal Menon's daughter, induce him to enter into the agreement Exhibit XIV and did Gopal Menon enter into the agreement with that ulterior object and not in the interest of the Tarwad as a Karnavan should have done?

(2*b*). Is that agreement deterimental to the interest of the plaintiff's Tarwad by reason of its causing injury to the irrigation of the plaintiff's Tarwad lands, whereas the old agreement Exhibit A (between the plaintiff's Tarwad and the Pandarams),

which it superseded, did not cause any such detriment?

(2c). Is that agreement detrimental to the plaintiff's Tarwad as interfering with his obligations to the Government and to the owners of lands lower down the anicut and is it, therefore, not binding on the plaintiff's Tarwad?

The learned Subordinate Judge dealt with the 2nd and 3rd issues together in paragraphs 6 and 7 of his judgment. So far as the 2nd issue is concerned, he does not come to close quarters with the grounds put forward by the plaintiff as his grounds of attack against the Karar. The Subordinate Judge's conclusions on the facts are:

(*a*) Exhibit XIV was entered into by Gopal Menon (the plaintiff's Karnavan) without the knowledge and consent of the plaintiff (a junior member then);

(*b*) The Karar Exhibit XIV "is *prima facie* injurious to the interests of plaintiff's Tarwad as it brings in a new joint owner or beneficiary of the anicut and channel" (that is a new beneficiary in addition to the plaintiff's Tarwad and the Pandarams who were the beneficiaries under Exhibit A of 1897).

I feel constrained to remark that this is an unsatisfactory way of disposing of the issue, which is whether the Karar Exhibit XIV is invalid "as alleged by the plaintiff," that is, on the ground that it would cause "great hardship" by cutting off irrigation water which the plaintiff's Tarwad lands were getting under the old Karar and that it would put to "trouble and loss the plaintiff, the ancient enemy" of the 1st defendant's family, and that "incalculable and inestimable loss and trouble and mental pain are likely to befall the plaintiff every year" (see plaint paragraphs 11 and 12) and on the ground of fraud, collusion and danger of subjection to legal liability to Government and to the lower riparian owners. The casual observation of the Subordinate Judge that the Karar is "*prima facie* detrimental" because it introduces a third beneficiary, is not convincing as unless the introduction of the 3rd beneficiary lessened the benefit till then enjoyed by the plaintiff's Tarwad under the old agreement, the mere introduction of a new beneficiary cannot be detrimental. The plaintiff not having been consulted is not a legal ground invalidating the agreement to which his Karnavan was a party.

The Subordinate Judge should have considered the respective terms of Exhibit A and Exhibit XIV as they affected the plaintiff's Tarwad, should have considered the evidence let in on both sides about the alleged fraud and collusion, and then decided the three questions (*a*), (*b*) and (*c*) and finally arrived at his conclusions on the 2nd issue.

However, as this is a regular appeal in which we are entitled ourselves to arrive at the necessary finding on the facts, I shall proceed to the consideration of the evidence.

Before dealing with the oral evidence, a few facts as to the litigation in the course of which the compromise Exhibit XV was entered into might be mentioned. That litigation began by the suit (Original Suit No. 454 of 1902) brought by the Nambidi as plaintiff against Gopala Menon (the Karnavan of the present plaintiff's Tarwad) as the 1st defendant and against the Secretary of State for India as the 2nd defendant for two principal reliefs, "to direct the 1st and 2nd defendants to surrender the road-site described in the plaint schedule to the plaintiff, after causing the channel which the 1st defendant newly opened through it to be filled up and after converting the said plot into road-site and if the channel is not filled up, to direct the 1st defendant to pay to the plaintiff Rs 50 for the expenses that would be required for the filling up of the said channel; (*b*) to restrain the defendants by a perpetual injunction from opening a channel along the said road-site and from carrying water through it, in case it is found that the said road-site has not been given up by the Government." The channel referred to above is the channel which was irrigating about 2,000 *puras* of Gopal Menon's (and the present plaintiff's) Tarwad lands, D in the Commissioner's plan Exhibit XII (I refer to that plan as proved to be correct in preference to the plaintiff's plan B). It is clear that if the Nambidi (the present 1st defendant) had succeeded in that suit, brought by him, the plaintiff's Tarwad "would have been injured considerably" as admitted in plaintiff's own evidence in this suit

(see page 159 of the printed records, lines 42 to 44).

I shall further set out (*a*) the rights of irrigation of the plaintiff's Tarwad and the Pandarams' family under Exhibit A and (*b*) of the plaintiff's Tarwad, the Nambidi's Kovilagam and the Pandaram's family under Exhibit XIV. Under Exhibit A of 1897, (1) plaintiff's Tarwad got the right to take water during 111 days out of the 9 months (or 273 days) in the year during which water was available (the remaining 3 months from the middle of March to the middle of June or about 92 days in the year being considered useless for irrigation purposes) ; (2) the Pandarams' family had the Murai during the remaining 162 days. (I have taken 273 days as equivalent to the 9 months, though the parties might have roughly considered that each month contained 30 days).

Under Exhibit XIV of 1904 : 1. Plaintiff's Tarwad got about 165 days instead of the 111 days in Exhibit A (out of the 273 days) ; 2. The Pandarams' family got 54 days' Murai (they having had 162 days' Murai under Exhibit A) ; and 3. The Nambidi's Tarwad got the remaining 54 days' Murai newly.

It will thus be seen that the plaintiff's Tarwad got under Exhibit XIV irrigation facilities for 54 days (165 minus 111) more than they had under Exhibit A and as it is conceded that the particular days in the Malabar months during which irrigation is allowed do not matter, Exhibit XIV is much more advantageous to the plaintiff's Tarwad than Exhibit A, it is the Pandarams that lost under Exhibit XIV, but the Pandarams not only do not complain but (as I said before) 2nd defendant gave evidence in this suit as defendants' 3rd witness in favour of the Nambidi. How then could Exhibit XIV, which was executed in compromise of the suit of 1902, be detrimental to the interests of the plaintiff's Tarwad ?

Only two witnesses were examined for the plaintiff. The first witness is the interested plaintiff himself and he is wholly unable to state how an agreement which is more favourable to his Tarwad than the former agreement, is really detrimental to his Tarwad. The gist of his evidence is that because it favours his enemy, the Nambidi, it is detrimental to himself. The 2nd witness is a dependant and creature of the plaintiff and he gives no evidence about the alleged injury caused by the new Karar. He says : "I depend upon the plaintiff for my subsistence." Even his Kudiyiruppu belongs to the plaintiff. As to the alleged promise made by the 1st defendant to Gopal Menon to make one of the 1st defendant's brothers to marry Gopal Menon's daughter, the only evidence is that of the plaintiff. He first said that the 1st defendant's brother, Madhava Rajah, was to marry Gopala Menon's daughter, but he was obliged to admit that Madhava Rajah's marriage had taken place in 1901 about 3 years before the date of this Karar. No doubt, one of the defendant's brothers married Gopal Menon's daughter after date of Exhibit XIV, but this was five years after the date of Exhibit XIV. There is absolutely nothing to connect that marriage with Exhibit XIV, except the plaintiff's evidence which is practically vague heresay evidence.

As regards the contention that the agreement interferes with the plaintiff's obligations to Government and to the owners of lands lower down the aniout, this has been sufficiently dealt with in the judgment of my learned brother with which I entirely agree.

The Subordinate Judge has found the agreement to be invalid on the ground that the 1st defendant is legally precluded from relying on the Karar by reason of the *res judicata* created by the decision of the High Court in Appeal Suit No. 59 of 1903 (7th issue).

The facts connected with that litigation have been set out in the judgment of my learned brother. The Court of first instance dismissed the Nambidi's Suit No. 50 of 1900 on three grounds: that the site of the channel then in dispute belonged to the Collector, and that the channel belonged to Gopal Menon's Tarwad; (2) that the Nambidi's suit for injunction was bad for non-joinder of the Secretary of State as a party ; and (3) that the relief of injunction is a matter of discretion in the Court and in the circumstances of that case, the injunction relief could not be granted, especially as in the absence of the Government as a party,

such relief would be futile. When the case went up on appeal to the High Court, this Court was not called upon to decide it either on the questions of law or on the questions of fact argued in the first Court. None of the three grounds on which the lower Court decided that the suit, so far as it related to the injunction relief in respect of the anicut and *chal* site, should be dismissed was considered by this Court and no opinion was arrived at on the question whether the lower Court's view on any of the three points was right or wrong. (That suit itself was substantially and mainly for the redemption of some mortgaged lands on payment of the mortgage amount and of the value of the improvements) It is an elementary principle of law that when an appeal is filed and admitted, the matters decided by the lower Court cease to be *res judicata* and are left open between the parties for argument before, and decision by, the Appellate Court. No questions were decided in the Appellate Court in the suit of 1900 owing to the parties agreeing that that portion of the decree of the lower Court which refused the injunction reliefs relating to the *chal* and anicut site, should stand, the remaining portion of the decree relating to redemption being modified in favour of the Nambidi (appellant) on the question of the value of improvements. Under those circumstances, it is futile to contend that any finding as to the rights of the Nambidi and Gopal Menon in the sites of or the waters tapped by the *chal* and the anicut was arrived at by the High Court on appeal. The argument based on the imaginary existence of that implied finding by the High Court, a finding which, if it existed, is, no doubt, later in date than Exhibit XIV of 1904 (the High Court compromise decree being dated January 1905), the argument being that that implied finding declared rights which superseded the rights created by Exhibit XIV, therefore, fails. No finding negativing the rights as declared and agreed upon in Exhibit XIV was necessarily implied in the High Court's decree, as no such finding was necessary for the disallowance by consent of parties or even otherwise of the plaintiff's prayer for injunction in that suit in respect of the anicut and *chal* site.

In the result, the appeal must be allowed with the appellant's costs in both the Courts payable by the plaintiff.

BURN, J.—The plaintiff, who is the last surviving member of a Malabar Tarwad, brought this suit for an injunction and to restrain the 1st defendant and his agents from interfering in any way with an anicut and channel which the plaintiff claims to be his property. Defendants Nos. 2 to 7, the representatives of the parties who will hereafter be referred to as the Pandarams, are persons who admittedly have some rights in the channel and who, according to the finding of the lower Court, are joint owners of the anicut and channel along with the plaintiff. The lower Court has granted the injunction prayed for and the 1st defendant appeals.

The anicut in question is known as Kottakatavu and is thrown across the Meenkara river. It is a temporary construction of branches and mud which is renewed from year to year with the permission of the Collector (*vide* Exhibits XVII, Q, R). The anicut appears to have been constructed for the first time in 1884 for the irrigation of some land known as Kolampara Challa, which is the Jenm property of the 1st defendant and which was held by the plaintiff's Tarwad under an agreement of 1841 for a term of years and subject to certain conditions as to reclamation. It was so used until 1896, when it became unnecessary for the irrigation of this particular land because other sources of supply were available. The plaintiff's family have acquired a considerable extent of land at some distance to the west of the Kolampara Challa. This is referred to in the evidence as the Pallam land. It appears to have been irrigated from the Meenkara river prior to 1896, but disputes arose as to the course of the channel and this led to the supply being stopped. In 1896 an application was made to the Collector for permission to construct a channel along an abandoned road to reach the Pallam land. The 1st defendant raised objections to the request being granted (*vide* Exhibits XXXI and XXXII), but eventually sanction was accorded by the Collector in 1897 (*vide* Exhibit Q). At about the time when permission for the construction of the new channel had been

obtained, an agreement was entered into between the plaintiff's Tarwad and the Pandarams (Exhibit A) for distribution of the channel water between them. The water is available for nine months in the year and under the agreement Exhibit A, dated the 9th of March 1897, the plaintiff's Tarwad was to take water between certain dates in each month and the Pandarams were to have the right to it for the remaining days of each of the months. The 1st defendant was no party to this agreement. On the 14th of December 1900 the 1st defendant instituted Original Suit No. 50 in the Court of the Subordinate Judge of Palghat. He sought to recover possession of the lands held by the plaintiff's Tarwad under the agreement of 1849, subject to the conditions as to compensation which had been provided therein. He also alleged that the 1st to 4th defendants in that suit, now represented by the plaintiff, had been irrigating the lands in suit by means of the Kottakatavu anicut and the channel coming therefrom. He contended that these had been constructed by the defendants in their capacity as persons in possession of the lands which he sought to redeem, that they should be considered as adjuncts to these lands and should be surrendered to him along with the lands. The plaint further sets out that the defendants had constructed a branch channel so as to interfere with the supply of water to the lands then in suit. It was asserted that the defendants had no right so to divert water to other lands of theirs and a perpetual injunction was asked for restraining them from doing so. The 1st defendant in that suit, who was the Karanavan of that Tarwad, in his written statement set out the history of the anicut and channel and stated that these had been constructed with the permission of Government and that the channel leading to the Pallam land had been dug on land which was the property of Government. The Subordinate Judge rejected the plaintiff's prayer in so far as it asked for an injunction to prevent the taking of water to the Pallam land. In his judgment the Subordinate Judge finds that the Government had not granted permission for the construction of the anicut in 1884 to the applicants merely on the ground that they were the tenants of the plaintiff and that in any event the permission granted in 1896 and subsequent years had no necessary connection with the grant in 1884. He also found that it was not established that the channel was necessary for the cultivation of the Kolampara Challa. As regards the ownership of the channel he found that it was exclusively the property of the 1st defendant. This finding is based on the authority given by the Collector to the 1st defendant to excavate the channel. But the Subordinate Judge pointed out that there might be a question with regard to the ownership as between the Government and the 1st defendant. The Government was no party to the suit, and in several places in the judgment it is stated that the reliefs asked for in respect of the anicut and channel cannot be granted because the Secretary of State is no party to the suit. An appeal was preferred by the plaintiff in Original Suit No. 50 of 1900 and he sought to have the decree of the Court of first instance reversed with regard to the refusal of the injunction. The appeal was eventually disposed of in terms of a compromise. A modification was made in the original decree with regard to the amount of compensation payable by the plaintiff and in other respects the decree of the Subordinate Judge was confirmed. The order of the High Court was passed on the 5th of January 1907. The original decree of the Palghat Court was passed on the 1st of December 1902. 18 days later the present 1st defendant instituted another suit, Original Suit No. 454 of 1902 on the file of the District Munsif of Alatur, and to this he made Gopala Menon the Karnavan of the plaintiff's Tarwad and the Secretary of State parties. The plaint sets out the facts regarding the permission granted by the Collector in 1896 for the construction of a channel and alleges that the Government had no right whatever to grant such permission, as the site of the channel is the property of the plaintiff. It was stated that the site formed part of an abandoned road and was the plaintiff's property and even if the road was held out not to have been abandoned, yet the public rights over the surface were only of a limited character and the Government had

no power to sanction the excavation of the channel. The prayers were that the defendants be directed to surrender the road-site to the plaintiff and should be restrained by a perpetual injunction from opening a channel in that place. Both the defendants filed written statements contesting the plaintiff's claim. This suit was compromised on the 6th of July 1904 and the agreement is Exhibit XIV. The Secretary of State was no party to the compromise and on the other hand the Pandarams, who were no parties to the suit, joined in the agreement which was entered into between the plaintiff and the 1st defendant. Here matters rested until the institution of the present suit on the 3rd of May 1916.

The plaintiff alleges that until the death of his Karnavan Gopal Menon in May 1913 he had no acquaintance with the management of the Tarwad affairs and had no occasion to inspect the suit properties. It is alleged that in 1914, 1915 and 1916 the 1st defendant's agents attempted to divert water from the channel, that this action on their part put the plaintiff upon enquiry and that he then discovered that the 1st defendant was asserting claims on the strength of the compromise embodied in Exhibit XIV, a document of the existence of which the plaintiff professes to have been completely ignorant. Paragraph 8 of the plaint alleges that the compromise was brought about by collusion between the 1st defendant and the late Karnavan Gopal Menon. Gopal Menon is said to have been induced to enter into this argument by a promise of a marriage between one of his daughters and one of the 1st defendant's brothers. It is also suggested that the Pandarams had been gained over by some device and there is also a general allegation of fraud. The plaintiff also asserts that the terms of the Karar are very detrimental to his interests. In the written statement of the 1st defendant the plaint allegations of fraud and collusion are denied. The agreement Exhibit XIV is stated to have been a *bona fide* settlement of a dispute made with the knowledge of the plaintiff. The alleged trespass is also denied, and it is stated that ever since the date of the compromise water has been regularly taken from the channel by the 1st defendant's men in accordance with the terms of the compromise.

The main question in dispute is whether the plaintiff is bound by this Karar of the 6th of July 1904. The Subordinate Judge has found that it is not valid and binding on the plaintiff. He points out that there is some evidence that Gopal Menon did not get on very well with some of the members of the Tarwad and that though in other suits instituted by the 1st defendant all the members of the Tarwad had been impleaded, yet in Original Suit No. 454 of 1902 Gopal Menon alone was made a party. The Subordinate Judge further states that the Karar is *prima facie* injurious to the interests of the Tarwad as it brings in a new joint owner or beneficiary to the anicut and channel. There is no specific finding in respect of the allegations of fraud and collusion and I am unable to find any evidence in support of them. It is true that a daughter of Gopal Menon was married to the younger brother of the 1st defendant in 1909, but this was five years after the execution of Exhibit XIV, and beyond the bare assertion on the part of the plaintiff there is no evidence of any promises having been held out at the time of the Karar. I am not prepared to accept the uncorroborated statement of the plaintiff as establishing that anything of the kind took place. Beyond the suggestion as to the promise of marriage, neither the plaint nor the evidence contains any specific allegation as to how the improper influence was exercised. It is true that the plaintiff was not impleaded in Original Suit No. 454 of 1902, while he had been included as a party in Original Suit No 50 of 1900. It is also true that he has not signed the compromise. His inclusion as a party was not, however, necessary and I do not think that any inference can be drawn from this omission or from the failure to obtain his signature in Exhibit X.V. As to the injurious nature of the agreement the Subordinate Judge bases his finding on the ground that rights have been carved out for a third party from those which formerly belonged to the plaintiff's Tarwad and the Pandarams alone Under the first agreement Exhibit A of 1897 the plaintiff was permitted to take water on 111 days and the Pandarams for 159 thus making up the full period of nine months. Under Exhibit

XIV 54 days are alloted to the 1st defendant, 54 to the Pandarams and 162 to the plaintiff's Tarwad. The Pandarams are *prima facie* the sufferers but they do not contest the suit. The plaintiff's Tarwad gets considerbaly more than it had before. The plaintiff himself is unable to give any clear explanation of how he can be damnified by this agreement. He professes that even if more days' supply is allowed him under Exhibit XIV than under Exhibit A, yet the terms of the former are injurious to him. He further added that if the 1st defendant's land were to be irrigated even for a Naligai, his crops would suffer. These are merely extravagant claims of an obstructive nature. Although the plaintiff was unable to explain the injurious effects of the agreement, yet some reasons for considering it as harmful to the plaintiff have been advanced at the hearing of this appeal. It is suggested that under Exhibit XIV the first defendant gets some rights to interfere with the repair and maintenance of the channel, while under Exhibit A it was entrusted to the sole charge of the plaintiff's Tarwad. I do not think that this is a right construction of Exhibit XIV, which seems to me to maintain the plaintiff's rights intact though it possibly relieves him of the burden of bearing all the charges. Next it is pointed out that under the permits for the construction of the anicut granted by the Collector in recent years (*vide* Exhibit Y) provision is made for water being let down the stream on 24 days during the irrigation season. It is suggested that difficulties may arise where this provision interferes with the water supply on days allotted to the 1st defendant or the Pandarams. I think, however, that the whole agreement between the parties to Exhibit XIV is subject to the conditions imposed in the Kychit granted by the Collector. This is clear from paragraph 8 of Exhibit XIV, which expressly refers to "the order issued by the Government for taking water." As far as the plaintiff himself is concerned, water has to be let down the river past the anicut on 12 days only out of the 162 allotted to him. Even deducting these days he is in a much better position than under the previous agreement. As to the circumstances under which the compromise was effected, it must be noted that the first attestor is one Ananta Pattar who was at the time a Tahsildar in that locality. He has not signed as Tahsildar, but the evidence is that he was deputed to try to effect a compromise between the parties. The Secretary of State had been impleaded in Original Suit No. 454. His right to the site of the channel was disputed and the determination of the question of ownership would have raised points of considerable difficulty. If the parties interested in the water supply could be induced to compromise their claims, the necessity for the determination of these complicated legal questions might be avoided. In these circumstances there is nothing improbable in an effort having been made by the Collector to have the dispute settled, and I see no reason to doubt the truth of the evidence that Ananta Pattar was deputed for this purpose. The plaintiff's Tarwad based their right to the anicut and channel on the permission for their construction which had been granted them by the Collector. The right of the Collector to give such permission was directly in issue in Original Suit No. 454, and the plaintiff himself admits that the interests of his Tarwad would have been injured to a considerable degree if the plaintiff in Original Suit No. 454 had met with success. Gopal Menon seems to have acquired considerable property for his Tarwad and to have been a stout champion of its interests as against the 1st defendant. At the time of the Settlement there was a substantial question in dispute and I think that Gopal Menon was well advised in setting it in the manner he did. The negotiations were started at the instance of the Collector and the plaintiff has in my opinion failed altogether to establish that the agreement was procured by undue influence or other unfair means. I am unable to agree with the finding of the learned Subordinate Judge and think that the compromise was for the benefit of the Tarwad and binding on the plaintiff. The Subordinate Judge has also found on the 4th issue that the 1st defendant is debarred from enforcing the rights claimed by him under Exhibit XIV by reason of the decision in Original Suit No. 50 of 1900 and Appeal Suit No. 59 of 1902. I am unable to agree with this conclusion. The reliefs which the present 1st defendant claimed in that suit have already been

mentioned. The Subordinate Judge found that the anicut and channel were not being enjoyed by the plaintiff's Tarwad as holders of land under 1st defendant but in virtue of the independent sanction of the Collector acting on behalf of Government. He also found that it was not established that injury would be caused to 1st defendant by the taking of water through the extensive channel to the Pallam land. There was no determination of the rights of all the parties interested in the channel water. The judgment contains some strongly worded remarks to the effect that the first defendant has no title to the anicut and *chal*, but those observations must be read along with the rest of the judgment. It was recognised that the rights of the Tarwad were derived from the order of the Collector and that the question of ownership as between Government and 1st defendant was open and could not be determined in the suit because the Secretary of State was not a party. The fact that the Government was not a party is stated as a sufficient reason for not granting either of the reliefs which were sought with reference to the anicut and channel. There was nothing to prevent the 1st defendant contesting the claim of Government to grant permission for the construction of an anicut and channel. This is what he in fact did in the subsequent suit in the Alatur Court. The compromise in that suit was entered into when Appeal Suit No. 59 of 1902 was pending in the High Court. I am unable to see how anything in the earlier proceedings can operate to prevent the parties interested in the irrigation from the channel from coming to an agreement between themselves, which would lead to the abandonment of litigation which in its result might have seriously prejudiced rights claimed by the several contracting parties.

I, therefore, agree with my learned brother that this appeal should be allowed and the suit dismissed with costs throughout.

M. C. P.

Appeal allowed.

LAHORE HIGH COURT.

REVISION No. 937 OF 1918.

June 17, 1919.

Present:—Mr. Justice Abdul Raoof.

Musammat BAL KAUR AND OTHERS—PLAINTIFFS—PETITIONERS

versus

SHIB DAS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1898), O. XXXIII rr. 2, 5, 15—Application for leave to sue as pauper not accompanied by schedule of property, dismissal of—Application, subsequent, whether barred.

Where an application for leave to sue as a pauper is rejected on the ground that it is not accompanied by a schedule of the property belonging to the applicant, a subsequent application is not barred under rule 15 of Order XXXIII of the Civil Procedure Code. [p. 208, col. 1]

Revision from the order of the Subordinate Judge, 1st Class, Lahore, dated the 17th June 1918.

Mr. *Tirath Ram*, for the Petitioners.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The facts out of which this petition for revision has arisen may be stated as follows:—The petitioner applied for permission to sue as a pauper on the 26th of February 1917. This application was not accompanied with a schedule of moveable and immoveable property belonging to the applicant as required by rule 2, Order XXXIII of the Code of Civil Procedure. On account of this defect the application was rejected on the 16th of August 1917. The Court recorded the order in the following words:—

"This is an application for permission to sue as a pauper, but was not accompanied by a schedule of any property belonging to the applicant, as required under Order XXXIII, rule 2, Civil Procedure Code, and is, therefore, hereby rejected under Order XXXIII, rule 5, Civil Procedure Code."

The applicant then made a second application, dated the 23rd December 1917, which has been rejected again by the Court. He has, therefore, come up to this Court for revision. The reason given for the rejection of the present application is that it is barred under Order XXXIII, rule 15, Civil Procedure Code. In support of this opinion the learned Subordinate Judge has relied upon the case of *Atul*

Chandra Sen v. *Raja Peary Mohan Mookerjee* (1). Having regard to the special features of that case it can hardly be said to be applicable to the present case. In the present case beyond the fact of an application being presented without the required schedule and the appearance of the parties, nothing further was done. In the case relied upon evidence was taken on both sides, and it was found that the applicant had made a false statement, that his own *purohit* contradicted him, and that he was owner of a house. The first application in that case, therefore, was rejected not for want of any formality, but because the applicant had been found to be possessed of property. The order no doubt purported to have been made with reference to the provisions of rule 2, namely, that the applicant had not furnished the particulars required with regard to the plaint. In substance, however, the order was made within the meaning of rule 7, Order XXIII, Civil Procedure Code.

It is contended on behalf of the respondent in this case that according to the ruling relied upon the second application was prohibited by rule 15, because the order was made under rule 5 (*a*), and according to the said ruling orders made under rule 5 (*a*) barred a second application with reference to the provisions of rule 15. The learned Judges at page 813 of the report remarked:—

"The question, therefore, narrows itself to this, namely, whether the rejection under rule 5 (*a*) in all cases is free from the bar laid down in rule 15."

Evidently the learned Judges meant to imply that there may be some cases in which an order made under rule 5 (*a*) may be barred under rule 15, and there may be other cases in which such an order may not be a bar to a second application. This ruling was cited in a Full Bench case reported as *Howa* v. *Sit Shein* (2) decided by the Lower Burma Chief Court. The learned Judges in a very exhaustive judgment examined the provisions of the different rules under Order XXXIII, Civil Procedure Code, and came to the conclusion that an order made under rule 5 (*a*) could not bar a second application. It is needless for me to examine all the rules under Order XXXIII. It is enough to say that I entirely agree in the opinion expressed by the majority of the learned Judges of the Lower Burma Chief Court.

In my opinion, therefore, the Court below was not justified in rejecting the present application. I set aside the order of the Court below and send the case back to it to be disposed of according to law.

Revision accepted.

(1) 33 Ind. Cas. 812; 20 C. W. N. 669.
(2) 42 Ind. Cas. 903 (F. B.); 9 L. B. R. 93; 11 Bur. L. T. 77.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 129 OF 1919.

April 15, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Sulaiman.

MUHAMMAD ANWAR ALI KHAN AND OTHERS—APPELLANTS

versus

DARA SHAH KHAN AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 47, 48—Order refusing to remove guardian—Appeal, whether lies.

An order refusing to remove a guardian is final and is not open to appeal under sections 47 and 48 of the Guardians and Wards Act.

Appeal from an order of the District Judge, Bareilly, dated the 20th June 1919.

Mr. *Mukhtar Ahmad*, for the Appellant.

Mr. *S. P. Ghose*, for the Respondent.

JUDGMENT.—This is an appeal against an order passed by the District Judge of Bareilly, refusing to remove a guardian from her post. A preliminary objection is raised that no appeal lies. We think there is considerable force in this argument. Section 47 of the Guardians and Wards Act gives a right of appeal against an order made by the District Court under section 39 for removing a guardian, but it nowhere gives a right of appeal from an order refusing to remove a guardian. Section 48 distinctly says:—"Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure, an order made under this Act shall be final and shall not be liable to be contested by suit or otherwise." It is, therefore, clear that no appeal lies from the order of the Court below and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

LACHMAN CHAMAR *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 811 OF 1919.
February 21, 1920.
Present:—Mr. Justice Piggott.
LACHMAN CHAMAR—
APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 498—Accused marrying woman represented to be a widow—Woman claimed as wife by another—Denial by her of marriage and staying preferably with accused—Accused, whether guilty of wrongful detention.

Accused married a woman whom her relatives represented to be a widow. The complainant claimed the woman as his wife and demanded her from the accused. She denied that she had ever seen the complainant, or had had anything to do with him and deliberately walked into accused's house. Accused was convicted under section 498, Penal Code, for detaining the woman with unlawful intent knowing or having reason to believe that she was the wife of the complainant:

Held, that the conviction could not be sustained, as the woman's attitude showed that she was not being detained by the accused with or without justification, having determined to stay with him and not submit to the complainant, and that the accused did not have "reason to believe" that she was the wife of the complainant. [p. 209, col. 2.]

Criminal revision against the order of the District Magistrate, Jaunpur, dated the 6th November 1919.

Mr. *J. M. Banerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant Lachman has been convicted under section 498 of the Indian Penal Code of detaining a young woman of the name of Dhakhia with intent that she may have illicit intercourse with himself, he knowing or having reason to believe the said woman to be the wife of his caste fellow, Harihar. The evidence shows that about the month of March 1919 Harihar allowed this woman to go away with her grandmother. A month later the complainant want to look for his wife and was told by the grandmother that she had gone off with somebody and that her whereabouts were unknown. He eventually traced her to the house of the accused Lachman in a village in another district. There is no evidence whatever that Lachman knew or had any reason to believe that Dhakhia was the wife of another man up to the time when Harihar arrived at his house and demanded the woman. There is no real reason for disbelieving Lachman's assertion, supported by evidence, that the grandmother represented *Musammat* Dhakhia to him as a young widow and that he believed himself to have contracted a lawful marriage with her according to the usual custom in the case of the re-marriage of a widow amongst members of his caste. The question is whether from the time when in the month of June the complainant Haribar arrived at Lachman's house and claimed the woman as his wife it ought to be held that Lachman had "reason to believe" this woman to be the wife of another man, and whether from that date he detained her with unlawful intent. From the evidence given by *Musammat* Dhakhia at the trial it is beyond question that she was living with Lachman of her own free will and had not the slightest desire to return to the complainant. She went so far as to deny that she had ever seen Harihar before in her life, or ever had anything to do with him. It is not easy to say on the evidence whether the Courts below were justified in holding that Lachman had reason to believe that Haribar was speaking the truth when he claimed this woman as his wife. For aught that appears from the record he may have received vehement assertions to the contrary from *Musammat* Dhakhia and may have felt convinced of the truth of these assertions. In any case I do not think it can be held on the evidence that Lachman "detained" this woman. According to Haribar's deposition what happened, when he arrvied at Lachman's house and claimed the woman, was that Lachman replied that he knew nothing about Haribar's claim. All he knew was that he had taken the girl from her grandmother and had contracted what he believed to be a lawful union with her. Having thus defined his position, he told Haribar that the latter could do what he thought proper. On this the woman deliberately turned her back on Haribar and walked into Lachman's house. I think there can be no mistake about the woman's attitude. She was not being detained there by Lachman but, with or without justification, had absolutely made up her mind to stay with him and not submit to Haribar's claim. Under the circumstances I do not think

that the conviction can be sustained. I accept the application of Lachman, set aside the conviction and sentence against him and acquit him of the offence charged. He has already been released on bail, his sureties will, therefore, be discharged.

Application accepted.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 636 OF 1919.

April 27, 1920.

Present:—Mr. Justice Martineau.

INDER SAIN AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 140, 149—"Offence," meaning of—Criminal Procedure Code (Act V of 1898), s. 164—Statement recorded in presence of Police Officer, value of—Witness withholding information about offence, reliability of.

The word "offence" in section 149 of the Penal Code means only an offence under the Penal Code and does not include an offence under the Railways Act [p. 225, col. 2.]

Consequently, a conviction under section 126 of the Railways Act, read with section 149 of the Penal Code, is illegal [p 225, col. 2.]

A statement cannot be said to be properly recorded under section 164, Criminal Procedure Code, if a Police Officer is present at the time and is allowed to put questions to the witness. [p. 225, cols. 1 & 2.]

Statements of witnesses who do not say anything about the commission of an offence which they have witnessed to anybody till the time of their examination by the Police and who on being questioned previously stated that they knew nothing, cannot be relied on. [p. 225, col. 1.]

Appeal from the order of the Special Magistrate, First Class, Rohtak, exercising enhanced powers under section 30, Criminal Procedure Code, dated the 20th September 1919.

Dr. *Gokal Chand Narang*, for the Appellants.

Lala *Shiv Narain*, Public Prosecutor, for the Respondent.

JUDGMENT.—This judgment will dispose of ten appeals, namely, Nos. 636, 637, 690 to 694, 755 and 790 of 1919 and 77 of 1920. Of the appellants in these appeals, three, namely, Kishan Sahai, Kuria and Hira Lal, have been convicted under section 126 of the Railways Act of loosening rails and sleepers on the Parnala Railway Bridge with intent to endanger the safety of persons travelling on the railway; two, namely, Chankas Rai and Tara Chand, of abetting that offence and seven, namely; Inder Sain, Jowala Pershad, Lajja Ram. Hari Ram, Bakhtawar, Jas Ram and Kanshi Ram, of being members of an unlawful assembly, some members of which, in prosecution of the common object, loosened rails and sleepers on the Parnala Railway Bridge with the intent aforesaid. It is not disputed that early on the morning of the 14th April 1919 an attempt was made to remove rails on the Parnala Bridge which is about a mile from the Bahadurgarh Station in the Lahore direction. All the guard sleepers on the bridge were broken off and thrown away, and the bolts and fish plates and some dog spikes of one rail were removed, and other damage mentioned by Harsa Singh, Sub Way Inspector (P. W. No. 8), was done. Fortunately the work of removing the rail had not been completed when the 4 Down Mail train arrived at about 7-15 A. M. and the train passed over the bridge in safety.

About 250 yards from the bridge on the south side of the line (*i. e.*, the right side as one goes from Lahore to Delhi) is the village of Parnala. Near the Railway Station, which is also on the south side of the line, are the old and new Mandies of Bahadurgarh, the old Mandi lying between the station and the new Mandi. The town of Bahadurgarh lies to the south of the Mandies.

Four of the appellants are railway employees at Bahadurgarh Station, Chankas Rai being the Station Master, Tara Chand, the timekeeper, Kuria, a hammerman and Hari Ram, a trollyman. Kishan Sahai is a carpenter working in the old Mandi; Kanshi Ram is Secretary of the Municipal Committee of Bahadurgarh. Of the remaining appellants Hari Ram is a servant of a shopkeeper of the new Mandi and the others are all shopkeepers and Banias of that Mandi, Jas Ram being the Chaudhri.

The prosecution story is briefly as follows:—

For some days before the occurrence there was unrest and excitement among the people at Bahadurgarh. On the 5th, 6th and 7th April

political meetings attended by some of the appellants were held at which speeches were made against the Rowlatt Act and on other subjects. On the 6th and 11th a *hartal* was observed. On the 13th a press message was received at Bahadurgarh Station to the effect that strikes had taken place among the Railway staff at other stations. At about 2 or 2 30 A. M. on the 14th the appellant Tara Chand, accompanied by the Assistant Station Masters Panna Lal and Udho Das (who have been acquitted by the Magistrate) and two other Railway employees, went to the new Mandi with the idea of bringing people to the station and getting them to join in committing some mischief, and in order to collect them they resorted to the expedient of having an alarm of "thief" raised, pretending that a cow belonging to Panna Lal had been stolen. Having collected some people and addressed them they returned to the station, taking with them some men from the old Mandi on the way, and they were joined at the station by about a dozen men from the new Mandi. These men went to the Station Master and consulted with him as to what was to be done. After this consultation which took place at about 4 or 4-30, the Mandi people returned to the Mandi. Some time later a number of the Mandi people collected and went to the Parnala Railway Bridge. Kuria and Hira Lal also went there with a wrench and a crowbar, which they had got from Badna mate under Tara Chand's orders. The men set to work to remove the rails, but the train arrived before they could accomplish their object and they ran away.

The theory for the defence briefly is that the crime was committed by the people of the Parnala village, one or two menials employed on the Railway being also in the conspiracy, and that Kanwal Singh, Zaildar of Bahadurgarh, and Nisar Mohammad, Vice President of the Bahadurgarh Municipal Committee, had been instrumental in getting the appellants prosecuted.

Between 6-15 and 7 on the morning of the 14th April Mr Canning, Permanent Way Inspector, (P. W. No 54) was informed, while he was at his house, by Badna mate (P. W. No. 20) that a lot of men were gathering on the bridge. He sent for the Time-keeper Tara Chand and told him to go and tell the Station Master to stop the 4-Down Mail, as Mr. Nachery, a Loco. Inspector, who was with Mr. Canning, wanted to go by it in order to see what had happened to the 3-Up Mail which was long overdue. Tara Chand returned with the Station Master Chankas Rai at about 7-15. Mr. Canning asked the latter to stop the Down Mail at Bahadurgarh. The Station Master said that he could not do so as the line clear had been given and all the signals had been lowered. Just about that time the Down Mail ran through. Chankas Rai and Tara Chand left Mr. Canning, but came back after a few minutes with Badam, gatekeeper, (P. W. No. 52), who said that men were gathering at the bridge and making a row. Mr. Canning then told the Station Master to stop all trains both up and down, and sent Tara Chand to take men with him and go and see what had been done to the bridge, and in case the damage was slight to put it right. He also sent Harsa Singh, Sub-Way Inspector, (P. W. No. 8), to the bridge on his arrival from Saupla at 9, and Tara Chand and Harsa Singh had the bridge repaired.

The first report of the bridge having been damaged was made to the Police at Thana Bahadurgarh at 9 A. M. on the 14th April by Ramji Lal (P. W. No. 40), a Jat of Parnala. The Head Constable who recorded the report wrote to the Station Master asking him to wire to the Sub-Inspector of the Railway Police at Jind. Mr. Browne (P. W. No. 1), Deputy Superintendent, Sub Divisional Officer, Railway Police, who was investigating a case at Shakurpur, was also informed of the occurrence by Mr. Canning at 9-30 or 10 and he sent a Police guard to guard the Parnala Bridge and wired to the Sub-Inspector, Railway Police, at Jind ordering him to proceed at once to the spot and start investigation. Sub-Inspector Nur Ahmad of the Railway Police (P. W. No. 58), arrived at Bahadurgarh at about 1 A. M. on the 16th April, and commenced investigation in conjunction with Sub-Inspector Kirpa Narain (P. W. No. 9), the officer in-charge of the Bahadurgarh Thana. These officers did not succeed in obtaining any evidence to show who the culprits were. Sub Inspector Kirpa Narain says that he learnt from Kanwal Singh, Zaildar of Bahadurgarh (P. W. No. 41), that the damage had been done by the Mandi people in conjunction with the Railway staff, and that Kanwal Singh mentioned the name of Jas Ram and

said his information was obtained from Fateh Ullah (P. W. No. 15) and from other inquiry. Strange to say, however, the Sub-Inspector did not send for Fateh Ullah. On the 19th April Sub-Inspector Nur Ahmad sent a report to the Deputy Superintendent of Police regarding the investigation which had been carried on up to that time and the information obtained. That report has been admitted as evidence by the Magistrate and marked as Exhibit P-25; but it appears to be nothing more than a part of the Police diaries and is, therefore, inadmissible in evidence. Sub-Inspector Kirpa Narain says that he made secret enquiries between the 16th April and the 6th May, when the Deputy Commissioner came to Bahadurgarh and told him to stop his inquiries, saying that he would make secret inquiries himself. Nothing more was apparently done by the Police till the 10th June, when Mr. Browne took up the investigation. Mr. Browne arrived at Bahadurgarh on the 13th June and stayed there till the 25th or 26th, and he says that during that time he unravelled the case. The Police had the statements of 26 of the prosecution witnesses recorded by Magistrates under the provisions of section 164, Criminal Procedure Code, some on the 23rd June, some on the 2nd July and some on the 6th July. Confessions of the appellants Kuria and Hira Lal, who had been arrested by order of the District Magistrate on the 23rd and 29th May, respectively, were recorded by Lala Suraj Narain, Magistrate, on the 24th June. A pardon was tendered to one Mansa Ram, a Bania of the new Mandi, and his statement was recorded by Sheikh Muhammad Fida Ulla, Magistrate, on the 10th July and the case was Chalaned the same day.

A mere perusal of the judgment of the lower Court would give the impression that the case against the appellants is a strong one, but I regret to find that the Magistrate has not examined the evidence critically. Although he has mentioned what the evidence is against each individual accused, he does not appear to have analysed it or given consideration to the question whether it is trustworthy, and he has altogether ignored glaring inconsistencies with which the record abounds. It is, therefore, necessary for me to go into the evidence somewhat minutely.

The evidence relating to the planning of the offence may be taken first. The story about the Railway officials having a false report of a theft spread with the object of collecting the Mandi people and then getting them to join in some nefarious scheme appears to be far-fetched and improbable. If they had not already secured the sympathy of the Mandi people and did not know what their attitude would be, they could not possibly have expected that those people, after being called out from their beds on a false pretence, would have been ready to join them in their plans. If, on the other hand, they knew that they could count on the assistance of the Mandi people, they would have gone straight to them and called them to the station to arrange matters and there would have been no object in raising a false alarm about a theft having taken place.

The witnesses as to the alarm having been raised are P. Ws. Nos. 6, 10, 11, 13, 14, 17, 47, 48, 52 and 56. They differ considerably as to the time and place at which the alarm was given. Phullu (P. W. No. 6) says he heard it coming from the goods shed at about midnight. Rahmat (P. W. No. 13) says he heard it a little after 1 coming from the Mandi from which the noise went on to the station. Ramji Lal (P. W. No. 56) says the alarm was raised in the old Mandi at about 1 or 2. Badam gatekeeper (P. W. No. 52) says he heard it at about 2 coming from the Mandi but as he was at his gate something like two-thirds of a mile away, it would have been practically an impossibility for him to hear the alarm at all. Other witnesses say that the alarm was given at about 2 or 2-30 or 3 in the new Mandi. One witness, namely, Sham Charan Das, Signaller (P. W. No. 11), says that he heard it at about 4 30 coming from the road outside the railway quarters. The learned Counsel for the Crown contends that the alarm of "thief" was being given at different places and for many hours during the night, but this is a theory which it is impossible to accept, and there does not appear to have been any reason for continuing to spread a false

report of theft after the Railway Babus had succeeded in collecting the Mandi people. The story told by Mansa Ram (P. W. No. 10) about the alarm is entirely at variance with what he said in his statement on the 10th July. In the latter statement he said that Lajja Ram suggested raising a cry of "thief," that he agreed to the proposal, and that he took away a bullock which was yoked to a cart outside Lajja Ram's shop, and raised an outcry that the bullock had been stolen, upon which some 20 people assembled at Lajja Ram's shop. But at the trial he has stated in his evidence that he heard an alarm of thief coming from the direction of the station, that he came downstairs and saw Panna Lal, another Babu, and some other men, that Panna Lal told him that his cow had been stolen and that he and some of the Mandi people searched for the cow in the Mandi, but did not find it and then went to the station.

The principal witnesses with regard to the alarm having been raised are Abdul Rahman (P. W. No. 14) and Mumtaz (P. W. No. 47), who are Chaukidars in the old Mandi. They say that the Railway Babus came at about 2 or 2·30 A. M. to that Mandi and said they were searching for a cow of theirs which was lost, that they went on to the new Mandi, and that after about an hour or half an hour an alarm of thief was raised in the new Mandi, upon which Abdul Rahman went there. Abul Rahman says that he found a number of men at Lajja Ram's shop and that Tara Chand was telling them that there had been a row in Delhi and a strike at Shakurpur and that the Mandi people should do something in order to give the Railway staff at Bahadurgarh an excuse for striking. His statement on this point does not agree with that of Mansa Ram, according to whom the conversation which took place with the Railway Babus who came to the new Mandi was on the subject of the cow which they said had been stolen. In examination-in-chief Abdul Rahman says that when the Babus left he followed them first to the old Mandi from where they took some men with them, and that then he went with them to the station, where they were joined by men from the new Mandi. In cross-examination he has altered his statement and has said that the Babus went from the new Mandi to the station, that the men of the two Mandis went there afterwards, and that he followed in order to see the *tamasha*. Mumtaz, however, contradicts him and says that the Railway Officials accompanied the people of the new Mandi to Ram Chandra's shop in the old Mandi and from there to the station. The evidence of Ahmad (P. W. No. 48), an Octroi Muharrir, employed at the Railway Station octroi post, which is opposite Ram Chandar's shop, does not agree with that of Mumtaz, for he says that the five men who had come from the station and gone to the Mandi returned to the station without stopping anywhere, and that it was not till about half an hour later that 15 or 16 men came from the new Mandi to Ram Chandar's shop, and then took seven men with them from there and went to the station. Sham Charan Das (P. W. No. 11) says that he was awakened at about 4 30 by hearing the alarm of "thief" from the road outside the Railway quarters, and that he went there and found the Station Master, the Assistant Station Masters, Tara Chand and some Banias of the Mandi at the Station Master's quarters. His statement on this point cannot be believed, as there was no possible object for the Railway Babus to continue giving the alarm of 'thief' after they had collected the Banias of the Mandi and brought them to the Station Master's quarters. In fact according to Abdul Rahman the alarm had subsided as soon as it was raised in the new Mandi, for when he reached that Mandi nothing was being said about the alleged theft of the cow, but he says that Tara Chand was discoursing on other matters. It is clear, therefore, that the evidence with regard to the raising of the alarm and the collecting of the people is extremely conflicting and unsatisfactory.

We come next to the evidence as to what took place after the Mandi people had joined the Railway Babus at the station and as to the conversation which is said to have taken place with the Station Master Chankas Rai. The evidence on this point consists of the statements of Abdul Rahman, Mumtaz and Sham Charan Das, and they

differ widely from one another. Abdul Rahman says that the three Station Babus were inside the Booking Office and that Tara Chand said that the train was coming, that they should get ready and throw brick-bats at it, and that this would give an excuse for the staff to stop work. The witness goes on to say that from there all went to the quarters of the Station Master, who was sitting on his bed, that the Station Master told them that there were about Rs. 1,000 or 1,100 in the chest and that they could rob it and set fire to the station, and that Lajja Ram remarked, "Let the train arrive and we will see what can be done."

Mumtaz says in examination-in chief that the Railway Babus and the Mandi people went from the old Mandi to the Station Master's Office, that the Station Master was present there, and that one of the three Babus said that the telegraph wires had been broken at Shakurpur and the train had been held up there, and that they should go and break the bridge before the train came in. He says that on this he returned to his duty. His evidence thus contradicts Abdul Rahman's on three important points:

(1) He says that the conversation took place in the Station Master's Office, whereas Abdul Rahman says it was in the Booking Office.

(2) His account of the conversation materially differs from Abdul Rahman's account, according to which nothing was said about breaking the bridge; and

(3) He says that the Station Master was present, whereas according to Abdul Rahman the Station Master was in his own quarters, to which the men afterwards adjourned.

In cross-examination Mumtaz tries to improve matters by saying that from the Station Master's Office all went to the Station Master's quarters and that there the Station Master told the other men to go and break the bridge. But this is inconsistent with the statement he made in examination in chief, namely, that he returned to his duty after one of the Babus had said that they should go and break the bridge.

Sham Charan Das (P. W. No. 11) says that when he got to the Station Master's quarters, the men there were saying that no train had been come during the night and so strike had taken place; that somebody asked the Station Master what should be done and whether the line should be uprooted; that the Station Master replied: "Wait, I shall tell you presently," and that Tara Chand said the line should be uprooted but they should wait.

In his previous statement before Lala Suraj Narain the witness made no mention of the reply which he now says the Station Master gave, and in cross examination he has said that he does not remember whether the Station Master gave a reply. He says that no one spoke about plundering the cash chest or about setting fire to the station. The Magistrate thinks that Sham Charan Das's statement is not inconsistent with Abdul Rahman's because Sham Charan Das was not present at the beginning of the conversation at the Station Master's quarters and Abdul Rahman left before Sham Charan Das did, but he overlooks the fact that Abdul Rahman has stated in cross-examination that Sham Charan Das was present when the Station Master said that they should rob the cash chest. It is urged for the defence that Sham Charan Das is not on good terms with the Station Master. In this connection it may be noted that the latter reported to the District Traffic Superintendent on the 23rd May that Sham Charan Das had ceased working on the 9th May and had not resumed duty notwithstanding that the Sub Assistant Surgeon had said that he could be put on duty. The statements of the three witnesses, Abdul Rahman, Mumtaz and Sham Charan Das as to the conversation at the station and at the Station Master's quarters are quite inconsistent with one another and no reliance can be placed on them.

Abdul Rahman says that when he was at the Station Master's quarters, Lajja Ram and Hari Ram called him and Phullu and told them to go to Sankhaul and fetch Kura Jat with 10 or 20 men, and that they started off, but had not gone far when Lajja Ram called them back, after which he (Abdul Rahman) went back to his duty in the old Mandi. Even with regard to this small incident the evidence is contradictory. Phullu (P. W. No. 6) makes

no mention of the incident and in fact according to the evidence he did not go to the Station Master's quarters at all. Ramji Lal (P. W. No. 56), a shoemaker of the old Mandi, says that on hearing the alarm of "thief" at abont 1 or 2 he went out of his shop and saw six or seven men collected at Ram Chandar's shop, which is opposite his own, and that Ram Chandar and another man told him to bring back Rahman (*i e*, Abdul Rahman) and Phullu, who were going to Sankhaul, so he ran and called out to them and they returned. According to this witness, therefore, Abdul Rahman and Phullu had started to go to Sankhaul from the old Mandi, and were called back to that Mandi by Ram Chandar, and this happened some hours before the Mandi people are alleged to have gone to the Station Master's quarters. His evidence is thus irreconcilable with Abdul Rahman's, Ramji Lal goes on to say that at about 5.45 Ram Chandar and other men passed his shop going to the new Mandi, and that Ram Chandar told him that men were collected in the new Mandi for the purpose of breaking the bridge, and asked him to go with them. This witness admits that he had been turned out of the shop he was occupying by Ram Chandar to whom it belongs, so that the motive for his giving the evidence which he has given is apparent.

Reverting to the evidence of Abdul Rahman, his untrustworthiness is shown also by the fact that he mentions Jowala Pershad and Inder Sain as two of the men who went from the Mandi to the station, although he had stated before Lala Suraj Narain that he had not seen them anywhere between 2 and 5. He says that he made a false statement on this point before Lala Suraj Narain because on the day his statement was recorded, Mansa Ram had told him he would be murdered if he named Jowala Pershad, Inder Sain, Kanshi Ram or Jas Ram. The falseness of the explanation is obvious, as Mansa Ram himself named those very men in the statement which was recorded by Lala Suraj Narain on the 24th June, the day after Abdul Rahman's statement was recorded. It may further be noted that the persons who Abdul Rahman said in examination in chief had threatened him were Lajja Ram and Hari Ram, whereas in cross-examination he says it was Mansa Ram who had threatened him.

Abdul Rahman and Mamtaz had no object in going with or following the Mandi people to the station, and the reason given by Sham Charan Das for going to the Station Master's quarters is, as pointed out above, a false one. None of these witnesses made any statement as to what they now profess to have seen until their statements were taken by Mr. Browne in June, and it is impossible to accept the explanation given by Abdul Rahman and Mumtaz (Biloches by caste) that they kept quiet for fear of being murdered by the Banias.

The theory that the attempt to remove the rails was the result of conspiracy between the station staff and the Banias of the Mandi seems improbable for more than one reason. In the first place Sham Charan Das himself admits that the station staff were on bad terms with the Mandi people, and a file D-17 produced by the defence shows that the appellant Inder Sain as Secretary of the Mercantile Association of the Bahadurgarh Mandi had on the 13th March 1919, written to the District Traffic Superintendent complaining that the Station Master would not let the Mandi people enter the Booking Office for buying first, second and intermediate class tickets which they used to do before and asking that a separate window might be made for persons wanting to buy such tickets. The District Traffic Superintendent sent that complaint to the Station Master for remarks, and Chanka Rai replied on the 29th March that there were very few first and second class tickets, and there was no need for a separate window, and that the complainant was in the habit of writing such letters so as to bring Government Officials under his influence. The District Traffic Superintendent informed the complainant on the 9th April that there was no necessity for a separate window, but that instructions had been issued to the Station Master to avoid inconvenience to first, second or intermediate class passengers. It seems unlikely that the Station Officials would have conspired with the Banias of the Mandi, to have the rails taken up on the Parnala Bridge, when the relations between them were not of a

particularly friendly nature. Another reason for rejecting the theory of conspiracy is the improbability of the conspirators waiting to carry out their plan till only a short time before the arrival of the train. If it had been arranged at 4 or 4-30 to have the rails taken up at the Parnala Bridge, why should not men have been sent at once to put the plan into action?

The learned Counsel for the Crown has laid some stress on the fact that the Station Master did not stop the train when Mr. Canning sent him a message by Tara Chand to do so. No inference, however, can be drawn against the Station Master from this, even if it be assumed that Tara Chand gave him the message, which it is not proved that he did. Stopping the Mail Train is a serious matter, and Mr. Coyle, the driver of the Mail Train, in fact states that the Station Master would not have been justified in stopping the Mail on an oral message from the Permanent Way Inspector.

We may come now to the evidence as to the carrying out of the plan alleged to have been formed at the Station Master's quarters. The evidence of the witnesses other than those belonging to the village Parnala may be considered first.

The evidence of Gobinda (P. W. No. 2), Budhu (P. W. No. 3) and Mansa Ram (P. W. No. 10), who have retracted their previous statements, proves nothing against the appellants. The evidence of Biru pointsman (P. W. No. 4) also proves nothing against them. He says he saw Kuria and Hira Lal taking a wrench and a crowbar, which they had brought from the direction of the workshop, towards the bridge, but he says that this was after 7-30 A. M., so that he is referring to the time when they went to repair the bridge after the Mail Train had passed. He says that he saw a number of men collected outside the Station Master's quarters at 6 A. M., but this does not appear to be in accordance with the general story of the prosecution, which is that after the consultation at the Station Master's quarters at 4 or 4 30 the people returned to the Mandi. Moreover the witness admits that he did not hear what the people were saying.

Ahmad (P. W. No. 48) says that at 6 A. M. he saw that about 100 men had collected in the old Mandi and were saying "Come along and break the bridge," that the appellant Lajja Ram was among them and that they all went off towards the bridge; but this witness admits that he made no mention of what he had seen to anybody till he made his statement to Mr. Browne.

Dhan Singh (P. W. No. 12) gatekeeper at gate No. 6, which is a little over 1,100 yards from the bridge and is between the bridge and the Railway Station, says that at 6 A. M. he saw about 100 men going towards the bridge and shouting "Mahatma Gandhi ki Jai" and that among them he recognised Lajja Ram, Udmi, Bhakhtawar, Kuria and Hira Lal, of whom the last two had with them a wrench and a crowbar. He also says that when they had gone a considerable distance, he saw Jowala Pershad, Inder Sain and Kanshi Ram going towards the bridge and that they called Rahmat who was at his brick kiln which is near the gate, and asked him to give them men to break the bridge, but that he replied that he had no men and they went on towards the bridge. This witness admits that he told no one about the matter till he was sent for by Mr. Browne and made his statement to him, *i. e.*, in June, and further that he made that statement only after he had been detained by the Police for eight or ten days. He also admits that although he knew that men had gone to damage the bridge, he showed the green flag when the Mail Train came instead of the red flag, which is the danger signal, an admission which, if his statement as to his knowing that men had gone to break the bridge be true, would suggest that he was concerned in the plot. He would naturally have been suspected and might well have made the statement he has made for the purpose of saving himself.

Rahmat (P. W. No. 13), who is employed as a Munshi at a kiln not far from Dhan Singh's gate, says that he saw 40 or 50 men come from the Mandi and go along the line towards the bridge and that four men from the crowd went to the station and after a while followed towards the bridge He says that those four were Inder Sain, Jowala Pershad, Kanshi Ram and Mansa

Ram, and that Inder Sain called him and asked him to let him have some men, but the witness said he had none to spare and asked why they were wanted, on which Jowala Pershad said that the Station Master had told them he had received a telegram that a special train with military band, artillery and a machine gun was coming and that they were going to pull down the bridge before the train arrived. The men then went on and the witness returned to the kiln.

It is to be noted that Dhan Singh makes no mention of Mansa Ram's presence or of Jowala Pershad telling him what he had been told by the Station Master. Rahmat admits that he told nobody what he had seen till Mr. Browne began his investigation. He admits further that his employer Chiranji Lal and the appellant Jowala Pershad used to be partners in a brick kiln, but that Jawala Pershad left the partnership two years ago and has become the partner of other persons in another kiln, and that those persons have been underselling Chiranji Lal, having only 4 or 5 months before the witness gave evidence obtained a contract from the Municipal Committee for supplying bricks at a lower rate than that at which Chiranji Lal supplied them. It does not appear very likely that Jowala Pershad would have asked Rahmat, a servant of the proprietor of a rival kiln, to let them have men for breaking the bridge. I consider that no reliance can safely be placed on the statements of Dhan Singh and Rahmat.

Fateh Ullah (P. W. No. 15), a labourer who lives in the town of Bahadurgarh but works in the new Mandi, says that he went to work at about 7 A. M., that at about 7 30 he saw Jas Ram and Jawala Pershad leaving the new Mandi and followed them, and that Bakhtawar and Inder Sain came from the direction of the Parnala pond (which is on the side of the bridge) and told Jas Ram and Jawala Pershad that the bridge had been damaged but they had been interrupted in the middle of their work. The witness says that he went on to the goods shed to look for work, and that as he was passing the Station Master's quarters, the Station Master called him and said that the cash in the chest contained about Rs. 1,000 or, 1,100 and that they should take it and told him also that the line had been broken. The witness says he went and informed Kanwal Singh, Zaildar, and Nisar Mohammad, Vice-President of the Municipal Committee, who were at the latter's *baithak*.

This witness' evidence is quite inconsistent with that of the two witnesses just mentioned Dhan Singh and Rahmat, for according to them Jawala Pershad and Inder Sain were going along towards the bridge before the Mail Train came, while according to Fateh Ullah, Jawala Pershad left the Mandi after the train had come and was not with Inder Sain but met him coming from the direction of the bridge. The evidence is inconsistent also with what Kanwal Singh Zaildar and Nisar Muhammad say they were told by Fateh Ullah. Kanwal Singh (P. W. No. 41) says that Fateh Ullah came and told him and Nisar Muhammad that Inder Sain, Jas Ram and Bakhtawar had come from the direction of the bridge to the Mandi. Nisar Muhammad (P. W. No. 57) gives another version or rather two other versions. In examination-in chief he says that Fateh Ullah reported that he had seen Indar Sain, Jas Ram and Jawala Pershad (not Bakhtawar) returning from the direction of the bridge. In cross-examination he says that what Fateh Ullah told him and Kanwal Singh was that he had gone to the new Mandi to give medicine to a Mahajan's wife, and that when he was going from the Mandi to the station he saw Indar Sain, Jas Ram and Jawala Pershad standing at the new Mandi entrance and saying that if the mail had not arrived the bridge would have been broken. Sub-Inspector Kirpa Narain says that Kanwal Singh Zaildar mentioned the name of Jas Ram, and he admits that Bakhtawar's name was not mentioned in the report (P-25) which Sub-Inspector Noor Ahmad sent to the Deputy Superintendent on the 19th April.

Fateh Ullah's further story about the Station Master's calling him and telling him to plunder the cash chest (at a time when it should be remembered the Station Master had just had an interwiew with Mr. Canning) appears to be highly improbable, and here too we find a contradiction between his statement and that of Nisar Muhammad, who says that Fateh Ullah told him and Kanwal

Singh that it was when he was returning from the goods shed, and not, as is now stated by Fateh Ullah, when he was going to it, that the Station Master spoke to him about the money in the chest and told him to take it with the further direction (not mentioned by Fateh Ullah in his evidence) that people should tie his hands and feet.

In cross examination Fateh Ullah admits that Jawala Pershad, Jas Ram, Inder Sain and Bakhtawar are members of the Panchayat of the Mandi which has recently levied a tax of one anna on the Re. on wages; so that he had a clear motive for falsely accusing them. Notwithstanding the important information which is alleged to have been given by him to the Zaildar and by the latter to the Sub-Inspectors, the Sub-Inspectors did not send for him and question him nor was he called before the Deputy Commissioner when the latter came to Bahadurgarh, and it was not till the 10th June that he was sent for and his statement recorded by Mr. Browne. It is clearly impossible to rely on Fateh Ullah's evidence.

Chandu (P. W. No. 16), a labourer who works at Jas Ram's shop, says that he went there at 7-30 and that Jas Ram's nephew, who was there, told him that others had gone to break the bridge and that he should go too, and that after a while Jas Ram, Inder Sain, Bhola, Jwala Pershad, Mansa Ram, Bakhtawar and Hari Ram came and said that if the Mail Train had not come the bridge would have been broken. This witness like others made no mention of the matter to any one till he made his statement to Mr. Browne. He earns only a few annas a day and his evidence is entitled to no weight and even if believed, does not show that the men he names had anything to do with damaging the bridge.

Har Narain (P. W. No. 18) began his evidence by saying that at about 6 A. M., when he had gone to his work at the new Mandi, he saw a large number of men going along the line towards the bridge, some of whom were saying "break the line," and he named some of the appellants whom he said he saw following the crowd, but on being put a further question, he replied that this was all that the Police had taught him to say and he then said that he did not in fact go to the Mandi at all that morning and did not know anything, but that the Police had beaten him and compelled him to make the statement.

Faiz Muhammad (P. W. No. 17), a blacksmith who works under the Permanent Way Inspector, says that at some time after 5 A. M. 10 or 12 men went from the Station platform towards the new Mandi, saying "do not touch the telegraph wires, they are of use to us but break the line and the bridge" and that he recognised Inder Sain and Jawala Pershad who were a bit ahead of the others. He also says that afterwards when he had gone to the station, Kuria came to Tara Chand and said tools were wanted and Tara Chand and the Station Master told him to go and get them from Badna mate, upon which Kuria went off to Badna. The witness says that this last incident occurred two or three Gharis after sunrise so that it might possibly, even if his statement were true, relate to the time when Kuria got tools for repairing the bridge, after the Mail Train had passed, as the evidence of Harsa Singh (P W. No. 8) Sub-Way Inspector shows that Kuria was one of the men employed to repair the bridge. Faiz Muhammad, however, admits that he kept silence about the matter to which he now deposes. He says that he and Mahi Dhan went to Mr. Canning's bungalow and told him a row was going on and asked for orders as to whether they should go to protect their families or attend to their work. He did not inform Mr. Canning, his superior officer, of what he professes to have seen and when questioned by Harsa Singh (P. W. No. 8) as to whether he knew who had done the damage, he told him he did not and persisted in his assertion (see Harsa Singh's evidence on page 202 of the record). He admits that he told no one what he had seen until he was questioned by Mr. Browne, and also admits that even in his statement to Mr. Browne he did not name the Mandi people, though he now names two of them. His evidence seems to be quite unreliable.

Mahi Dhan (P. W. No. 19), a carpenter working under the Permanent Way Inspector, says that he saw Tara Chand talking to Kuria in front of the latter's quarters at 5 30 or 5-45, but did not hear what they said. He also states that Jawala Pershad

and Inder Sain came to his quarters and that the former asked him for a wrench. The witness replied that he had none and asked Jawala Pershad why he wanted a wrench. Jawala Pershad told him it was in order to uproot the line. He says that Jawala Pershad said to Kuria, who was standing outside the quarters, "You fetch a wrench; this man is afraid," upon which Kuria ran towards the station, and Jawala Pershad and Inder Sain went off in the direction of the bridge. The witness says that after a while he decided to go and inform the Permanent Way Inspector. He then saw Rahmat having an altercation with four or five men at the level crossing more than hundred paces off and also saw 10 or 15 men running towards the bridge. He sent Kahna trolleyman to go and see what the men were doing, and he himself went to the Permanent Way Inspector's bungalow. He says that on his way he saw 50 or 60 men going along outside the fencing in the direction of the bridge, that he had proceeded a little way when he met Mansa Ram running from the direction of the station towards the bridge, that Mansa Ram asked him where he was going, that the witness told him that he was going to the Permanent Way Inspector, and that on this Mansa Ram said that if the witness made a report to the Permanent Way Inspector or anybody else, he would murder him. The witness further says that he overtook Faiz Muhammad, that they both went to the Permanent Way Inspector, and that he told the latter that there was a great row and men were going towards the bridge.

It is to be observed that according to this witness Mansa Ram was alone and was far behind the crowd who were going to the bridge, whereas according to Rahmat Mansa Ram was with Inder Sain, Jawala Pershad and Kanshi Ram. Mahi Dhan like Faiz Muhammad withheld all information of what he professes to have witnessed from Mr. Canning, although they both used to see Mr. Canning daily. Mr. Canning says that Mahi Dhan and Faiz Muhammad told him merely that they were in fear about their familes. Mahi Dhan also admits that he was asked by Mr. Canning on the 23rd of April who had done the damage to the bridge and that he replied that he did not know. He admits that he gave the same reply to Harsa Singh (P. W. No. 8). It was not till his statement was taken by Mr. Browne that he made mention of the matters to which he now desposes. Even in that statement he said nothing about having been threatened by Mansa Ram. His evidence appears to be no more reliable than that of Faiz Muhammad.

Kahna (P. W. No. 22), trollyman of the Sub Way Inspector, supports the first part of Mahi Dhan's statement, saying that he saw Jawala Pershad and another man talking to Mahi Dhan and asking him for tools, that when Mahi Dhan said he had none, Jawala Pershad told Kuria to get the tools from somewhere, and that Kuria went off to the station, while Jawala Pershad and his companion went towards the bridge. The witness goes on to say that after half an hour being told by Mahi Dhan to go to the bridge and see what was being done, he went there and saw some 40 men, of whom Kuria was unfastening bolts with a wrench and Hira Lal was taking out dog spikes with a crowbar, and that meanwhile the Mail came and the people dispersed. The witness like others admits that he told nobody what he had seen and he made his statement for the first time in Mr. Browne's investigation.

Badna (P. W. No. 20), temporary mate, says that at about 5·30 Kuria and Hira Lal came to his quarters and asked him for a crowbar and a wrench, saying Tara Chand had sent for the tools as there was something to be done; Tara Chand was standing by himself some 20—30 paces off, and called to Badna to give the tools, and Badna got Bhairu gangman to take the tools down from the roof and give them to Kuria and Hira Lal who then went off. Badna says that he left Bahadurgarh that day with Mr. Canning and that on his return on the 22nd he found a wrench and a crowbar lying in front of his door. It might be argued that this witness's evidence is on a par with that of Faiz Muhammad and Mahi Dhan, as he made no mention to Mr. Canning of the matter to which he has deposed and when questioned by him and by Harsa Singh, he told them he did not know who had damaged the bridge. But it must be borne in mind that he would naturally have been unwilling to disclose

the fact that he had supplied the tools which were used for the purpose of breaking the bridge. It seems improbable that he would ultimately have stated that the wrench and crowbar had been borrowed from him—a statement which would have directed suspicions towards him if it had not been true—and I think his evidence is, therefore, entitled to weight as against Kuria and Hira Lal, the men to whom he says he lent the tools. But I can attach no value to his statement as to Tara Chand being present a little way off and telling him to give the tools, as it is as likely as not that he added this part of the story in order to exculpate himself.

Khuba, gangman, (P. W. No. 21) says he saw the incident to which Badna has deposed, and Badna's evidence is also supported by that of two other gangmen Bhairu (P. W. No. 23) and Jontha (P. W. No. 55), although these witnesses also said nothing about the matter either to Mr. Canning or to Harsa Singh.

Chiman (P. W. No. 59), a labourer who works in the new Mandi, says that he was saying his prayers at 5 A. M. in *chaubara* in front of the entrance of the new Mandi, when Hari Ram came and said that people were going to break the bridge and asked him to come. He replied that he would go when he had said his prayers. Kanshi Ram, Bakhtawar and Jawala Pershad were standing below and they and Hari Ram went off towards the bridge. After about half an hour the witness went to the new Mandi, and went along with 10 or 12 other men to the bridge, which they found was being damaged by about 18 men, among them being Mansa Ram and the appellants Kuria, Bakhtawar, Hari Ram, Kanshi Ram, Jawala Pershad and Jas Ram. The witness says that Kuria had a wrench but he did not notice a crowbar. The men asked him to help in breaking the bridge, but he declined. Meanwhile the train came and the men ran off, some towards Parnala and others to the new Mandi. This witness admits that he had never done any work for Hari Ram, Kanshi Ram, Bakhtawar or Jawala Pershad and had nothing to do with them, so that it does not seem likely that they would have gone to his *chaubara* and interrupted him in the middle of his prayers in order to ask him to join them in breaking the bridge. He says that he went off to Najafgarh the same day and remained there until a Policeman fetched him to Mr. Browne, who recorded his statement. He also says that he had come to the Mandi only two days before the 14th April, and that he had not been at Bahadurgarh for three months previous to that.

It seems very doubtful whether he was really at Bahadurgarh on the 14th April, and it is not explained how Mr. Browne got information about him and what led him to send for him, as the witness admits that he had not told anybody that he had been to the bridge or had seen anything. He also makes the significant admission that when he was brought before Mr. Browne, it was only after the latter had told him 50 times to tell the truth that he made his statement. His evidence is clearly not of the slightest value.

Raja Faqir (P. W. No. 37), a gangman employed under the Permanent Way Inspector, says that he had gone home for a day's leave on the 13th April, and that early next morning he was going along the line to Bahadurgarh when he saw 40 or 50 men breaking the bridge, among whom were Kuria and Hira Lal. The latter seized him and told him to come and join in breaking the bridge. The witness said he would come after leaving the flour, which he was carrying, at the gateman's hut and he then went on to his quarters. Before he reached his quarters the train passed and he saw the men from the bridge run away, some towards Parnala and some towards Nizampura. He admits that he told nobody what he had seen till he made his statement to the Railway Thanedar some two months later.

Badam (P.W. No. 52) is the gatekeeper of the gate nearest to the Parnala bridge, and the first thing to be noticed is that although he deposes not only to having seen men going to the bridge but also to having seen it being damaged, he was not included as a witness in the Chalan. He says that at about 6 or 6-15 A.M. Kanshi Ram, Inder Sain and Jawala Pershad passed his gate going towards the bridge, that Mansa Ram was following them and that a few paces behind came a mob of 50 or 60 men among them being Kuria and Hari Ram, of whom the latter had a wrench and a crowbar. He says that he asked Kuria what they were all going to do, and that Kuria had a pull at the witness's

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Huqqa and said he did not know what they were going to do, but he was going with them. They went on to the bridge and began to damage it and on hearing the noise of its being broken, the witness went there. He says that Hira Lal was taking out pins with a crowbar, Kuria was unfastening bolts with a wrench and Kishan Sahai was cutting sleepers, etc., with an axe, and other men were breaking the guard sleepers and masonry pillars. The witness says he went back to his gate and was there when the train passed, and that he then went to Mr. Canning's bungalow to inform him. In cross-examination he adds that he saw Jas Ram returning from the bridge with 10 or 15 other men near the Dhaula well, and that Jas Ram was reproving the others and telling them they had not done well in breaking the bridge. In examination-in-chief, however, the witness made no mention of Jas Ram at all.

It is to be observed that Badam's statement as to his seeing Jawala Pershad going to the bridge and Jas Ram coming from it is inconsistent with the evidence of Fateh Ullah mentioned above, as according to Fateh Ullah those two persons were going from the Mandi to the bridge when they met Bakhtawar and Inder Sain who had left the bridge when the Mail train came, Mr. Canning's evidence shows that Badam told him on the 14th April merely that men were gathering at the bridge and were making a row, and that he could not say whether they were doing anything to the bridge. Badam admits that he said nothing to Sub-Inspector Nur Ahmad when the latter came to his gate on the 17th April, and that when questioned by Harsa Singh he said he knew nothing, and that he also said the same to Mr. Canning on the 23rd April. He says that on the evening of the 5th May he went to Parnala village and called all the Lambardars and told them that the Deputy Commissioner was coming next day and they should tell him who had broken the bridge. Notwithstanding this he admits that he mentioned the names of only Kuria, Hira Lal and Jas Ram to Mr. Canning on the 5th May and to the Deputy Commissioner on the 6th and that it was not till the 12th June that he made a full statement when he was sent for by Mr. Browne. The only persons against whom Badam's evidence seems to be entitled to any weight at all are Kuria and Hira Lal, whom he mentioned in his statements of the 5th and 6th May, *i. e*, more than a month before the Police investigation which resulted in the prosecution of the appellants. It is noteworthy that he admits that although he knew that the men were damaging the bridge, yet he did not show the danger flag when the Mail Train came. This admission affords a reason for suspecting that he was concerned in the plot to remove the rails.

I now come to the evidence of the Parnala villagers and may note here that Sub-Inspector Kirpa Narain states that when he questioned the villagers they exhibited complete ignorance of the affair. Ramji Lal (P. W. No. 40), who made the first report at the Thana, says that he went out in the morning to ease himself and saw 50 or 60 men come from the direction of the station and the Mandi and begin to break the bridge, and that he recognised Jas Ram, Mansa Ram, Hari Ram, Inder Sain and Jawala Pershad among them. He says that he told them not to damage the bridge as the blame would fall on his village, but Jas Ram told him to go away. The Mail Train arrived and the people scattered, and the witness, leaving Amin Lal who was with him near the water which is near the bridge, went to Pir Dhan Lambardar, and told him what had occurred and came back with him to the bridge. Amin Lal was still near the water when they got there. They then returned to the village, where Sultan and Wazira joined them and Ramji Lal went with Pir Dhan, Sultan and Wazira to the Thana and made this report.

This story does not agree with the report made at the Thana. Ramji Lal named none of the appellants in that report, but said that he did not know the names of the people who had been damaging the bridge or where they lived. He does not allege that the appellants were not known to him, but he says merely that the reason for his not naming them in the report was that he was afraid because Parnala is a small village. He also said in his report, not that the people dispersed on the arrival of the train, but that they ran away when he and Amin Lal raised a hue and cry

Now it is perfectly clear that it was the arrival of the train which interrupted the men who were trying to remove the rail, and prevented them from effecting their purpose. Apart from other evidence on this point there is the evidence of the driver of the train, Mr. Coyle, who says that as the train was near the Parnala Bridge he saw a crowd of over 30 men running away from it. The fact that Ramji Lal in his report gave a deliberately false reason for the crowd dispersing is very significant. What was his object in not making a true report? The theory which suggests itself is that in order to divert suspicion from himself and Amin Lal, he was anxious to convey the impression that they had actively interfered to prevent the bridge from being damaged. He appears to be an unreliable witness.

Amin Lal (P. W. No. 25) says that he took his buffalo out to water it at about 5-45, and saw Kuria and Hira Lal, whom he knew, loosening the line on the bridge with a wrench and a crowbar, and that some 60 or 70 other men were there. Then the train came and the men ran away along the line. The witness says that the men appeared to be Sikhs and that there was no Mahajan among them. This contradicts those witnesses who depose to the presence of certain of the appellants who are Mahajans. Amin Lal says that he told nobody what he had seen till he made his statement to Mr. Browne It may be noted that he makes no mention of his or Ramji Lal's telling the men who were at the bridge not to damage it.

Pir Dhan, Lambardar, (P. W. No. 35) says that Ramji Lal came and told him that men had come to break the bridge. He told Ramji Lal to stop them and Ramji Lal ran off. The witness took Wazira, Matru and Sultan with him and followed. On their way they met Ramji Lal and Amin Lal coming from the bridge, and Ramji Lal told them that the men had run away towards the station and the Mandi. It is apparent that his version differs materially from Ramji Lal's. Pir Dhan admits that Ramji Lal mentioned no names to him. He says that on their way to the Thana they met Udmi, a Bania of the Mandi, who told them not to name any one in the report, but this is contradicted by Ramji Lal and Sultan (P. W. No. 24), who say they met no one on the way. Pir Dhan also says that Jas Ram came with some five other men to Harbhaj, Ala Lambardar, and asked him not to take any names, saying that he would be responsible for his silence. It seems incredible that the Mandi people would have done this and thereby directed suspicion towards themselves.

Sultan (P. W. No. 24) says that he was called by Mutru, Chaukidar, and went with Ramji Lal, Pir Dhan and Wazira to see the bridge and then returned to the village and went with them to the Thana. His statement proves nothing against the appellants.

Wazira and Matru who also went with Ramji Lal to the Thana have not been produced.

Imrat (P. W. No. 26) says that when he was at the entrance to the village, he saw 60 or 70 men going from the Mandi side to the bridge, and that he went to the bridge, and recognised Mansa Ram, Jas Ram Jawala Pershad, Kishan Sahai, Hari Ram and Inder Sain among the men. He says that he did not notice a crowbar with any of them, but that Kishan Sahai had an axe and Mansa Ram a wrench whereas according to other witnesses, it was Kuria or Hira Lal who had the wrench. He says he begged the men not to damage the bridge as the blame would fall on his village. Shortly afterwards the train passed and the men ran away. This witness made his statement for the first time to Mr. Browne.

Raja Mali (P. W. No. 27) says that he was at the Dhaula well 300 paces from the bridge when the train passed, and that the men who were at the bridge ran away. He says that 15 or 20 men came in his direction and he recognised Inder Sain, Jowala Pershad, Jas Ram, Hardwari and Mansa Ram. Some one called out to him to seize the men as they had broken the bridge, so he and two Sita Rams, Multan and Tale, who were near him, stopped the men, but Jas Ram said they had not succeeded in breaking the bridge and begged Raja and his companions to let him go, which they did. This witness admits that he told nobody about the matter till he made his statement to Mr. Browne.

Multan (P. W. No. 28) and Tale (P. W. No. 29) corroborate Raja's statement as to

their stopping men who came from the bridge and the former says he recognised Jas Ram, Mansa Ram and Hari Ram, while the latter indentifies Jas Ram and Jawala Pershad. These witnesses too admit that they told nobody about the matter until they were examined by Mr. Browne.

Kirpa (P. W. No. 34) deposes to the same incident and says he recognised Jas Ram, who asked the men who stopped him to let him go. He is a labourer earning a few annas a day, and like other witnesses he told nobody what he had seen until he made his statement to Mr. Browne. Arjan (P. W. No. 39) also deposes to Jas Ram being caught by some men of the village near the Dhaula well, and to his being allowed to go on his saying that no damage had been done to the line. He makes the same admission as to his keeping silence about the matter until he made his statement to Mr. Browne. He is a Chamar earning only a few annas a day.

Shadi (P. W. No. 49) is a witness to the same incident, and he says he told no one about it till he was called by an Indian Police Officer two months later. Sita Ram Bairagi (P. W. No 53) says that he went to the Dhaula well to beg and that some men of his village stopped four or five Banias who came running from the bridge, but he was some 50 paces off and did not recognise them. This witness as well as Tirkha and Shadi are not among the witnesses who are included in the Chalan. Sita Ram Jat (P. W. No. 31) contradicts the other witnesses by saying that the men who came from the bridge were too numerous for them to be able to stop any.

Ram Jas (P. W. No. 30) says that he was at his threshing floor when he saw 60 or 80 men come to the bridge from the direction of the Mandi and begin to damage it, one man having a wrench, another a crowbar and others axes. He went up close to the bridge and recognised Jas Ram and Jawala Pershad, who were telling the others to be quick in breaking the bridge. He says that Ramji Lal and Amin Lal were near and asked the men why they were breaking the bridge and the men told them to go away. After a while the train came and the men ran off. The witness says that most of them were Banias of the Mandi and some belonged to the Railway. He admits that he said nothing to the Lambardars or Thanedars or to the Zaildar who came on the 16th April, giving as his reason that he was in fear of his life. He said nothing in fact about what he had seen until he made his statement to Mr. Browne.

Bujan (P. W. No. 32) says that he was at his field, and seeing a crowd at the bridge went up there. He recognised Kishan Sahai who was breaking the woodwork with an axe and Jas Ram who abused the men and said they had done very wrong in breaking the bridge and told them to run away as the train was coming, whereupon they all ran away. This witness too told nobody what he had seen till he made his statement to Mr. Browne. His evidence with regard to Jas Ram is inconsistent with that of other witnesses, who make out that Jas Ram was taking part in getting the bridge broken.

Raghunath (P. W. No. 33), who is a labourer, says that he was at Ram Jas P. W. No. 30's threshing floor at the time of the occurrence, and he corroborates Ram Jas' statement. He says he recognised three men including one of the appellants, namely Lajja Ram. He too says he told nobody what he had seen until he was questioned by Mr. Browne.

Raja Jat (P. W. No. 38) says that he saw some 50 men coming from the direction of the station and begin to break the bridge. He recognised only Jas Ram. He says the people ran off in different directions on Jas Ram's telling them that the Mail Train had come. In cross-examination the witness said that he told nobody what he had seen until he was called by Mr. Browne. In re-examination he said he mentioned the matter generally to the village people.

It appears to me impossible to place any reliance on the evidence given by the witnesses of Parnala village mentioned above in the face of the report made by Ramji Lal at the Thana, in which he said that none of the men were known, and of the facts that the villagers when questioned by the Thanedars said they knew nothing whatever about the affair and that the witnesses kept silent for two whole months. It is also to be observed that the evidence as to Jas Ram and other men being caught when they were coming

away from the bridge and as to Jowala Pershad having been among the men at the bridge is irreconcilable with the evidence of Fateh Ullah mentioned above.

This completes the evidence of the alleged eye-witnesses. There are a few other witnesses whose evidence has to be considered.

Har Bhaj, Ala Lambardar of Parnala, (P. W. No. 36), says that on the 15th April Mansa Ram came and took him and Ramji Lal to Jas Ram and Banwari in the new Mandi, and that Jas Ram asked them not to disclose the names of persons who were taking part in damaging the bridge, promising not to let them suffer. He says that next day when the two Thanedars came to investigate the case, he and Ramji Lal sent Ram Jas, Bhura and Shib Lal to fetch the Mandi men and to tell them they had done the deed and should come and bear the consequences. The Mandi men did not come and Shib Lal was then sent and he brought Jas Ram, Banwari, Hari Ram, Jawala Pershad and Bakhtawar, who came to the witness' Deorhi and asked him not to take their names or produce them before the Police and said they would bear the consequences. The witness says that on that occasion he did not disclose anything to the Thanedars, but that he told the Zaildar next day about the matter mentioned above.

Har Bhaj's story is a very improbable one. There was no need for the Mandi Banias to send for him and ask him not to disclose the names of the offenders, seeing that he had been away all day on the 14th and had no personal knowledge of what had happened. Neither Mansa Ram nor Lajja Ram makes any mention of the incident. It is also unlikely that the Mandi men, if they were guilty, would have gone to Parnala on the 16th April when the Sub-Inspectors were making an investigation there. Har Bhaj's statement that he informed the Zaildar about these matters the next day is not corroborated by the latter. As to his statement about his sending Ram Jas, Bhura and Shib Lal to fetch the Mandi men, Ram Jas says nothing about the matter. Bhura has not been produced, and the statement of Shib Lal (P. W. No. 60) as to the men he brought from the Mandi does not agree with that of Har Bhaj, for he leaves out the names of Hari Ram and Jawala Pershad and substitutes the names of Fateh Chand, Mansa Ram and Ram Sarup. Har Bhaj says that he was called by the Deputy Commissioner but did not tell him anything through fear of the Mandi people. Shib Lal also admits that he said nothing about the Banias of the Mandi coming to Parnala and asking the Lambardars not to mention their names until he made his statement to Mr. Browne, and he says the reason was that he was afraid of the Mandi people plundering the village. The idea of the Jats of Parnala being afraid lest the Banias of the Mandi might come and loot their village is ludicrous in the extreme.

Kanwal Singh, Zaildar, (P. W. No. 41) says that Fateh Ullah came and told him and Nisar Muhammad at 10 A. M. on the 14th April that the Railway and the Mandi people had broken the Railway bridge and implicated Jas Ram, Bakhtawar and Inder Sain who, he said, had been coming from the direction of the bridge and that the Station Master was telling the people that there were Rs. 1,000 or Rs. 1,100 in the cash chest which they should rob. He got his horse and rode to the bridge, which he found had been repaired, and then went to Parnala village and made secret inquiries. He says that the men seemed to have united and would not disclose any facts. This favours the theory put forward for the defence that the people of Parnala village were concerned in the commission of the crime. It has already been pointed out that the information which the Zaildar says was given to him by Fateh Ullah does not tally with Fateh Ulla's evidence in Court, and although the Zaildar says he got the information on the morning of the 14th, it was not till the 16th that he communicated it to the Police when the two Sub-Inspectors came to investigate the case. It may also be mentioned that both the Zaildar and Nisar Muhammad who took part with the Police in the investigation appear to be not on very good terms with the appellant Kanshi Ram, having joined in an application made to the Tahsildar two or three months before the occurrence for having Kanshi Ram transferred.

Muhammad (P. W. No. 57) mentions the information given to him and the Zaildar by Fateh Ullah (his account of it differing, as already pointed out, from Fateh Ulla's and the Zaildar's versions), but admits that he did not communicate it to the Sub-Inspectors or tell any one else about it till he mentioned it to Mr. Browne during the latter's investigation. It is worthy of note that he is an applicant for an appointment as Honorary Magistrate on the Bahadurgarh Bench and that he was told by the Deputy Commissioner of Rohtak about two months before the commission of the offence that his application would be considered if he did any special services.

The above review of the evidence for the prosecution shows that that evidence is highly conflicting and that the bulk of it is very unsatisfactory. Most of the witnesses are of low position and there are several who are not free from the suspicion of having been concerned in the offence themselves and may have implicated others in order to save themselves. A very weak point in the case is the fact that the witnesses kept silence for a long time about the incidents to which they have deposed, saying when questioned that they knew nothing about the affair, and that it was only when Mr. Browne took up the investigation, two months after the occurrence, that they made their statements. The explanations given by some of them that they were afraid of being murdered by the Banias of the Mandi, or in the case of the Jats of Parnala that they were afraid that the Banias might plunder their village, cannot possibly be believed. The circumstances under which the witnesses made their statements after Mr. Browne had taken up the investigation require some notice. I have already referred to the statement of Har Narain (P. W. No. 18) that the story at first related by him in Court was the one which the Police had taught him and to the admission of Chiman (P. W. No. 59) that he made his statement after being told a great many times by Mr. Browne to tell the truth. With regard to the statements recorded by Magistrates under section 164 of the Criminal Procedure Code, not only were Police Officers present when the statements were recorded, but they were allowed by one of the Magistrates at least, namely, Sheikh Muhammad Fida Ullah, to put questions to the witnesses. That Magistrate says that an Inspector of Police was present and used to question the witneses as to what happened at various places and also questioned Mansa Ram as to who were present at the bridge, and he also says that the witnesses used to say something voluntarily and stop and that then, when questioned by the Sub-Inspectors, they used to continue their statements. It is impossible to feel any confidence in statements made in such circumstances, which differ little from statements made to the Police themselves, especially when it is borne in mind that for two full months the witnesses had withheld all information and had told every one who questioned them that they know nothing. It may be noted that some ten of the witnesses have retracted their previous statements wholly or in part when giving their evidence at the trial. My conclusion after a careful consideration of the whole case is that the evidence against all the appellants other than Kuria and Hira Lal is quite unreliable.

Further the case against those of the appellants who have been convicted under section 126 of the Railway Act read with section 149, Indian Penal Code, must fail on a legal ground. Section 149, Indian Penal Code, renders all members of an unlawful assembly liable for an offence committed by any member of the assembly in prosecution of the common object of the assembly. Now section 40, Indian Penal Code, provides that except in the chapter and sections mentioned in clauses (2) and (3) of that section the word "offence" denotes a thing made punishable by the Indian Penal Code. Section 149 and Chapter VIII, in which section 149 occurs, are not mentioned in clauses (2) and (3) of section 40, and consequently the word "offence" in section 149 means only an offence under the Indian Penal Code, and does not include an offence under the Railways Act.

The case against Kuria and Hira Lal stands on a different footing, for in the first place there are their confessions recorded on the 24th June and although those confessions appear to me to be of no value as against the other persons whom they implicate, I see no good reason for rejecting

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them as against Kuria and Hira Lal. They admitted in those confessions that they had taken part in loosening the rails, though they tried to minimize the part they took and sought to excuse themselves by saying that they acted under Tara Chand's orders. They retracted their confessions at the trial and alleged that they had made them under Police pressure. No evidence, however, was produced in support of this allegation. It is true that they were about a month in custody before they confessed, but there is other evidence which corroborates the confessions. There is the evidence of Badna, P. W. No. 20, supported by that of other witnesses mentioned above, as to Kuria and Hira Lal having borrowed a wrench and crowbar from him and I have already given reasons for believing that part of the story. Further there is the evidence of Badam (P. W. No. 52) which, while it is unreliable so far as it implicates others of the appellants, appears to be entitled to weight as against Kuria and Hira Lal. He made his statement with regard to those two appellants on the 5th and 6th May, and it cannot be said that he made it under pressure, as the original Police investigation started by Sub-Inspectors Nur Ahmad and Kirpa Narain had come to an end, while Mr. Browne did not commence his investigation till more than a month later. No evidence has been produced by Kuria and Hira Lal in their defence, and I consider their conviction justified. There is also no reason for interfering with the sentences.

The result is that I dismiss the appeals of Kuria and Hira Lal but accept the appeals of the remaining appellants and acquit them and direct that they be set at liberty.

Appeal accepted.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 861 OF 1919.
March 15, 1920.
Present:—Mr. Justice Tudball.
EMPEROR—APPLICANT
versus
BHAGELU DOM—OPPOSITE PARTY.

Criminal Tribes Act (III of 1911), s. 22 (2) (b)—Failure to report change of residence—Previous conviction, form of.

The failure by a member of a criminal tribe notified under section 10 of the Criminal Tribes Act to report himself and to give information of his residence or intended change of residence renders him liable to conviction under section 22 (2) of the Act; if he has been previously convicted, he is liable to conviction under section 22 (2) (*b*) of the Act. [p. 227, col. 1.]

Criminal revision against the order of the Assistant Sessions Judge, Gorakhpur, dated the 18th September 1919.

The Government Advocate, for the Applicant.

JUDGMENT.—This is an application in revision on behalf of the Local Government asking that Bhagelu Dom's conviction under section 22, sub-section 2, clause (*c*), of the Criminal Tribes Act be set aside or a new trial on a fresh charge be directed.

Bhagelu Dom is a member of a criminal tribe which has been notified under section 10 of the Act. Under clause (*b*) of that section it was necessary for him to notify his place of residence and any change or intended change of residence and any absence or intended absence from his residence, to the Police. The rules have been issued under section 20 of the Act for the purposes and objects of the Act itself, and in respect to the present convict the rules which apply to him are those which were issued under section 20, sub section 2, clause (*d*). Rule 8 (*a*) is the rule applicable. Under it every registered member of a criminal tribe in respect of which a notification has been issued under section 10 (*b*) shall notify in person to the officer in charge of the Police station, within the limits of which he is for the time being residing, his place of residence and any change or intended change of residence and any absence or intended absence from his residence. If the new place of residence is within the jurisdiction of another Police station, a report of the new place of residence must be made in person within seven days of arrival to the officer in charge of the Police station within the limits of which the new place of residence is situate. The facts are as follows:—

Bhagelu was convicted and sentenced to a term of imprisonment which he served in the jail at Gorakhpur. On the expiry of his term when released from jail he

went to the Police Station at Gorakhpur (Kotwali) and reported himself. His home, that is, his place of residence was in a village within the limits of Police station Khampur. He was directed to report himself at Khampur Police Station. He failed to do this. He did not go home but went away to Patna. He, therefore, if the jail is to be deemed as the place of his residence at the time of his release, was changing his place of residence either for his own home in the Khampur Police Circle or for Patna, and it was his duty to report this change of residence or his intended change of residence. If on the other hand it is deemed that his old home at Khampur was still his residence, if he intended to go to Patna, it was still his duty to report himself and to give information of his intended change of residence at the Khampur Police Station. He failed to do this. Whatever view one may take of the facts, it is quite clear that he failed to comply with the terms of the notification, and he, therefore, committed an offence which falls under section 22, sub section 2, and not under section 22, sub section 1, which is the section under which the Assistant Sessions Judge has convicted him. The decision of the Court below is, therefore, wrong in so far as the conviction has been held under section 22, sub-section 1, clause (*c*). The conviction in view of the previous convictions could only have been under section 22, sub-section 2, clause (*b*), the maximum sentence for which is one of one year together with a fine. I, therefore, allow the application to this extent that I alter the conviction to one under section 22, sub-section 2, clause (*b*) of the Criminal Tribes Act. The man has already undergone something over three months' imprisonment and he has, pending the decision of this application, been admitted to bail. Under these circumstances I do not think it necessary to inflict a punishment greater than that which he has already undergone. I, therefore, reduce the sentence to a term equal to that which the accused has already suffered. He, therefore, need not surrender to his bail. If not on bail, he will be released.

Conviction altered.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 889 OF 1919.

November 19, 1919.

Present:—Mr. Pratt, J. C.

CHATTER SINGH DAMAI—

APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 447, 448—House-trespass—Entry into house at invitation of wife of owner with intent to commit adultery—Offence.

During the temporary absence of the complainant from his house his wife invited the accused to the house, who entered it with the intent to commit adultery:

Held, (1) that the complainant could not be said to have ceased to be in possession of his house because of his temporary absence; [p. 228, col. 2.]

(2) that the accused, having entered the house with the intent to commit an offence, was guilty of house-trespass. [p. 228, col. 2.]

Mr. *R. C. J. Swinhoe*, for the Applicant.

JUDGMENT.—Applicant Havildar Chatter Singh Damai of the Military Police Band has been convicted of criminal trespass and sentenced to one year's rigorous imprisonment.

The facts are that complainant, a Lance-Naik in the Myitkyina Battalion, suspected his wife of an intrigue and set a trap to catch the delinquent. He announced his intention of going on a shooting expedition and then set a watch on his house.

Applicant was caught in the house at night and there is no doubt that he went with the intention of committing an offence and on the invitation of complainant's wife. The sole point for consideration is whether he is guilty of house-trespass, when he entered on the invitation of the wife, who was in actual physical possession of the house.

The learned Sessions Judge has solved the difficulty by holding that possession by the wife is possession of the husband, but the objection to this solution is that the logical corollary to his view would seem to be that an invitation by the wife would be an invitation by the husband. Although the wife was in actual physical possession, it cannot be held that the husband ceased to be in possession of the house because of his temporary absence.

This would lead to the obviously impracticable position that a man ceased

to be in possession of property, as soon as he leaves it temporarily, and on this view supposing the wife in her husband's absence invited a man to the house, and the man came, while she was also out for the time being, the house would be in no one's possession.

I have not been able to find any precisely similar case, though one would imagine many such have been before the Courts.

Tok Gyi v. *Emperor* (1), on which the learned Advocate relies, does not appear to be of much assistance, as the alleged trespasser in that case entered by permission of the *pongyi* in actual possession and moreover there was no intention to commit an offence. The present is not a case of juridical as opposed to actual possession.

The Upper Burma case of *Queen-Empress* v. *Nga Tun Bye* (2) and the Lower Burma case of *Po Kin* v. *Crown* (3) are not parallel, because in those cases, although the accused entered the house on the invitation of an inmate, his intention was merely to keep an assignation and not, as in the present case, to actually commit an offence.

The nearest parallel I have been able to find is the case of *Queen Empress* v. *Kangla* (4), where accused was found to have entered complainant's house with intent to commit adultery. In that case the conviction was upheld, but there is nothing to show whether the husband was actually in the house at the time or not, and the record is silent as to whether the accused came on the wife's invitation.

The definition of criminal trespass in section 441 of the Penal Code runs:—

"Whoever enters into or upon property *in the possession of another* with intent to commit an offence, or to intimidate, insult, or annoy any person, in possession of such property, or, having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit 'criminal trespass.'"

It is to my mind clear that the essentials of the section have been complied with.

Applicant undoubtedly entered into property in the possession of another and with intent to commit an offence.

Even if it can be assumed that the original entry was lawful, because it was in possession of the wife, it ceased to be lawful, when applicant remained on the house with intent to commit adultery.

If the section is construed literally, the offence was committed as soon as the house was entered even on the view that the wife was in possessior, since it cannot be said possession by the wife was possession by her lover, or that it was not the possession of another so far as applicant is concerned.

I hold, however, that although the wife was in actual physical possession, the husband did not cease to be in possession.

The section does not lay down that the property must be in the sole possession of another.

The rejoinder to this argument is to quote the case of *Prankrishna Chandra, In the matter of the petition of* (5), wherein it was held that the entry of a stranger into a family dwelling house, with the permission and license of one of the members, is not criminal trespass.

I see no reason to doubt that the law as laid down in that ruling is sound so far as it goes, but unfortunately there was no intention to commit an offence in that particular case.

Although in the present instance the wife was in possession of the house and invited the accused there, the husband was legally in possession as well, and the intention was to commit an offence, which constituted an infringement of the rights of the husband.

Applicant must have known full well that the house owner would not consent to his entry for the purpose of committing adultery with his wife.

I see no reason to suppose that the conviction was wrong in law.

Applicant has, however, been sentenced to the maximum sentence of imprisonment admissible by law.

(1) 35 Ind. Cas. 810; 8 L. B. R. 425; 10 Bur. L. T. 77; 17 Cr. L. J. 378.
(2) U. B. R. (1897-01) I, 354.
(3) 1 L. B. R. 355.
(4) 23 A. 82; A. W. N. (1900) 208.
(5) 6 B. L. R. App. 80.

The offence is a serious one, but I do not think undue stress can be laid upon the point that the accused was a person of inferior caste.

I reduce the sentence to six months' rigorous imprisonment, which is to my mind sufficiently severe to meet the merits of the case.

Sentence reduced.

LAHORE HIGH COURT.
CRIMINAL REVISION No. 482 OF 1919.
July 21, 1919.
Present:—Mr. Justice Bevan Petman.
RAM KISHEN—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 345—Composition of offence with one of several accused persons, effect of.

The composition of an offence under section 345 of the Criminal Procedure Code with one of several accused persons has not the effect of an acquittal of all the accused persons. [p. 230, col. 1.]

Revision from the order of the Sessions Judge, Lahore, dated the 29th March 1919, modifying that of a Magistrate, 1st Class, Lahore, dated the 8th March 1919, convicting the petitioner.

Mr. *Ram Chand Manchanda*, for the Petitioner.

Mr. *Mul Chand*, Public Prosecutor, for the Respondent.

JUDGMENT.—Five persons were prosecuted under section 324 of the Indian Penal Code for assaulting and causing injuries to the complainant. Of these one, Mohni, was absconding and proceedings under section 512 of the Code of Criminal Procedure were taken against him. One accused was discharged by the Magistrate trying the case and the complainant compounded the offence with two others who were, therefore, acquitted. The petitioner Ram Kishen was, therefore, alone before the Court and he was convicted under section 324 of the Indian Penal Code and sentenced to six months' rigorous imprisonment and a fine of Rs. 50 or, in default of payment, to further rigorous imprisonment for four months. Mohni, the absconder, was subsequently arrested; but the complainant compounded his offence and he, too, was acquitted. The petitioner appealed and was so far successful that the Appellate Court, holding that it was not proved that he had used a knife, altered the conviction to one under section 323 of the Indian Penal Code, but the sentence was maintained.

For the petitioner it is contended that when the offence was compounded in respect of some of the accused, it had by operation of law the effect of an acquittal of the remaining accused and that, therefore, the Magistrate had no jurisdiction to continue the trial of, and convict, the petitioner, and that the conviction was illegal. It was further argued that the position was similar to a suit for damages against joint tort-feasors where if one defendant pays the damages or the plaintiff obtains satisfaction from him, the remaining defendants are no longer liable. Reliance is placed on *Chandra Kumar Das* v. *Emperor* (1) and *Emperor* v. *Mulo* (2). In the former case the facts were that a complaint was pending against certain accused, only some of whom were before the Court. The complainant intimated to the Court that he had compounded the offence and desired to withdraw his complaint and the Magistrate allowed the withdrawal. The Magistrate had, however, issued process against two other accused, and on their appearance had overruled an objection taken on their behalf, to the continuance of the proceedings, that the offence had been compounded. The Calcutta High Court held that the Magistrate's order was erroneous and that "if in the case of a compoundable offence the complainant intimates to the Court that he had compounded it and desires to withdraw his complaint, the order passed by the Magistrate allowing the withdrawal is in respect of the offence and not solely in regard to the persons actually under trial at the time, and it seems to us that, in so providing, the law contemplates that all the accused persons should be under trial at the same time before a Judicial Officer, unless in some exceptional circumstances, such as their absconding, or sickness

(1) 7 C. W. N. 176.
(2) 19 Ind. Cas. 948; 14 Cr. L. J. 292; 6 S. L. R. 284.

or some such reason, the attendance of some of them cannot be obtained." The Court remarked that it did not appear why the Magistrate had not issued process to these accused at the same time as to others and proceeded: "we think, therefore, that the complaint is compounded in respect of the offence committed so as to include the parties who are now under trial and that further proceedings against them must be stayed."

The decision in *Muthia Naick* v. *Emperor* (3) is against the present contention. In that case the decision of a Division Bench is very brief and as follows:—

"Petitioner's Vakil contends that the composition of an offence under section 345 of the Code of Criminal Procedure with one of several accused persons has the effect of an acquittal of all the accused persons. We can find nothing in the section to support this interpretation and if this is really the meaning of the learned Judges in *Chandra Kumar Das* v. *Emperor* (1), we must respectfully dissent. No other authority is quoted by petitioner."

The petition was accordingly dismissed.

I entirely agree with the above decision of the Madras High Court. I doubt whether the learned Judges of the Calcutta High Court intended to lay down the general proposition of law now attributed to them; but if they did, I am not prepared to follow them. The case is not analogous to a suit for damages against joint tort-feasors. The second ruling relied on is not really in point. I hold that the contention is bad in law and reject it.

With regard to the sentence, the complainant is apparently a man who in the case of some of the accused regards his wrongs as met by an apology, though probably accompanied by money; and under these circumstances I do not think a severe sentence is called for. It is suggested that the petitioner was too poor to meet the complainant's demands. I see also that the Magistrate awarded the present sentence under section 324, Indian Penal Code, and that although the lower Appellate Court altered the conviction to one under section 323, Indian Penal Code, it did not reduce the sentence. I think justice will be met by my present order. I maintain the conviction but reduce the term of imprisonment to the period already undergone which is roughly about $2\frac{1}{2}$ months, and maintain the fine. To avoid remanding the petitioner to jail his Counsel tendered Rs. 50, the amount of fine, which money has now been deposited in the office of this Court. I direct that the petitioner be discharged from his bail bond.

Sentence reduced.

(3) 43 Ind. Cas. 592; 41 M. 823; 19 Cr. L. J. 176.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 61 OF 1920.

April 8, 1920.

Present:—Justice Sir P. C. Banerji, KT.

BHAGGI LAL—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), s. 6—U. P. Public Gambling (Amendment) Act (I of 1917), s. 3—Common gaming house, what is.

Where upon the search of a house persons are found therein engaged in gambling and instruments of gaming are also found, and there is evidence that the owner made a profit by allowing his house to be used as a place for gambling, it must be presumed under section 6 of the Public Gambling Act, as amended by the U. P. Public Gambling (Amendment) Act of 1917, in the absence of evidence to the contrary, that the house in question is a common gaming house. [p. 231, col. 1.]

Criminal revision against the order of the Magistrate, 1st Class, Allahabad, dated the 26th December 1919.

Mr. *Zahur Ahmad*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Bhaggi Lal, the applicant, has been convicted under section 3 of Act III of 1867, as amended by Act I of 1917, of the Local Council for keeping a common gaming house. The applicants in the connected case No. 50 have been convicted under section 4 of the said Act. It has been found that in a house which was owned or kept by Bhaggi Lal a large number of persons (about 65) were discovered by the Police gambling on a particular night. The Police had obtained a warrant under section 5 of the Act and the validity of the warrant is

not questioned. It is not disputed that gambling was going on in that house and that the persons who were arrested and who have been convicted were gambling there. The main contention is that the house was not a common gaming house within the meaning of the Act. That depends upon the further question whether instruments of gaming were found in the house. Under the definition of the expression "instruments of gaming" as given in section 2 of Act I of 1917, an instrument of gaming includes any article used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming. In the present case certain articles were found in the house called *solahis* which are *couries*, and these were used as a means for carrying on gambling. Therefore, the articles found in the house were instruments of gaming. As the house was searched under a warrant properly issued and instruments of gaming were found in the house, that circumstance is under section 6 of the Act evidence that the house was used as a common gaming house, unless the contrary was proved. In the present case there is no evidence to the contrary. Therefore, under section 6 it must be presumed that the house in question was a common gaming house. In addition to this a witness was examined, who deposed that Bhaggi Lal was making a profit and charging a commission for the use of his house for purposes of gambling on that particular night. It is stated that the witness was an approver and, therefore, his evidence ought not to be accepted without corroboration. It appears that the witness, whose name was Mujahid Khan, was examined under section 10 of the Act. The Court was competent to examine him on oath and his evidence, if believed, could be acted upon and if the Court was of opinion that he had made a true statement, it might grant him a certificate freeing him from prosecution in connection with the gambling. This, it seems, was done in the present case. Whether a certificate was granted or not is immaterial, but no pardon had been granted to the witness and he was not examined as an approver within the meaning of the Code of Criminal Procedure. As already stated, he was examined by the Court in exercise of the authority which the Court had under section 10 of the Act. Thus in the present case we have first of all the presumption that by reason of the discovery of instruments of gaming in the house occupied by Bhaggi Lal, the house was a common gaming house, and we have the additional fact that there is positive direct evidence that he used to make a profit by allowing his house to be used as a place for gambling. Bhaggi Lal has, therefore, been rightly convicted. It necessarily follows, from the fact that the other persons were gambling in the common gaming house kept by Bhaggi Lal, that their conviction is legally correct. I have been asked to interfere with the sentence as being excessive. This was a bad case of gambling in which a large number of persons of various castes had assembled together and no less than Rs. 1,400 were found in the possession of the men who were carrying on the gambling. In these circumstances I do not think I should be justified in interfering with the sentence. I accordingly dismiss the application.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 232 OF 1919.

February 3, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

PERTAP RAI AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 325—Charge under s 325 read with s. 149—Conviction under s 325, legality of—Criminal Procedure Code (Act V of 1898), ss. 236, 237, 238.

If an accused person is charged with grievous hurt under section 325 read with section 149 of the Penal Code, he cannot be convicted of the substantive offence under section 325, Indian Penal Code, such a course not being warranted by the provisions of sections 236, 237 and 238, Criminal Procedure Code. [p 234, col 1]

Jatindra Nath Chaterjee v. *Emperor*, 11 C. W. N. 666; 34 C. 698; 5 Cr. L. J. 427, followed.

Criminal appeal against the order of the Sessions Judge, Sonthal Parganas at Dumka, dated the 23rd September 1919.

PERTAP RAI v. EMPEROR.

Messrs. *S. P. Varma* and *Surendra Nath Dey*, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

MULLICK, J.—This is a case which arises out of a family dispute among some Rajputs residing in Mouza Choa. It appears that there was a dispute about land between Pratap on the one side and the deceased Kashi on the other, who was the son of Pratap's brother Mahatab. On the morning of the 4th of June last Kashi had driven away Pratap's labourers from the field and had come back to his house and was lying down reading. The evidence shows that he was a school master by profession.

Pratap is thereupon alleged to have gone with 15 others to Kashi's room, pulled him out and assaulted him with *lathis*. Kashi was assisted by his cousin Banwari and Banwari's sons Parbhu, Darshan and Jagar Nath. The allegation also is that Mahatab and his son Prayag joined Kashi's side, while Hublal, the brother of Mahatab, together with his servants and dependents assisted the accused, and an attempt has been made in the course of the trial to ascribe the fatal blow to Hublal himself. That allegation has been disbelieved by the learned Sessions Judge and although the Assessors found that Hublal, Pratap and his son Jagar Nath joined in the attack which resulted in the death of Kashi, the learned Judge has acquitted Hublal and convicted only Pratab and Baij Nath of the offence of causing grievous hurt under section 325, Indian Penal Code, and sentenced them to rigorous imprisonment for four years each.

It appears that Pratap and Baij Nath arrived at about 9 A. M. at the Thana and made a complaint to the officer in charge. At 11 A. M. Hira, a relation of the deceased, arrived at the Thana and made a complaint as to the assault upon Kashi. The officer in charge did not ascribe very much importance to the case and told Hira to fetch the wounded man. When Hira returned he found that Kashi was dead and after some delay in obtaining bearers to carry the corpse, he reached the Thana again at about 7 P. M. when a regular first information was recorded.

The Sub-Inspector arrived at the place of occurrence the next day and arrested 16 persons, all members of the family or servants and dependents of the family. Three out of these 16 were discharged by the Committing Magistrate, while the remaining 13 were committed for trial for offences under sections 147 and 304 read with section 149, Indian Penal Code.

The learned Sessions Judge in his judgment, which is not altogether satisfactory, found we think that there was no unlawful assembly because the assailants of Kashi did not number 5. He thinks that only Pratap and Baij Nath attacked Kashi in his room and caused the injuries which resulted in his death.

The medical evidence shows that Kashi had three injuries on the head and face, which were probably the result of one *lathi* blow. He had also three injuries on other parts of the body, two of which were probably caused by *lathis* and one by a fall. There is also evidence to the effect that Parbhoo, Darshan, Jagarnath and Prayag on Kashi's side received injuries probably caused by *lathi* blows.

On the side of the accused the only persons hurt were Pratap and Baij Nath.

The statement of Pratap and Baij Nath, though not very clear as recorded by the Committing Magistrate, would seem to show that the defence was that there were two occurrences on that day, the first of which was a quarrel in the early morning between Pratap and Baij Nath on the one side and Banwari and Mahatab on the other about some civil appeal, in the course of which they were assaulted by some members of Banwari's party. They state that they then went to the Thana, that while Pratap remained on in the Bazar, Baijnath returned home alone and that on his return he was further assaulted by his former assailants.

Though the learned Sessions Judge has not discussed the evidence with sufficient fulness, we have ourselves examined it very carefully and we are not satisfied that his reasons for disbelieving the allegation that there was an unlawful assembly and a riot are well founded. We think that he has acquitted 11 of the 13 accused before him against the weight of evidence. At least as regards 7 there was clear evidence that

they joined in the attack upon Kashi in his room and afterwards in his yard.

It is true that the witnesses Parbhoo, Jagarnath, Darshan and Prayag are relatives of those who were in dispute with Kashi, but having regard to the circumstance that the dispute is one between members of the same family and that the occurrence took place in the family homestead at a time and at a place where no independent witness could have been available we think that the learned Judge was wrong in rejecting the prosecution story and substituting a theory of his own.

We do not think it would be proper to reject the prosecution story and at the same time without any evidence at all to hold that it was Pratap and Baij Nath who struck the fatal blow. At the trial an attempt was made to show that Hub Lal and Baij Nath gave the deceased one or two *lathi* blows while he was lying on the yard and while his remaining assailants were running away. Possibly the object of the witnesses who made this statement was to fix Hub Lal and Baij Nath with the fatal injury. But reading the whole evidence it seems clear that the fatal injury was inflicted when the seven men who were armed with *lathis* pulled the deceased out and attacked him in the verandah and before he was knocked down. It is difficult in these circumstances to say what particular part each played in the attack, and it is for that reason that the Committing Magistrate charged the accused before him with offences under sections 147 and 149 read with section 304, Indian Penal Code. As to those whom the learned Sessions Judge has acquitted we think that there was evidence to support the charges, but we are not now concerned with their acquittal.

Mr. Varma who has said all that it was possible to say on behalf of his clients has suggested to us that it would be extremely dangerous if we were to accept the prosecution case against Pratap and Baij Nath, for that would amount to a reversal of the findings upon which the acquittal of the remaining accused was based and might be taken by the Crown as an invitation to appeal against their acquittal. We have no concern with that contingency. What we have to see is whether the learned Sessions Judge was right in rejecting the allegations as to rioting and constructive culpable homicide not amounting to murder in respect of Pratap and Baij Nath. We think that inspite of the discrepancies between the statements made by the eye witnesses before the Police and those made by them before the Sessions Court, the witnesses have substantially told the truth as regards the assault.

It may be conceded that the witness Darshan, although he now professes to have seen the whole of the attack from beginning to end, did not really arrive till Kashi had been knocked down. The other discrepancies seem, in my opinion, neither serious nor material and making the fullest allowance for Mr. Varma's contentions, I think it is abundantly established that more than five persons attacked Kashi, that Pratap and Baij Nath were members of that unlawful assembly, the common object of which was to beat Kashi for having resisted the cultivation of the lands in dispute, and that the fatal blow was inflicted in prosecution of that common object.

Mr. Varma has attempted to suggest that the slightness of the other injuries upon the body of Kashi indicates that the *lathi* blow on the head was an accident. We are quite unable to accept this suggestion. There can be no doubt from the position of the injuries that they were inflicted voluntarily and having regard to the fact that *lathis* do and are commonly expected to cause death if directed at the head of the victim, there can be no doubt that the assailants knew that death was likely to result.

In these circumstances we think the conviction under section 325 should be set aside and the conviction under section 149 read with section 304, Indian Penal Code, be substituted therefor. The sentence for four years' rigorous imprisonment will remain unchanged.

We may observe that the appellants were in fact charged before the learned Judge under sections 147 and 304 read with 149, Indian Penal Code, and that while convicting them under section 325, the learned Court has passed no orders under sections 149 and 304. We desire to draw the learned Judge's attention to the case of *Jatindra Nath Chatterjee*

v. *Emperor* (1) where it was held that if an accused is charged with grievous hurt under section 325 read with section 149, Indian Penal Code, he cannot be convicated of the substantive offence under section 325, Indian Penal Code, such a course not being warranted by the provisions of sections 236, 237 and 238, Criminal Procedure Code.

SULTAN AHMED, J.—I agree.

Appeal dismissed.

(1) 11 C. W. N. 696; 34 C. 698; 5 Cr. L. J. 427.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 100 OF 1920.

April 17, 1920.

Present :—Mr. Justice Piggott.

BHOLA NATH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 3, 6—Presumption as to occupation—Warrant, issue of, legality of—Criminal Procedure Code (Act V of 1898), s. 260—Summary trial—Non-appealable sentence—Judgment, contents of—Trials, separate—Judgment, joint, legality of.

Where there is a fair presumption under section 6 of the Public Gambling Act that a person is the occupier, or has the use of a room, within the meaning of section 3 of the Act, as a common gaming house, the issue of a warrant is not illegal. [p. 235, col. 1.]

In the case of two separate trials where the law requires a judgment to be written in each, it is improper to record a single judgment. [p. 234, col. 2.]

In a summary trial, where a non-appealable sentence is passed, the Magistrate need only record a finding and his reasons therefor. [p. 234, col. 2.]

Criminal revision against the decision of the District Magistrate, Allahabad, dated the 13th January 1920.

Mr. *E. A. Howard*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Bhola Nath has been convicted on a summary trial of the offence of keeping a common gaming house punishable under section 3 of Act III of 1867. The Magistrate tried two persons Bhola Nath and Basdeo, separately on the alternative charge that either they were keepers of a common gaming house, or they were engaged in gaming in a common gaming house and thereby liable to punishment under section 4 of the same Act. He has convicted Bhola Nath alone under section 3 and Basdeo under section 4. He at the same time conducted under the procedure prescribed by Chapter XXII of the Criminal Procedure Code a separate trial of a number of persons for having committed an offence punishable under section 4 aforesaid at the same time and place. The first objection taken is that the Magistrate has written a single judgment in both trials. I do not think that the writing of a single judgment in two separate trials, where the law requires a judgment to be written, is commendable. If two separate cases are so closely connected together that the trial Court thinks a single judgment would sufficiently cover the two separate cases, the best course to adopt is to write a detailed judgment containing a complete recital of the facts in what seems to be the more important of the two cases, and it would not be objectionable as a rule to refer to such recital in the separate judgment recorded on the less important case. At the same time the Court should always be careful to see that evidence which is only admissible in one of the two cases is not referred to or put forward as a reason for a conviction in the case in which it is not relevant. In the trial which I am now considering, the sentence passed was non-appealable and the Magistrate was under no obligation to write a judgment at all. All that the law required of him was a finding accompanied by a brief statement of his reasons for finding the accused guilty. The only question which really arises with regard to the procedure followed in this case is whether or not a statement made by one Muhammad, who was not on his trial along with Bhola Nath and Basdeo, has or has not been used as one of the reasons for finding Bhola Nath guilty. The learned Sessions Judge has referred to Muhammad's statement in the order which sets forth his reasons for finding Bhola Nath guilty and I think it may fairly be contended that he has made use of Muhammad's statement against the applicant Bhola Nath. The question which

then arises is whether, with reference to the provisions of section 167 of the Indian Evidence Act, it does or does not appear to this Court that, independently of Muhammad's statement, there was sufficient evidence to justify the conviction. I am decidedly of opinion that there was. Objection is taken to the irregularity of the warrant on the strength of which the gaming house in question was raided by the Police, but I am satisfied with the reasons given by the Magistrate for holding that the warrant was perfectly legal. The facts set forth in the record before me show that the Court had abundant grounds for applying the presumption laid down by section 6 of the Public Gambling Act, III of 1867. On the strength of that presumption alone, it should have been found that the room in question was being used as a common gaming house. There was other evidence before the Court. One Jokhu had been brought before the Magistrate as one of the persons found by the Police in the gaming house at the time of their raid. He was lawfully examined by the Magistrate and his statement is clear that gambling was going on at the time of the Police raid and that it was going on for the benefit of Bhola Nath. Under the circumstances of the case I think the Magistrate would have been warranted in recording a conviction based upon Jokhu's evidence, taken in connection with the other facts observed by the Police Officers and the search witnesses at the time of the raid. Over and above this we have the fact that the room in question was over a Thakurdwara which had been dedicated by Bhola Nath. Indeed the defence in the Magistrate's Court went so far as to allege that it was actually part of the Thakurdwara. There was, therefore, as the Magistrate remarks, a fair presumption that Bhola Nath was the occupier of this room, or at any rate had the use of this room, within the meaning of section 3 of Act III of 1867. I think there can be no doubt upon the facts set forth in the Magistrate's order that Bhola Nath was rightly convicted. The sentence passed seems to me by no means inappropriate under the circumstances. I reject this application.

Application rejected.

PATNA HIGH COURT.

CRIMINAL REVISION No. 354 OF 1919.

November 3, 1919.

Present:—Mr. Justice Das.

JHARI SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 143, 297—Offence under s. 297, gist of—Trespass, meaning of—Interpretation of Statutes—Legal term, meaning of.

The gist of an offence under section 297 of the Penal Code is trespass, and before a person can be convicted under that section it must be proved that there was a trespass by him with the intention and in the places mentioned in the section. [p. 238, col. 1.]

The term "trespass" means an unjustifiable intrusion upon property in possession of another person. [p. 238, col. 2.]

In interpreting a Statute, the settled rule of construction is that where the Legislature uses a legal term which has a known significance, it must be assumed that the term has been used in that sense and in no other. [p. 238, col. 1.]

Criminal revision against the order of the Sub-Divisional Magistrate, Gaya, dated the 16th September 1919, with power under section 407 (2), Criminal Procedure Code, dismissing the appeal of the petitioners against the order of the 2nd Class Magistrate, Nawadah, dated 29th August 1919.

FACTS appear from the judgment of the Appellate Court, which was as follows:—

"The dispute which has given rise to this case relates to a tank, called Nokhar Pokhar, near Nawadah surrounding an ancient and sacred temple of the Swetambari sect of the Jain community on or about the site of which Goutam Swami, a famous and eminent Jain saint, is said to have entered into Nirvana more than 2,000 years ago.

The temple and its vicinity or precincts, therefore, are regarded as a place of great sanctity by the whole Jain community and are annually resorted to as a sacred place of pilgrimage by the people of that community.

From a religious point of view this case seems to me to be of more than ordinary importance, so as to demand a very careful and scruplous consideration of the facts and circumstances which have transpired in the evidence adduced in this case.

The occurrence is said to have taken place on the 5th of January last in the bed

of the aforesaid tank, from which the six appellants with others are alleged to have caught and destroyed fish with the avowed object of wounding the feelings and insulting the religion of the Jains who go to the temple and tank for purposes of worship and pilgrimage.

A brief account as to how the great delay has occurred in the trial of this case has been given by the lower Court in its judgment, dated the 29th August 1919, and I need not repeat it. After the second order for further enquiry passed by the learned Sessions Judge of Gaya, the case ultimately came up for trial before Babu C. K. Mathur, Deputy Magistrate of Nawadah, with 2nd Class powers, who found the appellants guilty under section 143 and section 297, Indian Penal Code, and sentenced the first appellant to rigorous imprisonment for a month and a fine of Rs. 20 only or in default to further rigorous imprisonment for a month, and the rest of the appellants to rigorous imprisonment for a fortnight and a fine of Rs. 10 only or in default to further rigorous imprisonment for a fortnight each under the latter section (297, Indian Penal Code). He passed no separate sentence under section 143, Indian Penal Code. The appellants were charged under another section, *viz.*, section 295, Indian Penal Code, but they were acquitted of this charge.

The present appeal is thus from that portion of the judgment of the lower Court which deals with the offences under section 143, Indian Penal Code, and section 297, Indian Penal Code. I, therefore, propose to decide this appeal on the evidence relating to the offences alleged to have been committed under these two sections.

As the outset I may remark that though the learned Deputy Magistrate has written a very long and elaborate and carefully considered judgment, he has fallen into an error of inadvertency giving rise to a marked inconsistency in his finding with regard to the offence under section 297, Indian Penal Code. While discussing the evidence bearing upon section 295, Indian Penal Code, he remarks, 'it would be too much to presume on behalf of the prosecution that because fishing is prohibited in this particular tank and not in every tank usually, this tank becomes a sacred object or place of worship.' Immediately after this he observes, 'on the other hand the circumstances of the occurrence fully comply with the provisions of section 297, Indian Penal Code. There was such a trespass on the tank for wrongful purposes according to prosecution evidence as is contemplated by the section.' If 'there was such a trespass on the tank as is contemplated by the section 297', that trespass must be in a place of worship ; and so it is quite clear that the lower Court did hold here that the tank is a place of worship and thus he contradicted his previous findings on this point. It is, therefore, necessary for this Court to examine and weigh the evidence adduced on this point with great care and scrutiny. In a previous part of his judgment the learned lower Court is emphatic with regard to the oral evidence of the prosecution that 'the evidence on the whole is believed to be true and reliable;" two witnesses, *viz.*, P. W. No 1 and P. W. No. 6, depose distinctly that the temple and the tank round it are regarded and used as a place of worship by the Jain community. The first witness, who is a Bhat Brahman and a Vaisnava too, is the Pujari of the place and there is nothing in his evidence to show that he was not telling the truth with regard to the tank being a place of worship. P. W. No. 6 is a very respectable rich Zamindar and an Honorary Magistrate of Behar and his eldest brother is the manager of the temple. He, being a Jain himself and having visited the place on several occasions, solemnly swears that "both the temple and the tank are held sacred by the Jains and form their place of worship." I fully believe the evidence of these two witnesses on this important point of the case and that the tank surrounding the temple is a place of worship within the meaning of section 297, Indian Penal Code. The peculiar position of the tank within the precincts of the temple and its antiquity and sanctity like those of the temple itself leave no room for doubt in my mind that the Jains regard and resort to it as a place of worship.

Having found on the evidence of the two respectable and reliable witnesses referred to above that the tank is a place of worship within the meaning of section 297, Indian Penal Code, I now come to

a consideration of the question whether the persons who are alleged to have caught and killed fish in the tank, did so with the intent or knowledge that the feelings of any person were likely to be wounded or that the religion of any person was likely to be insulted by the act of killing fish in that tank. It has been amply proved that there had been a keen and long standing dispute with regard to the tank and the right of the fishing in it between the Maliks and the tenants of the village on the one side and the person representing the interest of the Jains on the other, and it is admitted and proved that there has been a final decision, that no one can catch fish from this tank and that the Jains have the right to preserve and protect the fish in that tank. So far, therefore, as this right and the right of using the tank as a place of worship are concerned, the Jains are undoubtedly in possession of the tank. It is an historical fact well known to all, that the Jains are extremely averse to the destruction of life in any form, kindness to all creatures being a vital and cardinal doctrine of their religion. This point has been fully and ably discussed by the learned lower Court and I agree with it in thinking that the catching and killing of the fish in the tank was done with the intention or knowledge of wounding the feelings and insulting the religion of the Jain community. The motive for such a wanton and outrageous act of sacrilege is quite clear from the fact, as found by the learned trying Magistrate. He says, " the disappointment caused to the Zamindar for all the above reasons seems to be more than he can bear, and there can be no wonder if the present action was taken through his creatures to cause further harassment to Jain people and thereby force them sooner or later to pay a fancy price for the tank out of religious susceptibilities. That the Zamindar is heavily indebted is borne out by D. W. No. 7. I thus quite agree with the lower Court in finding that the circumstances of the occurrence fully comply with the provisions of section 297, Indian Penal Code. There was such a trespass on the tank for wrongful purposes according to prosecution evidence as is contemplated by the section.

The accused appellants denied the charges and the occurrence as well. In this connection their allegation in paragraph 15 of their written statement is significant, as indicating that they are fully aware of the wantonness and serious consequence of the act of catching and killing any fish in the tank. They have been clearly identified by the eye-witnesses as having taken an active part in the act of fishing in the tank on the 5th January last, and I agree with the lower Court in holding that the evidence of these witnesses is 'true and reliable.' I, therefore, uphold the conviction of the appellants under section 297, Indian Penal Code."

The rest of the judgment deals with the charge under section 143, Indian Penal Code, which is not material to this report.

Messrs. *G. C. Das* and *Khurshed Husnain*, for the Petitioners.

Mr. *G. C. Pal*, for the Opposite Party.

JUDGMENT.—The petitioners have been convicted under sections 143 and 297 of the Indian Penal Code and have been sentenced to various terms of imprisonment and fine.

The charge against the petitioners was that they caught and destroyed fish from the bed of a tank with the object of wounding the feelings and insulting the religion of the Jains to whom the tank is a place of worship. The petitioners are the servants and tenants of the Zemindar. It is found that the Zemindar is the owner of the tank and it is not disputed that the tank is in the possession of the Zemindar. But the Record of Rights is to the effect that although the tank is in the possession of the Zemindar, still no one can catch fish in the tank and that the Jains have the right to preserve and protect the fish in the tank. In other words, the Jains have a right to prevent the owner of the tank from utilising it in a particular way. In other words, they have an incorporeal right over the tank.

The Appellate Court says: "So far, therefore, as this right and the right of using the tank as a place of worship are concerned, the Jains are undoubtedly in possession of the tank." I do not at all agree with this view of law. In my view, upon the facts found and on the

Record of Rights the Jains are certainly in possession of an incorporeal right, but it cannot be said that they are in possession of the tank.

That being so, could the petitioners have been convicted under section 297, Indian Penal Code? Section 297 runs as follows:— "Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any persor, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted, thereby commits any trespass in any place of worship, or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

It will be seen that the gist of the offence is trespass. Therefore, in my view, before there can be a conviction under section 297, Indian Penal Code, it must be proved that there was a trespass by the accused persons with the intention and in the places mentioned in section 297, Indian Penal Code.

I agree with the view which has very often been expressed that the word "trespass" in section 297 cannot be construed by reference to section 441. But I wholly differ from the view which has been taken, certainly in one case which was cited before me by the learned Assistant Government Advocate, that it means merely any injurious act. It is, in my opinion, a well settled rule of construction that where the Legislature uses in an Act a legal term which has a known significance it must be assumed that the term has been used in that sense and in no other sense. In *Queen* v. *Slator* (1) it was argued upon section 7 of the Corrupt Practices Prevention Act that the term "indictment" there meant criminal proceedings. The Court rejected the contention. Denman, J, said "It always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well known legal term" and Bowen, J., added: "The whole of the argument fails if it is not shown that there is a popular use of the term 'indictment' as including information. There is certainly no such popular use of the term among lawyers, and if there is among persons ignorant of the law it is an incorrect use of the term." In my view, trespass as a legal term means and has always meant an unjustifiable intrusion upon property in possession of another person.

The learned Assistant Government Advocate says that it means merely an intrusion and nothing more than that, and not an intrusion upon another person's possession. Adopting the words of Bowen, J., I may say that there is certainly no such popular use of the term among lawyers. Is there then a strong compulsion of the other words in that section which would induce the Court to alter the well-known meaning of the legal term? In my opinion there is not. The whole section can be read consistently by giving to the word "trespass" that meaning which has always been given to it in law.

The offence would then be committed if a person, with the intention set out in section 297, commits any unjustifiable intrusion in any place of worship, to take the case which is before us, in the possession of another person. That is the way in which I read section 297.

In this case the tank was not in the possession of the Jains and, therefore, in my view, an offence under section 297 has not been committed by the petitioners. It is conceded that if the conviction under section 297 fails, the conviction under section 147 must necessarily fail. I would, therefore, set aside the conviction and sentences passed on the petitioners and direct that the fines, if paid, be refunded.

Conviction set aside.

(1) (1881) 8 Q. B. D. 267 at p. 272; 30 W. R. 410; 51 L. J. Q. B. 246; 46 J. P. 694.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 113 OF 1920.

April 14, 1920.

Present:—Mr. Justice Tudball.

RAM BARAN SINGH AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 345, 439—Composition of offence—Revision—High Court or Sessions Judge, power of, to allow composition.

Neither the High Court nor the Judge of a Court of Session, when sitting as a Court of Revision, has the power, in view of section 345 of the Criminal Procedure Code, to allow an offence to be compounded. [p. 239, col. 2.]

Criminal revision from an order of the Additional Sessions Judge, Mirzapur, dated the 31st October 1919.

Mr. *A. P. Dube*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision. The applicants were convicted of an offence under section 323 of the Indian Penal Code and sentenced to pay a fine of Rs. 25 each. They went in revision to the Sessions Judge and there they sought for permission to compromise the case with the opposite party. The Judge held that he had no power to allow a compromise in view of the terms of section 345 of the Criminal Procedure Code. The applicants, therefore, came to this Court. Two points are taken: first of all that the Court of the Sessions Judge had jurisdiction to allow a compromise to be filed although he had no power to acquit, and secondly, that the sentence was unduly severe. In so far as the Sessions Judge's jurisdiction to allow a compromise to be filed is concerned, I think there is no force in this application. Section 345 of the Criminal Procedure Code in clause 7 distinctly says:—"No offence shall be compounded except as provided by this section." The first four clauses of the section refer to the compounding of a case in the original Court of trial. Clause 5 says that offences may be compounded when an accused has been committed for trial or when he has been convicted and an appeal is pending only on the leave of the Court to which the accused has been committed or before which the appeal is to be heard. Clause 6 says:—"The composition of an offence under this section shall have the effect of an acquittal of the accused." There is no provision whatsoever in this section for the composition of an offence when the matter is before the Court on revision. The Sessions Judge himself clearly could not allow a composition because he had no power on revision of passing an order of acquittal. All that he could do was to refer the matter to this Court. It is urged that this Court under section 439 has, in revision, the powers given to an Appellate Court under section 423 of the Code, and it is urged that clause (*d*) of the latter section is quite wide enough to enable this Court to allow a composition to be filed before it on revision. That clause runs as follows:—"May make any amendment or any consequential or incidental order that may be just or proper." This, in my opinion, cannot possibly be held to enable the Court to allow a composition to be filed. A composition means an acquittal. Clause (*d*) is an addition to the Code which was put in in order to make it clear that when a Court came to a certain decision, either a conviction or an acquittal, it could also pass any necessary amendment which followed as a consequence on the order which had been passed in the case. It was never intended to overrule clause 7 of section 345. My attention is called to the case of *Ram Piyari* v. *Emperor* (1). On the other hand, there is another decision* by one of the two Judges who was concerned with the former, in which he has taken the opposite view. I think this latter view was the more correct. This Court has only those powers on revision which are granted to it by section 439 and no further. If the Legislature had intended to grant this Court power to allow a composition on revision, it would clearly have said so in section 345, whereas, it has not done so and has clearly stated that no offence shall be compounded except as provided by that section. The first ground for revision, therefore, fails. As regards the sentence, the applicants are not persons of any position. They no doubt were rightly convicted. The

(1) 5 Ind. Cas. 696; 7 A. L. J. 103; 32 A. 153; 11 Cr. L. J. 205.

*See *Ram Chandra* v. *Emperor*, 28 Ind. Cas. 103; 37 A. 127; 13 A. L. J. 104; 16 Cr. L. J. 247.—*Ed.*

matter was a trivial one and a sentence of Rs. 25 fine was perhaps hardly called for. In this respect I allow their application. I reduce the sentence of fine from one of Rs. 25 to one of Rs. 10 in each case. The excess, if paid, will be refunded.

Sentence reduced.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 18 OF 1920.

February 26, 1920.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

Srimati DASSYA AND ANOTHER—PETITIONERS

versus

NIBARAN CHANDRA GHOSH—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Absence of one of the Jurors at the time of making investigation, effect of—Report of other Jurors, whether should be acted upon—Procedure.

Where in a proceeding under section 133 of the Code of Criminal Procedure only four out of the five Jurors were present at the time of the investigation:

Held, that the Magistrate should not act upon their report but should allow the proceedings to go on after appointing a fresh Jury.

Criminal revision against an order of the District Magistrate, Pabna, dated the 14th November 1919, affirming that of the Deputy Magistrate, Pabna, dated the 24th September 1919.

Babu *Khitish Chandra Chuckerbutty* (with him Babu *Panchanan Ghosal*), for the Petitioners.—The facts of the case are as follows. The petitioner No. 1 is a helpless widow and petitioner No. 2 is her *dharmaputra* (godson) and the opposite party one Nibaran Chandra Ghose who is related to the petitioner No. 1, tried in various ways to oust them from their homestead. The opposite party brought a case under section 133, Criminal Procedure Code, alleging that a way had been obstructed by the petitioners by raising a hut thereon. The petitioners denied the existence of the alleged way over their homestead land and five Jurors were appointed by the Court and they were asked to report on the matter. The Jurors fixed the 27th August as the date on which they would take evidence and the petitioners were ready with their evidence on that day. But the Jurors did not turn up that day and the petitioners were not informed on what date they would come and so they went to the Sadar Station, Pabna, to ascertain why the Jurors did not come on the fixed date. While the petitioners were away at Pabna to ascertain the date, four out of the five Jurors arrived on the spot without giving any notice to the petitioners and took *ex parte* evidence and submitted their report to the trying Magistrate.

The learned Magistrate, relying on the *ex parte* report, found against the petitioners. The petitioners then moved the District Magistrate against that order of the lower Court but he did not interfere in the matter.

My first submission is that the Courts below erred in law in relying upon the *ex parte* report of the Jurors.

My second point is that the report of the Jurors is defective as only four out of the five Jurors were present at the time of the investigation.

My third point is that proper notice should have been given to the petitioners on the expiry of the date fixed on the first occasion.

Babus *Debendra Nath Bagchi* and *Mohini Mohan Bhattacharjee*, for the Opposite Party.—I have filed a counter-affidavit showing that one notice was given to the petitioners and that the absentee Juror was a nominee of the petitioners who stayed away on 3 more occasions only to put obstacles in the way. Evidence was duly taken from neutral parties. There has not been any failure of justice. The report may also be taken as one under section 141, Criminal Procedure Code. Refers to *Durga Charan Das* v. *Sashi Bhusan Guho* (1).

JUDGMENT.—In this case we make this Rule absolute. The Rule was granted on the second ground that the report of the Jurors was defective as only four out of the five Jurors were present at the time of the investigation and so the report was illegal and it ought not to have been relied on. It appears that the Magistrate acted upon the report. In our judgment he should not have done so. He should have appointed a fresh Jury and allowed the proceedings to go on with the fresh Jury.

The Rule is made absolute. The Magistrate must appoint a fresh Jury.

Rule made absolute.

(1) 13 C. 275 at p. 279; 6 Ind. Dec. (N. S.) 693.

KANNAN NARAYANAN v. MUTHALPUREDATH RAMUNNI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1467 OF 1918.

October 2, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

KANNAN NARAYANAN *alias* NARAYANAN MOOPIL MOOSSAD—PLAINTIFF—APPELLANT

versus

MUTHALPUREDATH RAMUNNI MENON (DEAD) AND OTHERS—DECEASED DEFENDANT No. 7 AND DEFENDANTS NOS. 1 TO 5, 8 AND 9 AND LEGAL REPRESENTATIVE OF DEFENDANT No. 7—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 116—Suit to recover arrears of rent under registered kanom *deed—Limitation.*

The period of limitation applicable to a suit to recover arrears of rent from the assignee of a person holding under a registered *kanom* deed is contained in Article 116 of Schedule I to the Limitation Act. [p. 242, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in Appeal Suit No. 4 of 1918 (Appeal Suit No. 520 of 1917 on the file of the District Court, South Malabar), preferred against the decree of the Court of the District Munsif, Walluvanad, in Original Suit No. 188 of 1916.

Mr. *C. V. Ananthakrishna Aiyer*, for the Appellant.

This second appeal coming on for hearing on the 22nd of July 1919, the Court delivered the following

JUDGMENT.—The second appeal is dismissed as against 9th respondent (legal representative of 7th defendant) with costs. On the finding in appeal the 8th defendant is liable to pay arrears of rent. He is not represented in this second appeal.

We must ask the lower Appellate Court to return a finding on the questions

1. What arrears of rent were due from the 8th defendant.

2. What amount, if any, was payable by plaintiff for redemption after setting off arrears on the date of the first Court's decree.

Findings will be submitted in six weeks, and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the Subordinate Judge of South Malabar at Calicut submitted the following

FINDING.—The High Court has called upon me to record findings on the following two issues:—

1. "What arrears of rent were due from the 8th defendant."

2 "What amount, if any, was payable by plaintiff for redemption after setting off the arrears on the date of the first Court's decree"

* * * * * * *

I, therefore, find that the arrears of rent due from the 8th defendant for the six years claimed in the plaint is Rs. 449-2-8 and that for the three years immediately preceding the suit is Rs. 157-13-7. In addition to the rent, 8th defendant is also liable to pay the revenue of the properties. Interest has been allowed by the Court on arrears of revenue at 6 per cent. per annum. The revenue due from the 8th defendant for the six years claimed in the plaint will be Rs. 47 12-9 with interest and that due for the three years immediately preceding the suit with interest will be Rs. 15-11-2.

3. *2nd Issue*:—The Kanom on the entire property is Rs. 91-6-10. The value of improvements due to 1st defendant in respect of item No 2 is Rs. 97-8-10 and that due to 7th defendant is Rs. 10 6-3. The arrears of rent for the six years as found above come to Rs. 455 5-1 from defendants Nos. 1 and 8 and the total amount of revenue claimed in the plaint with interest at 6 per cent. per annum comes to Rs. 111 11-1. The plaintiff is entitled to set off the whole arrears against the Kanom and value of improvements and the plaintiff is not liable to pay anything for redemption after setting off the arrears to the date of the first Court's decree.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred to by this Court for trial, the Court delivered the following

JUDGMENT.—We must accept the findings now submitted, as the respondents do not appear and file any objection.

The 8th defendant will be liable to pay the arrears of rent claimed by the mortgagor landlord in the place of the 7th defendant, as he is the assignee of the former's right and the rent claimed accrued after the date of the assignment. We think the landlord is entitled to 6 years' arrears from the 8th defendant, for even though his liability arises from his privity of estate, the result of such privity is to make him bound by the covenants in the registered Kanom deed. As the rent is payable under such a covenant, we think that Article 116, Indian Limitation Act, applies against him also. With all respect to the learned Judge, we are unable to follow the ruling of Miller, J., in *Naduvil Edom Kelu Achan* v. *Varadarau Aiyar* (1). We observe the learned Judge does not say what article applies to the case in his view, though he holds against the application of Article 116 of the Limitation Act.

Plaintiff cannot, however, get a decree for a larger amount for arrears than what was given to him by the 1st Court's decree, as he did not appeal against it.

In the result we must modify the decree of the lower Appellate Court by substituting the 8th defendant for the 7th defendant in paragraphs 2 and 4 of the 1st Court's decree. Plaintiff will be paid his costs of this second appeal by the 8th defendant. Time for redemption will be three months from this date.

M. C. P.

Decree modified.

(1) 24 Ind. Cas. 481; 26 M. L. J. 283.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 145 OF 1919.

March 5, 1920.

Present:—Justice Sir N. R. Chatterjea, KT., and Mr. Justice Panton.

FANNY EMMELINE PETERSON—OPPOSITE PARTY—APPELLANT

versus

EARNEST HENRY SHAVE AND ANOTHER—PETITIONERS—RESPONDENTS.

Guardianship—Mother—Natural right of mother to have custody of her child, whether can be given up for good by agreement—Child made over by mother to another to be brought up as the latter's own—Mother, whether precluded from claiming it back—Circumstances depriving mother of her natural right—Expectations or associations.

A mother cannot be deprived of her natural right of absolute control over her own child by any agreement. Therefore, the mere fact that the child was made over by its mother to another to be brought up by the latter as her own, or even a definite agreement never to claim it back, would not preclude her from having the custody of her own child. But there may be circumstances in a particular case which would render it undesirable in the interests of the infant that the mother should resume her rights over it when she has once made over the child to another, and associations or expectations have been created on the part of the infant When there are no such associations or expectations which it would be undesirable in the interests of the infant to disturb or disappoint, the Court exercising the jurisdiction of the Crown over infants would not deprive the mother of her natural right of guardianship over her child. [p. 244, col. 2; p. 246, col. 1.]

Appeal against the order of the Judge, 24 Parganas, dated the 21st of March 1919.

FACTS appear from the judgment.

Mr. *Avetoom* (with him Mr. *J. W. Chippendale*), for the Appellant.—A mother cannot enter into a contract to give away her child to another for ever. By giving away the child to be brought up by the aunt for some time, the mother does not lose her natural right of guardianship. A person can acquire no lien on the person of a child for costs incurred for its maintenance. In the absence of the father the Court, in determining who is entitled to have the custody of the child, should give effect to the mother's wishes in respect of the care, maintenance and education of the child. See *Queen* v. *Barnardo Jone's case* (1). The Court exercising the jurisdiction of the Crown over infants should give effect to what will be for the interest and

(1) (1891) 1 Q. B. 194; 64 L. T. 72; 39 W. R. 195

welfare of the infant. It cannot be argued that the mother, by placing the child in the care and custody of the aunt, has created expectations which the Court in the interests of the infant would not disturb. There is, again, no suggestion whatever against the character of the mother or as to her fitness, which would disentitle her to act as the guardian of her son. There is absolutely nothing to deprive the mother of her natural right of control over her infant son.

My next point is that the lower Court had no jurisdiction to pass the order under appeal in view of the fact that for more than 9 months in the year the child was living in Allahabad outside the jurisdiction of the Court which passed the order. The child must be within the jurisdiction of the Court; otherwise the order of the Court will be of no effect.

Mr. *Renfrey* (with him Babus *Nogendra Nath Ghose* and *Uma Charan Laha*), for the Respondents —The objection as to jurisdiction was not taken in the lower Court and is, moreover, a purely technical one.

As to the merits I submit that the right of the mother as guardian of her infant son should not be permitted to be capriciously exercised: when the natural guardian has permitted another to maintain and educate her child, she should not be allowed arbitrarily or capriciously to alter the mode of its maintenance and education, or to take it from the custody in which she has allowed it to remain. See *Agar Ellis, In re*; *Agar Ellis* v. *Luscelles* (2). The law on the subject is clearly laid down by their Lordships of the Judicial Committee in *Annie Besant* v. *Narayaniah*(3). Their Lordships in that case approved of the decision in *Lyons* v. *Blenkin* (4). Reads Trevelyan's Law relating to Minors at page 70.

The child was made over to my client absolutely to be brought up as her own. There is no dispute that she loves the child dearly and she herself and are husband are giving every comfort and education to the child. Your Lordships should not interfere unless it is necessary in the interests of the child.

Mr. *Apcar toom*, in reply.—The decision in *Annie Besant* v. *Narayaniah*(3) really supports my contention. The guardian of the child in the exercise of his discretion may entrust the custody and education of the child to another, but this delegation of authority is essentially revocable and if the welfare of the infant requires it, the natural guardian can, notwithstanding any contract to the contrary, revoke the authority and take custody of the child once more into her own hands. The only consideration for your Lordships would be whether the mother by placing the child in the custody of the aunt has created associations or given rise to expectations which your Lordships would not disappoint or disturb in the interests of the infant.

JUDGMENT.—This appeal is against an order appointing Ernest Henry Shave and his wife Ethel Mary Shave joint guardians of a minor named John Christopher Peterson—under Act VIII of 1890. Mrs. Shave is the aunt (mother's sister) of the minor. The application of Mrs. Shave and her husband was opposed by Fanny Emmeline Peterson, the mother of the infant. The infant is the posthumous son of Alfred Peterson, who died by an accident on the 15th January 1911, and was born on the 25th August 1911 at Darjeeling. He was, therefore, about $7\frac{1}{2}$ years of age at the time when the application was made and is about $8\frac{1}{2}$ years now. Mr. Peterson at the time of his death was the manager of a sugar factory earning Rs. 375 a month and commission, and on his death Mrs. Peterson was left in a destitute condition. She had four other children whom she placed in charitable institutions, two of the boys went to La Martiniere, the elder being now an apprentice in the Lilooah Workshops. The third boy is at Kalimpong and the daughter is on the Bruce Foundation at Mussouries.

When the infant was between two and three months old, Mrs. Peterson brought him to her sister Mrs. Shave in Calcutta and made him over to her as she was going to be trained as a nurse. In so doing she acted very properly and she at

(2) (1883) 24 Ch D. 317; 53 L. J. Ch. 10; 50 L. T. 161; 32 W. R. 1.

(3) 24 Ind. Cas. 290; 41 I. A. 314 at p. 320; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 5 0; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253 16 Bom. L. R. 625; 12 A. L. J. 1155; 38 M. 807 P. C.).

(4) (1821) Jacob 245; 37 E. R. 842; 23 R. R. 38.

once went through a course of training as a nurse so that she might earn her own livelihood, and be in a position to maintain her children.

The respondent's case is, that the child was made over to her absolutely to be brought up as her own. Mrs. Peterson, on the other hand, says that she never agreed that the child should stay permanently with the Shaves and did not part with him for good. It appears, however, from Exhibit 1, a "Progress Book" in the handwriting of Mrs. Peterson, that the "baby was made over to my sister, his aunt, to bring up as her own." It also appears from the evidence that in 1914, Mrs. Peterson and Mrs. Shave went to the Rev. Mr. Henderson with a project of re-christening the child. It further appears that the infant calls Mrs. Shave his mother, and Mrs. Peterson "aunt Emmy." There is no doubt, therefore, that the child was made over to Mrs. Shave to be brought up as her own. There is also no doubt the evidence that Mrs. Shave and her husband are very fond of the child and have treated him like their own child. The boy was at school at Allahabad at the time when the application for guardianship was made; but is now, we are told, at school at Kurseong.

Mrs. Peterson, after being trained as a nurse, joined the Cambell Hospital and also had private practice and in January 1919 got an appointment at Darjeeling as sister in-charge of the Victoria Hospital. There her pay is Rs. 160 a month with a free furnished house and permission to have private practice, which is worth Rs. 60 to Rs. 80. She wants the minor, now that she is in a position to maintain and educate him. She says: "I want the minor as he came after my husband's death and I am fonder of him than of the others. I propose to send him as a day-boy to the Diocesan School."

The learned District Judge says: "Upon the evidence I find that Mrs. Peterson resigned all her rights over the child almost from the time of his birth, that she contributed nothing towards his maintenance, and that up till quite recently when she quarrelled with Mrs. Shave, she made no attempt to recover possession of him. I find, on the other hand, that the Shaves have supported the child uninterruptedly from the time he was made over to them up till the present time, that they are as fond of him as he is of them, and that he has been brought up to regard them as his parents. The question, therefore, for decision is whether Mrs. Peterson is now entitled to rescind her agreement of surrender and recover possession of the infant. It has always been a well established principle of the Court, when the natural guardian has permitted another person to maintain and educate his child, not to permit him arbitrarily or capriciously to alter the mode of its maintenance and education, or to take it from the custody in which he has allowed it to remain," and referring to the observations of Cotton, L. J., *Agar Ellis, In re*; *Agar Ellis* v. *Lascelles* (2) held that Mrs. Peterson cannot successfully maintain her claim. He accordingly declared Mrs. Shave and her husband joint guardians of the minor. Mrs. Peterson has appealed to this Court.

We do not think that the mere fact that the child was made over by the mother to Mrs. Shave to be brought up by her as her own, or even a definite agreement never to claim it back, would preclude her from having the custody of her own child. It is well settled that the mother cannot be deprived of her natural right of absolute control over her own child by any such agreement. But there may be circumstances in a particular case, which would render it undesirable in the interests of the infant that she should resume her rights when she has once made over the child to another, and associations or expectations have been created on the part of the infant.

In the case of *Queen* v. *Barnardo*, *Jone's case* (1) Lord Esher, M. R., discussing the rights of the mother of a legitimate child, observed:—"What are the rights of the mother of a legitimate child? It is her undoubted right, if there is no father living, to have the company and care of and the control over her own child. That is the law of England founded on the law of nature. If that be the mother's right, it follows that with regard to the actual care of and control over the child, she may nominate some one else to have the same right as she has herself to take care of and have the

control over it. It cannot be denied that she may say to what school her child shall be sent or that she may choose its tutors or its governesses. She may say, 'I wish the child to be placed under the care and control of this or that person', and if there is no good reason to the contrary, the law will enforce her wish. In the present case, the child is in the actual care of Dr. Barnardo, being there of the mother's own free will. More than that, she has by an agreement undertaken not to take the child away. The law is perfectly clear that parents cannot bind themselves by any such agreement. No such agreement can deprive a parent of the right of absolute control over his or her own child. This applies precisely to the mother of an illegitimate child She cannot by any agreement absolve herself from the duty of taking care of it. The existence of the agreement is, therefore, immaterial. Then comes the question—the child being in the actual care of Dr. Barnardo and the mother desiring to have it placed in the care of some one else—which of the two is it to be given to? The Court is bound to give effect to the wish of the mother even though the child be illegitimate, unless there is some good reason to the contrary. Is there in this case any reason to the contrary? She did right, in my opinion, in giving up the child to Dr. Barnardo, being herself unable to take care of it. After leaving to him all the trouble and expense of taking care of it for 18 months, she comes forward and says, 'I want my child back'" After discussing the circumstances the learned Judge came to the conclusion that there was nothing to entitle the Court to say that she should not be allowed to exercise her natural and legal rights with respect to her child.

That was a case of an illegitimate child and yet the Court of Appeal held that in determining who is entitled to have the custody of and control over an illegitimate child, the Court will, in a proper case, give the same effect to the mother's wishes in respect of the care, maintenance and education of the child as it gives to the wishes of the father of a legitimate child in those respects.

In *Agar Ellis, In re; Agar Ellis* v. *Lascelles* (2), referred to above, the Court of Appeal held that a father has a legal right to control and direct the education and bringing up of his children until they attain the age of 21 years, even although they are Wards of Court, and the Court will not interfere with him in the exercise of his paternal authority except (1) where by his gross moral turpitude he forfeits his rights, or (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children being Wards of Court out of the jurisdiction without the consent of the Court.

The observations of Cotton, L. J., relied on by the learned District Judge are as follows:—"The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have, as where a father has allowed, in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect, and then the Court interferes to prevent the father from having the custody of the child, not because he is immoral or has forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right." The question whether there are any such circumstances in the present case, which would induce the Court to interfere to prevent Mrs. Peterson from having the custody of her child, will be considered later.

On behalf of the respondent reliance was placed upon the case of *Annie Besant* v. *Narayaniah* (3). In that case, the Judicial Committee observed: "There is no difference in this respect between English and Hindu Law. As in this country so among the Hindus the father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust and he cannot, therefore, during his lifetime substitute another person to be guardian in his place. He may, it is true, in the exercise of his discretion as guardian entrust the custody and education of

his children to another, but the authority he does confer is essentially a revocable authority and if the welfare of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If, however, the authority has been acted upon in such a way as, in the opinion of the Court exercising the jurisdiction of the Crown over infants, to create associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation: *Lyons* v. *Blenkin* (4)."

The question, therefore, is whether in the present case there are circumstances which preclude the mother from insisting on rights which she would otherwise have, or whether the mother has acted in such a way as to create associations or give rise to expectations on the part of the infant which it would be undesirable in his interests to disturb or disappoint. In *Annie Besant's case* (3) the two boys were made over by their father to Mrs. Besant, who offered to take charge of them and defray the expense of their maintenance and education in England and at the University of Oxford, and by a letter affected to appoint Mrs. Besant to be guardian of their persons and authorised her to act as such from that time forward. The boys were, accordingly, sent to England by Mrs. Besant and they were prosecuting their studies at Oxford. One of them had nearly attained the age of majority. Both of them appeared by Counsel, who stated to the Court that the infants did not desire to return to India or to abandon their chance of obtaining a University education in England. The Judicial Committee pointed out that the Court in India had no jurisdiction over the boys, as they were in England when the application was made. No proceedings were taken under the Guardians and Wards Act, a suit having been brought against Besant. It was further pointed out that the order directing Mrs. Besant to take the boys back to India could not be lawfully carried out without their consent or without an order from the Court exercising the jurisdiction of the Crown over infants in England. Their Lordships, accordingly, dismissed the suit but without prejudice to any application the father of the boys might think fit to make to the High Court in England touching the guardianship, custody and maintenance of his children.

The facts in that case, therefore, are different from those of the present. Then the question is whether the Court would disappoint any expectations raised if the infant be taken away from the custody of Mrs. Shave. It appears that Mr. Shave is employed in a paulin factory at Dum Dum, his present salary being Rs. 500 per month. Besides this he earned a bonus of Rs. 3,000 last year. But he and Mrs. Shave have children of their own, a boy and a girl. It is true that they are fond of the infant and have hitherto brought him up comfortably and paid all his expenses. The boy also appears on the evidence to be attached to them. As stated above, he is now at school and they pay his expenses, which amount to Rs. 25 a month. If left to them, there is no doubt that they will educate him properly. But beyond that it does not appear that there is any question of any expectation. The appellant's position at Darjeeling now enables her to maintain and educate the child without difficulty, and in some respects compares favourably with that of the Shave who live at Dum Dum. She has a free furnished house at Darjeeling and can easily afford to send the boy to school as a day-boy. Mr. and Mrs. Shave reside at Dum Dum. In the usual course of things the boy would be at Kurseong for about eight months in the year and can only live with them during his holidays. On the other hand, he can live with his mother at Darjeeling. There is no suggestion whatever against her character or fitness to act as the guardian of her son. Her brother-in-law Mr. Peterson, examined by the respondent, said that she is a good and affectionate mother. It may be mentioned that even after the child was made over to Mrs. Shave, she often visited the child, and it is admitted that for sometime in the year 1914 both the sisters lived together in Calcutta and the infant lived with them. It does not appear, therefore, that her affection for the child has ceased. The evidence, however, as to her having paid money to her sister for

the maintenance of the infant is not satisfactory, and has been rightly rejected by the Court below.

It is said on behalf of the respondent that Mrs. Peterson has four other children in charitable institutions and that she should in the first place devote herself to their interests. One of them, as already stated, is now an apprentice in the Lilooah Workshop, and it appears that she has in fact had the others to stay with her in Darjeeling during their holidays. This infant is her last child and her desire that it should be restored to her is a natural one. We are not satisfied that the interests of the infant would naturally suffer if he were taken out of the custody of Mrs. Shave, nor do we think that "the mode of the child's maintenance and education" will be materially altered.

Mrs. Peterson through her Counsel has offered to send the boy to the Shaves to live with them for a month every year.

In all the circumstances of the case, we think that the order of the Court below should be set aside. The infant will be restored to the guardianship of his mother, Mrs. Peterson.

In the circumstances we direct that the parties do bear their own costs in both Courts.

Appeal decreed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 88 OF 1919.

March 9, 1920.

Present :—Mr. Kotval, A. J. C.

Musammat KASIDANBI AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

GANGULAL AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Evidence Act (I of 1872), s. 68—Transfer of Property Act (IV of 1882), s. 59—Attestation of mortgage-deed—Execution by pardanashin *lady—Proof.*

In the case of a *pardanashin* lady executing a mortgage-deed it is not essential that the attesting witnesses should actually see the executant sign or make a mark. The attestation would be sufficiently proved if there is evidence that the lady admitted that she was the executant and the deed was taken behind the *pardah* for her signature and after it was signed by her, the signatures of attesting witnesses who were present there were then made.

Appeal against the decree of the District Judge, Raipur, in Civil Appeal No. 25 of 1918 decided on the 19th November 1918.

Messrs. *S. Ramdas* and *A. C. Roy*, for the Appellants.

Messrs. *K. K. Gandhe* and *D. W. Kathalay*, for the Respondents.

JUDGMENT.—The plaintiff sues on a mortgage bond purported to have been executed by the three defendants who are Muhammadans. Defendants Nos. 2 and 3 are the wives of defendant No. 1. Defendant No. 1 admitted execution and consideration. The case was heard *ex parte* against defendants Nos. 2 and 3. As the two attesting witnesses deposed that defendants Nos. 2 and 3 did not execute the deed in their presence, the plaintiff was allowed to prove execution by other evidence under section 71 of the Evidence Act.

The plaintiff himself as P. W. No. 3 stated that defendant No. 1's wives were present behind the *pardah* while the deed was written, that they themselves told him that they were defendant No. 1's wives, that defendant No. 1 took the deed to them and got it signed by them and that the signatures of the attesting witnesses who were present at the time were then made. P. W. No. 4 supports this witness and further states that he saw the women behind the *pardah* touch the pen and that defendant No. 1 identified them as his wives. It is to be noted that each attesting witness states in the attestation clause that the signatures and marks were made in his presence.

Both the lower Courts have held that the mortgage-deed is duly proved.

In second appeal it is urged that there has not been any valid attestation, as according to the plaintiff himself the attesting witnesses did not see the defendants Nos. 2 and 3. There is authority, however, in *Harnarain Narain Singh* v. *Ganaur Singh* (1), *Isri Prosad* v. *Rai Ganga Prosad*

(1) 3 Ind. Cas. 309; 13 C. W. N. 40.

AIDAL SINGH v. PEAREY LAL.

Singh Bohadur (2) and *Sarurjigar Begam* v. *Baroda Kant Mitter* (3) for holding that in a case like the present it is not essential that the attesting witnesses should actually see the executant sign or make a mark. Apart from this there is the evidence of P. W. No. 4 that he saw the women behind the *pardah*, who were identified by the defendant No. 1 as his wives, touch the pen. The lower Courts have rightly held that the deed is duly attested. No other ground is urged. The appeal fails and is dismissed with costs.

Appeal dismissed.

(2) 3 Ind. Cas 311; 14 C. W. N. 165.
(3) 5 Ind. Cas. 5.9; 37 C. 526; 14 C. W. N. 974; 11 C. L. J. 563.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 18 OF 1920.
April 12, 19 0
Present:—Mr Justice Rafique and
Mr. Justice Piggott.
Kunwar AIDAL SINGH—DEFENDANT—PETITIONER
versus
L. PEAREY LAL AND OTHERS—PLAINTIFFS—OPPOSITE PARTIES

Civil Procedure Code (Act V of 1908), s. 115—Interlocutory order deciding preliminary issues—Revision, whether entertainable.

An application for revision is not entertainable from an order deciding preliminary issues in a suit, where such order would be appealable when the suit is finally decided

Civil revision against the order of the Subordinate Judge, Agra, dated the 5th February 1920.

Messrs. *U. K. Baipai* and *N. P. Asthana*, for the Petitioner.

Messrs. *B. E. O'Conor* and *Baleshwari Prasad*, for the Opposite Party.

JUDGMENT.—The two Applications Nos. 18 and 19 of 1920 are applications in revision and have arisen out of two suits filed in the Court below on foot of three mortgages. The common defence to the two suits was that they were bad for misjoinder of causes of action and of parties and that the plaintiff was seeking a partial sale which was not

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permissible under the law. The lower Court disposed of both the points against the applicants. They have, therefore, come up in revision to this Court and contend that the Judge of the Court below was in error in deciding the said issues against the applicants. We think that the present applications are not entertainable. The points that have been decided against the applicants can be made the subject matter of appeals if the two suits are eventually decided against the applicants. The applications, therefore, fail and are dismissed with costs, including fees in this Court on the higher scale.

Application dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 323 OF 1919.
December 8, 1919.
Present:—Mr. Justice Chatterjea and
Mr. Justice Panton.
MAJARADDIN KABIRAJ—PETITIONER
versus
MAJIBAR RAHAMAN BISWAS AND OTHERS
—OPPOSITE PARTIES.

Appeal—Finding of first Court not concurred in by Appellate Court—Duty of Appellate Court.

Where an Appellate Court does not find itself in agreement with the finding of the trial Court, it should come to an independent finding of its own upon the evidence on the record [p 24', cols. 1 & 2.]

Rule against the order of the District Judge, Nadia.

FACTS appear from the judgment.

Mr. *K. Ahmed* (with him Babu *Sarat Ch. Mookerjee*), for the Petitioner.—The petitioner is a private purchaser. Opposite party No. 1 is the auction purchaser. Opposite parties Nos 2 and 3 are decree holders. An application was made for setting aside the sale under Order XXI, rule 90, of the Code of Civil Procedure. The first Court set aside the sale, but on appeal its judgment was reversed by the District Judge. The property in dispute is an occupancy holding which was purchased by me sometime previous to the auction sale for Rs. 400. The value set out in the proclamation was Rs. 75 only. The property was sold at Rs 300. The first Court found, as a matter of fact, that the price

was inadequate. The learned Judge relying on the finding that the price was adequate which was purely as slip of the pen, simply reversed the decision of the Munsif without giving his reasons therefor. My grievance is that the Judge proceeded on a misapprehension of the Munsif's findings and that he erred in law in not coming to an independent finding of his own on the point. A judgment of reversal ought to contain the reasons for the reversal. The case ought to go back for re-hearing.

Babu *Bireswar Bagchi* (for Babu *Narendra K. Bose*), for the Opposite Parties.—The Munsif found that the price at which the property was sold was not inadequate. The learned Judge at most misread the Munsif's judgment. The Judge distinctly stated in his judgment that he "saw no reason not to accept the findings" of the learned Munsif. I submit that amounts to an independent finding and is sufficient reason for the reversal of the learned Munsif's judgment. He must have gone through the evidence. The way in which he records his finding sufficiently bears that out. The learned Judge is perfectly right in his finding. My next point is that the case does not fall within section 115, Civil Procedure Code, inasmuch as there is no irregularity materially prejudicing the petitioner's interests, nor has the Court exercised its jurisdiction wrongfully. Refers to *Kumar Chandra Kishore Roy* v. *Basat Ali* (1). That case was not much stronger than the present one.

Mr. *K. Ahmed* in reply.

JUDGMENT.—It seems to us that the learned District Judge did not arrive at an independent finding of his own upon the evidence on the record, but proceeded upon a misapprehension that the Court of first instance had found that the price fetched at the sale was adequate, which was obviously due to a slip of the pen as a reading of the entire judgment will show. The learned Judge apparently did not consider that he was reversing the finding of the Munsif, as he merely says that he saw no reason not to accept the finding of the Munsif. We think that in these circumstances the Judge should come to an independent finding of his own upon the evidence on the record.

The case is accordingly remanded to the lower Appellate Court for re hearing of the appeal. Costs, one gold *mohur*, to abide the result.

Case remanded.

(1) 44 Ind. Cas. 763; 27 C. L. J. 418; 22 C. W. N. 627.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 54-B OF 1916.

September 5, 1917.

Present :—Mr. Mittra, A. J. C.

PENTAYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KESHEORAO—PLAINTIFF—RESPONDENT.

Stamp Act (II of 1899), s. 35—Unstamped document, validation of—Original not forthcoming, effect of—Document lost, contents of, proof of—Oral evidence, admissibility of—Negotiable Instruments Act (XXVI of 1881), s. 80—Pro-note—Agreement to pay interest, proof of—Secondary evidence, admissibility of—Interest, rate of, allowable—Period for which interest payable.

The procedure for validating unstamped instruments prescribed by Chapter IV of the Stamp Act has no application to an instrument the original of which is lost and is not forthcoming, as under section 35 of the Act it is only an original unstamped instrument which can be validated by payment of stamp duty and penalty. [p. 250, col. 2.]

Where the original of an instrument is not forthcoming, oral evidence to prove its contents is inadmissible [p. 251, col. 1.]

Secondary evidence of a written agreement to pay interest on a pro-note at a certain rate is inadmissible, and interest can only be awarded in accordance with section 80 of the Negotiable Instruments Act [p. 251, col. 1.]

In the case of a promissory note payable on demand, the date of the demand and not of the making of the note must be taken as the point from which to calculate interest. [p. 251, col. 1.]

Appeal against the decree of the Additional District Judge, Amraoti, dated the 9th November 1916.

Mr. *G. V. Deshmukh*, for the Appellants.

Mr. *M. V. Joshi*, for the Respondent.

JUDGMENT.—The plaintiff sues upon a promissory note for Rs. 1,000 admittedly executed on the 20th December 1912 by

PENTAYA v. KESHERAO.

Pentaya, defendant No. 1, and his son Balanna, defendant No. 2. The plaintiff claims interest at the rate of 12 per cent. per annum though the promissory note is silent on the point. The plaint alleges a promise to pay this rate of interest, but does not mention that there was a written agreement to this effect. According to the plaintiff Rs. 70 was paid on the 28th July 1913 by way of interest. The plaint says that the cause of action accrued on the 28th November 1915, as on that date the plaintiff made a final demand for payment. The defence was that there was no agreement to pay interest. The defendants denied the payment of Rs. 70 either as interest or principal. They also pleaded limitation. The plaintiff's Pleader in reply stated that the amount of Rs. 70 was specifically paid as interest and interest was agreed at 1 per cent. per mensem and the defendant No. 2 passed a chit along with the pro-note stipulating for the payment of interest. The claim was also within time according to the plaintiff by reason of an acknowledgment contained in the letter, dated 10th October 1914, written by defendant No. 2 Balanna, who was alleged to be the managing member of the family and who according to the plaintiff had authority to bind the defendant No. 1. These pleadings were recorded on the 17th January 1916. On the 21th January the defendant No. 2 was examined. He denied the letter dated 10th October 1914. No interest according to him was agreed to be paid and the amount was not to carry interest whatsoever.

The plaintiff's case is that there was a written agreement which he describes as a chit signed by Balanna, which was filed with the plaint and which he found was missing from the record on the 24th January and in lieu of which the chit 'A' has been substituted.

The lower Court has held that secondary evidence of the contents of the missing chit is admissible, inasmuch as its loss has been proved though its abstraction from the record is not believed by the learned Additional District Judge. The lower Court also finds the payment of Rs. 70 as interest, which has the effect of saving limitation. It also holds the acknowledgment (Exhibit P-9) dated the 10th October 1914 proved. According to the findings of the lower Court the two defendants are members of a joint family of which both are managers and the act of one is binding on the other. Upon these findings the plaintiff's case has been decreed in full.

The defendants have filed this appeal. The first point for consideration is whether secondary evidence was admissible to prove the contents of the missing chit. The evidence of the plaintiff and his clerk shows that at the foot of the promissory note a few words were added stating the agreement to pay interest at 1 per cent. per mensem, and this was only signed by Balanna. This slip of paper was separated from the promissory note, as the plaintiff says he was not aware whether the promissory note containing such an agreement to pay interest could be made on one anna stamp. The intention of the parties, therefore, was to treat the agreement to pay interest as something separate from the promissory note. It is admitted that the original chit was unstamped and it is also admitted that the chit 'A' is not a copy of it but substantially represents the purport of the missing chit. I am of opinion that secondary evidence is not admissible as the original is unstamped. If the original had been forthcoming, then under section 35 of the Stamp Act it could have been admitted in evidence on payment of penalty. But the procedure laid down in Chapter IV of the Stamp Act clearly shows that only original instruments can be validated by payment of the deficit stamp duty and penalty: for example, section 38 requires that the Court shall send to the Collector an authenticated copy of such instrument together with a certificate in writing stating the amount of duty and penalty levied in respect thereof. An authenticated copy of a lost instrument cannot be made, therefore, a lost instrument cannot be validated on payment of the penalty. This view is supported by the decision of the Madras High Court in *Sennandan* v. *Kollakiran* (1), which follows the earlier decision, *Muttukiruppa Kaundan* v. *Rama Pillai* 2). As

(1) 2 M. 103; 4 Ind. Jur. 499; 1 Ind. Dec. (N. S.) 416.

(2) 3 M. H. C. R. 158.

Secondary evidence of the written agreement is not admissible, plaintiff is only entitled to interest in accordance with the provisions of section 80 of the Negotiable Instruments Act.

As held in *Best* v. *Haji Muhammad Sait* (3) the plaintiff can get interest at 6 per cent. per annum from the date on which the promissory note ought to have been paid. To quote from the judgment already referred to, the note being payable on demand it is not the date of the making but the date of demand that must be taken as the point from which to calculate interest. In the plaint the date of first demand is given as the 29th September 1914 and interest will be calculated from this date.

The defendants try to prove by oral evidence an agreement not to charge interest. I agree with the opinion expressed by this Court in *Rangappa* v. *Bismilla Khan* (4) that such oral evidence is not admissible. I have also not the least doubt that the defendants' story that there was an agreement not to charge interest is absolutely false. The plaintiff did not know the defendants and it was on the recommendation of a Pleader who certified to the honesty and solvency of the defendants that he was induced to lend the sum. There is nothing in the letter to indicate that the plaintiff was to finance the defendants without interest.

There remains for me to consider whether the plaintiff's suit is in time. The plaintiff has pleaded a repayment of Rs. 70 as interest. He has produced his *rokar*, which shows an entry that the sum of Rs. 70 was paid towards interest. The defendants deny any payment at all, whether for principal or interest. The *rokar* has been produced in this Court and was inspected by the learned Counsel for the appellants. There is nothing suspicious in this entry. There was no reason why the plaintiff should debit himself with Rs. 70 in 1913 when he had ample time within which to file a suit. The plaintiff and his clerk have sworn to this payment of interest. There is also the evidence of Dattatrai (P. W. No. 5), who supports the plaintiff. I hold agreeing with the lower Court that the payment of Rs. 70 as interest by both the defendants has been proved. I also agree with the lower Court that the letter (Exhibit P-9) has been duly proved and would operate as an acknowledgment and save limitation as regards one of the defendants; but it is unnecessary to go into this subject, as I have already come to the conclusion that the suit is not barred by limitation. The parties are agreed that upon the findings arrived at by me the plaintiff is entitled to Rs. 1,106 as the amount due to him on the date of the plaint. The decree of the lower Court will be modified by substituting this amount for Rs. 1,300. The appellants will pay the respondent's costs, as they have failed on all the points taken by them in the memorandum of appeal.

Appeal partly allowed.

(3) 23 M. 18; 8 Ind. Dec. (N. S.) 407.
(4) 32 Ind. Cas. 238; 12 N. L. R. 9.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2467 OF 1918.

June 23, 1919.

Present:—Mr. Justice Shadi Lal.

GHANSHAM DAS—CREDITOR—APPELLANT

versus

PUBLIC BANKING AND INSURANCE COMPANY IN LIQUIDATION AND OTHERS—RESPONDENTS.

Company in liquidation—Solvency, test of—Interest after commencement of liquidation, liability to pay—Proof of interest, whether necessary.

If a company in liquidation is, or ultimately turns out to be, solvent, interest is payable upon any debts which carry interest, or upon which a right to interest has been acquired, out of the surplus assets remaining after payment of principal and interest up to the date of the winding-up order. [p 252, col .]

The solvency of a company is established by the fact that after the payment of the principal and interest up to the date of the winding-up, there are some assets which may be realized and will be sufficient to meet the liability on account of interest which accrued due after the commencement of the liquidation [p 25 , cols & .]

No proof is necessary for interest after the commencement of the winding-up, the creditor, if his debt is one that bears interest, gets it, if there is a surplus, as incidental to his debt, irrespective of

the question whether any mention of the interest was made in the order adjudicating upon his claim. [p 2 2, col 2; p 253, col. 1.]

Miscellaneous first appeal from the order of the District Judge, in charge of liquidation work, Lahore, dated the 28th June 1918.

Mr. *Hargopal*, for the Appellant.

Mr. *S. K. Mukerji*, for the Respondents.

JUDGMENT.—The appellant Ghansham Das, who purchased the deposit receipts of certain depositors, claims interest upon the debt due to him upon those receipts subsequent to the winding up. Now, so far as the claim of the creditors to recover interest after the date of the commencement of the winding-up is concerned, the law is to the following effect:—

If the company is, or ultimately turns out to be, solvent, interest is payable upon any debts which carry interest, or upon which a right to interest has been acquired, out of the surplus assets remaining after payment of principal and interest up to the date of the winding up order—*vide* Buckley on Companies, 9th Edition, page 474.

The question, then, is whether the assets of the company are more than sufficient to pay all moneys due at the date of the winding-up on account of principal and interest on such debts as bear interest. Now, it appears that the claims of all the creditors have either been discharged or will be discharged by the persons who have purchased some of the assets of the company and undertaken the liability to satisfy those claims. Further, it is beyond dispute that the contributories have so far paid only Rs. 50 in respect of their shares of Rs. 100 each, and can be called upon to pay the balance of the money due upon those shares. There are certainly surplus assets out of which interest subsequent to the winding up can be paid to the creditors, and I cannot understand why the District Judge says that the company is "as a matter of fact not solvent at the present moment." The solvency of the company has been fully established by the fact that after the payment of the principal and interest up to the date of the winding up there are some assets which may be realized and will be sufficient to meet the liability on account of interest which accrued due after the commencement of the liquidation.

The legal right of the creditors of this Company to recover subsequent interest does not, therefore, admit of any doubt, and the next question is whether the appellant has, by his act or conduct, forfeited his right. Now, so far as the meeting of the creditors and the contributories convened for the 16th February 1918 is concerned, it is sufficient to say that the notice convening the meeting confined itself to the question of the sale of the debts of the Company, and the matter of interest to be payable to creditors was neither mentioned in the notice nor taken up at the meeting. The appellant's absence from the meeting cannot, therefore, debar him from recovering interest.

It appears that the appellant was, prior to the purchase by him of the deposit receipts, Superintendent of the Liquidation Office, and consequently acquired information which he utilized in order to benefit himself at the expense of the creditors. His conduct is no doubt reprehensible, but there is nothing that extinguishes his legal right to recover interest.

Mr. Mukerji for the liquidator contends that as neither the appellant nor his predecessors-in interest originally prayed for interest after the commencement of the winding up, he cannot now ask the Court to award him interest. As pointed out by Stiebel in his book on Company Law, page 1222, no proof is necessary for interest after the commencement of the winding up; the creditor, if his debt is one that bears interest, gets it, if there is a surplus, as incidental to his debt. To the same effect are the following observations by Buckley, J, in the well-known case *Duncan Co., in re* (1):—

"Now what do you admit to proof for dividend in the winding up of a Company? The amount of the debt at the commencement of the winding-up. That has nothing whatever to do with the payment of interest accruing due after the winding-up, if the Company turns out to be

(1) (1905) 1 Ch. D. 207; 74 L. J. Ch. 183; 92 L. T. 103; 53 W. R. 298; 12 Manson 38.

solvent. There could not, until the fact of solvency was ascertained, be a right to claim that interest. The sum for which proof can be made is the amount which is entitled to rank for dividend against the assets to such an extent as they will go."

The Company has now turned out to be solvent, and the creditor is consequently entitled to subsequent interest irrespective of the question whether any mention of the interest was made in the order adjudicating upon his claim.

Though the appellant is entitled to interest out of the surplus assets of the Company, I do not think that he can recover it from the persons who have purchased some of the assets of the Company. The liability of the vendees depends upon the contract entered into by them; and upon that point the learned District Judge, who settled the matter at the meeting held on the 16th February 1918, says "that no mention of interest was made, that none proposed to pay interest, and I myself in writing the order never intended that interest should be paid." This concludes the question so far as the liability of the vendees is concerned.

For the aforesaid reasons I accept the appeal so far as to hold that the appellant is entitled to interest out of the money which is yet to be realized from the contributories. The District Judge is directed to make such call upon the contributories as is sufficient to discharge the claim for interest. In view of the conduct of the appellant described above, I leave the parties to bear their own costs in this Court.

Appeal accepted.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 214 OF 1919.

December 1, 1919.

Present:—Mr. Pratt, J. C.

MA YE BAW AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG SHWE HMAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption, suit for—Mortgage converted into sale—Sale, validity of, whether can be questioned by mortgagor.

Plaintiff sued to redeem a mortgage effected by himself. The defence was that the plaintiff had converted the mortgage into a sale, and this was established. Plaintiff objected to the validity of the sale on the ground that he had no power to effect it:

Held, that plaintiff had no *locus standi* to impugn the validity of the sale. [p. 254, col. 1.]

Mr. *O. G. Pillay*, for the Appellants.

Mr. *P. N. Bose*, for the Respondents.

JUDGMENT.—Plaintiff, Maung Shwe Hman, sued for redemption of two plots of land.

His case was that the land had been mortgaged orally by his father, Maung Te to defendant, Ma Ye Baw, and her deceased husband, Maung San, for Rs. 10 fifteen years previously.

Subsequently after Maung Te's death Maung Shwe Hman took a further advance of Rs. 50 from Maung San on the same land. The land being undivided ancestral estate, plaintiff asked that his two sisters and co-heirs, Ma Ein Zan and Ma Me Nyan, might be given an opportunity to be added as plaintiffs.

Ma Me Nyan was brought on as plaintiff by her own desire and nominated Shwe Hman as her attorney. The plaint was not otherwise changed. The Court of first instance found that five years ago there was a dispute between Shwe Hman and Maung San because the latter refused to allow redemption of the land. On the suggestion of the village Pongyi the matter was referred to arbitration and in accordance with the decision of the elders Maung San paid a further sum of Rs. 50 and converted the mortgage into an outright sale. The suit was accordingly dismissed.

In the first Court the Advocate for plaintiff argued that in any case there could be no valid sale without the consent of the co-heirs.

The Court, however, found that as they were in the village and did not object, this contention had no weight and in any case they could still sue to set aside the sale transaction.

As a matter of fact plaintiffs were not entitled to be heard on the question of the validity of the sale, which was not in issue, without first amending the plaint.

Plaintiff, Shwe Hman, relied on a mortgage effected by him. The defence was that he had converted the mortgage into a sale and this was proved. Plaintiff, having alleged a mortgage and the transaction having been proved to be a sale, had no *locus standi* to impugn the validity of the sale. Obviously, if he had power to effect a mortgage, he could effect a sale, and in any case he could not be allowed to take advantage of his own malfeasance.

The first Appellate Court found that the sale was proved but that, the consent of the co-heirs not having been obtained, it was invalid and granted a mortgage decree.

This was to my mind entirely without justification. There can be no doubt at all that in the transaction Shwe Hman acted as head of the family and for his sisters. They must have been well aware of the transaction, which was referred to the arbitration of the elders at the suggestion of the Pongyi. They did not protest nor did they take any steps to set aside the sale.

Even when one of them joined plaintiff's suit, she did not suggest that her brother had not the power to mortgage the property.

It must be assumed, therefore, that the sale was effected by Shwe Hman with the consent of the co-heirs

Apart from the question of consent the question of the validity of the sale did not arise in the pleadings and plaintiffs were not entitled to succeed on a case, which they had not set up.

I reverse the finding and decree of the District Court and restore the finding and decree of the Township Court with all costs.

Appeal decreed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1140 OF 1915.

May 22, 1919.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

BRIJ LAL—PLAINTIFF—APPELLANT

versus

DURGA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 244—Execution of decree—Sale of share of co-parcener in joint Hindu family—Purchaser, position of—Suit for partition and allotment of share, maintainability of.

A suit by the auction-purchaser of the share of a Hindu co-parcener in joint family property for partition of the joint property and delivery to him of what might be allotted to the share of the judgment-debtor would not be barred by the provisions of section 244 of the Civil Procedure Code of 1882 The mere fact that the decree-holder himself is the purchaser would make no difference. [p. 256, cols. 1 & 2]

Second appeal from the decree of the Senior Subordinate Judge, Ferozepore, dated the th February 1915, affirming that of the Munsif, 2nd Class, Zira, District Ferozepore, dated the 17th December 1913.

The Hon'ble Bakshi *Sohan Lal*, for the Appellant

Mr. *Shamir Chand*, for the Respondents.

JUDGMENT.—The facts of this case are as follows :—

One Ganpat Rai obtained a money decree for Rs. 939 inclusive of costs on the 10th August 1899 against one Lajpat. On the 25th August 1899 an application was made asking for the attachment and sale of Lajpat's share in certain property, which belonged to a joint Hindu family of which Lajpat was a member. The other members of the family objected to the attachment in that form, contending that Lajpat's share should first of all be ascertained. This was done and the share was found to be 1/6th of the property sought to be attached. Accordingly this 1/6th share was sold on the 4th June 1901 and purchased by Ganpat. The sale was duly confirmed and the necessary sale certificate issued. Ganpat then applied for possession by partition of the share purchased by him, to which request the other members of the family objected on the ground that no possession could be given until the property had been partitioned. On the 22nd November 1902 an order was made by the Court concerned directing that the purchaser should

sue for partition in a separate suit as partition could not be effected in execution proceedings. Nothing further was done until the 10th June 1913, when the present suit was instituted by the son of Ganpat. This suit was dismissed on a preliminary objection, the Court holding that a separate suit was barred by the provisions of section 47, Civil Procedure Code. The learned District Judge on appeal upheld this decision and the plaintiff appellant has thereupon come up to this Court.

The Courts below have relied on *Bhaga Shah* v. *Bura Shah* (1) and *Sheo Narain* v. *Nur Muhammad* (2). *Bhaga Shah* v. *Bura Shah* (1), however, is not really in point as the sale had never been confirmed, while *Sheo Narain* v. *Nur Muhammad* (2) was overruled by a Full Bench of the same Court in a decision reported as *Bhaguati* v. *Banwari Lal* (3). On the other hand, the present case is similar to that reported as *Yelumalai Chetti* v. *Srinivasa Chetti* (4), where it was held that the only right acquired by the Court sale was a right to effectuate the sale by a suit for partition of the joint property of the co-parceners and the delivery to the plaintiffs of what might be allotted to the share of the judgment-debtor. It was further held that the executing Court was not competent, on a mere application for execution by the purchaser, to enforce the right of the purchaser by an order for partition. That case dealt with a purchaser at the sale other than the decree-holder and to that extent might be considered distinguishable from the present one. In *Bhagwati* v. *Banwari Lal* (3) it was held, however, that the mere fact that the purchaser was also a decree holder made no difference. It seems to us that these two decisions are correct. Before the decree could be given effect to and possession made over, it was obviously necessary that a partition should first be effected. Whether or not section 47, Civil Procedure Code, would empower the executing Court to effect partition, it is perfectly clear that section 244 of the old Code did not give an executing Court such powers. We accordingly follow the two decisions referred to above and hold that the present suit is not barred.

We accept the appeal and setting aside the orders of the Courts below return the case to the Court of first instance for disposal in accordance with law. Stamp on this appeal will be refunded and other costs will follow the event.

Appeal accepted; Case remanded.

(1) 58 P. R. 1888.
(2) 30 A. 72: 5 A. L. J. 20; A. W. N. (1908) 12.
(3) 1 Ind. Cas. 416;31 A. 82 (F. B); 6 A. L. J. 71; 5 M. L. T. 185.
(4) 29 M. 294.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL NO. 239 OF 1919.

November 20, 1919.

Present:—Mr. Pratt, J. C.

MA ON ME—APPELLANT

versus

MA PYA GYI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 23—Ex parte *decree—Appellate Court, power of, to remand case—Inherent power, when to be exercised.*

An Appellate Court has inherent power not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case. [p 256, col 1.]

The question whether it is necessary for the ends of justice to exercise such power of remand must depend upon the circumstances of the particular case and in exercising such jurisdiction, the Court must be careful to see that its decision is based on general legal principles and subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. [p 256, col. 1.]

Mr. *S. Mukerjee*, for the Appellant.

Mr. *P. N. Bose*, for the Respondents.

JUDGMENT.—Plaintiff obtained an *ex parte* decree against defendants.

On appeal the District Court held that the case ought not to have been proceeded with *ex parte* and remanded the case for hearing of evidence for the defence and judgment on the merits.

It is not necessary to recapitulate the facts of the case. Suffice it to say that I entirely agree with the first Appellate Court that the trying Court ought not

to have proceeded *ex parte*, still less to have refused to allow defendants to contest the suit, when they petitioned against the *ex parte* trial.

It is contended on appeal in this Court that as the suit had not been disposed of on a preliminary point, the lower Court of Appeal had no power to remand the suit under Order XLI, rule 23. This is on the face of it a correct view of the law. The Judge in his order does not, however, quote any particular rule of law and apparently considered he was entitled to remand the suit for hearing on its merits under his inherent powers as a Court.

There is ample authority for this view.

In *Perumbra Nayar* v. *Subrahmanian Patter* (1) a Bench of the Madras High Court held that notwithstanding sections 562 and 564 of the Code an Appellate Court has inherent power under such circumstances not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re trial of the case.

This ruling was followed by a Full Bench of the same Court in *Sadasiva Krishna Ayyar* v. *Kuppan Ayyangar* (2) and I fully agree with the reasoning of the learned Chief Justice in that case.

A similar view was taken by a Full Bench of the Calcutta High Court in *Abdul Karim Abu Ahmed Khan Ghuznavi* v. *Allahabad Bank Limited* 3).

It was there laid down that the question whether it is necessary for the ends of justice to exercise such power of remand must depend upon the circumstances of the particular case and in exercising such jurisdiction, the Court must be careful to see that its decision is based on general legal principles and subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked.

Accepting these reservations, the present case was one, where a remand for disposal on its merits was clearly the most satisfactory solution of the case.

(1 23 M. 445; 10 M. L. J. 61; 8 Ind. Dec. (N. S.) 712.

(2 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479.

(3) 41 Ind. Cas. 698; 21 C. W. N. 877; 26 C. L. J. 49; 44 C. 929.

Defendants were entitled to have the case re-opened, whilst a mere remand for further evidence and a decision of the case on its merits by the first Appellate Court would not have been satisfactory.

The facts in *Maung Htu* v. *Maung Che* (4) were different, as the evidence on both sides was recorded and the trial complete before the remand by the Appellate Court was made. There is nothing in that judgment, which conflicts with the view that the first Appellate Court has in a case like the present inherent power to remand a suit for hearing and disposal on its merits. I hold the Court had inherent power to pass the order which it did and that the exercise of the power was justified by the circumstances of the case

The appeal is dismissed with costs.

Appeal dismissed.

(4) C. A. No. 120 of 1918.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2516 OF 1915.

May 21, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Martineau.

HIRA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BUTA—PLAINTIFF AND BHUDHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—After-born son, whether divests his mother's estate from date of birth or from date of father's death—Alienation by enceinte *widow, legality of.*

The rights of a son under Hindu Law in the estate left by his father commence at birth and not before. Therefore, an after-born son divests his mother's estate as a widow from the moment of his birth and not from the moment of his father's death. Between the date of the death of her husband and that of the birth of her son, the widow is competent to alienate her husband's property for necessity. [p. 258, col. 2; p. 259, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 27th May 1915, confirming that of the Munsif, 1st Class, Jullundur, dated the 14th November 1914.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Kanwar Narain*, for the Respondents.

JUDGMENT.—The house and site in suit belonged to Thakur, who died in May 1911. On the 4th of July 1911 his widow, *Musammat* Ralli, sold the property to defendants Nos. 3 and 4. The plaintiff, who is the son of Thakur, sues for possession contesting the validity of the sale effected by his mother. He brought the suit under the impression that his mother had sold the property as his guardian during his minority, but it turned out that she had sold it as its owner, five days before the plaintiff was born.

The Munsif held that the plaintiff, who was in his mother's womb at the time of his father's death, was in contemplation of law actually existing at that time, and that on his birth he divested the estate of his mother whose title was inferior to his own. He held in consequence that at the time of the sale the plaintiff was the owner of the property and not *Musammat* Ralli, and that, therefore, the sale by her was void. He accordingly passed a decree in the plaintiff's favour without going into the question of necessity.

On appeal the District Judge held that any action taken by *Musammat* Ralli in regard to the property should be regarded as action taken by a guardian on behalf of an infant in the womb and would have to be justified by necessity. He did not, however, go into the question whether necessity for the sale had been proved or not. He upheld the decree, apparently on the ground that a widow with child was not competent to alienate property to which she would have no right if the child turned out to be a son—a position which seems hardly consistent with the view first expressed by him that she could sell for necessity.

The defendants have preferred a second appeal to this Court. The appeal came before a learned Judge in Chambers, who referred the following question to a Division Bench:—

Under Hindu Law was the plaintiff's mother, *Musammat* Ralli, absolute owner of the property in dispute during the interval between her husband's death and the birth of the plaintiff, who was in her womb at the time of the death of her husband, and was she empowered under Hindu Law to sell the said property as owner thereof shortly before the plaintiff was born?

Mr. Tek Chand, who appears on behalf of the appellants, informs us that his argument was not correctly understood by the learned Judge. He does not contend that *Musammat* Ralli was the absolute owner of the property during the interval between her husband's death and the plaintiff's birth, but contends that she was the owner with the usual widow's estate, with power to alienate only for necessity. The question referred to the Division Bench does not, therefore, arise. The learned Counsel on both sides have, however, agreed that the appeal should be decided by this Bench, and it has accordingly been argued before us.

It is not disputed that the right of succession under Hindu Law vests immediately on the death of the owner of the property and cannot remain in abeyance, nor is it disputed that the plaintiff divested the estate of his mother whose title was inferior to his own, and that he is competent to contest the validity of the sale. The question is only whether *Musammat* Ralli's estate was divested from the date of the plaintiff's birth or from the date of his father's death.

Jatindra Mohan Tagore v. *Ganendra Mohan Tagore* (1) is cited by Mr. Kanwar Narain on behalf of the respondents to show that under Hindu Law a gift to a child *en ventre sa mere* is valid. That ruling does not cover the point before us.

In *Sabapathi* v. *Somasundaram* (2) it was held that under Hindu Law a son conceived was equal to a son born, and that accordingly an alienation by a Hindu to a *bona fide* purchaser for value was liable to be set aside by a son, who was in his mother's womb at the time of the alienation, to the extent of his share.

Mangli v. *Sobha Singh* (3) was a case in which a suit was brought for pre-emption by a person who had not been born at the time of the sale. The Court held that under Hindu Law a child begotten had, if

(1) 9 B. L. R. 377 (P. C.); 18 W. R. 359; 2 Suth. P. C. J. 642; 3 Sar. P. C. J. 82.

(2) 16 M. 75; 2 M. L. J. 244; 5 Ind. Dec. (N. s.) 761.

(3) 20 Ind. Cas. 272; 1 P. L. R. 1914; 218 P. W. R. 1913.

subsequently born, all the rights of a child in existence.

In *Minakshi* v. *Virappa* (4) it was held that in accordance with Hindu Law obtaining in the Madras Presidency the right of a son in the womb to ancestral property could not be defeated by a Will or gift.

Ram Krishna v. *Tripurabai* (5) relates to the effect of an adoption by a Hindu widow on a transfer previously made by her of a part of her estate. That case is not in point as the transfer was one made without necessity.

In *Hanmant Ramchandra* v. *Bhimacharya* (6) it was held that a posthumous son took the family property by right of survivorship on the principle of relation back to the time of the father's death, which applied in the analogous case of inheritance and partition, and that the rights of such a son stood on the same footing as those of a son *in esse* at the time of the father's death.

On behalf of the appellants Mr. Tek Chand has referred to (*i*) paragraph 499 of Mayne's Hindu Law, 8th Edition, in which it is stated that a child who is in the mother's womb at the time of the death is, in contemplation of law, actually existing and will *on his birth* divest the estate of any person with a title inferior to his own who has taken in the meantime; (*ii*) West and Buhler's Digest of Hindu Law, 3rd Edition, Volume 1, at page 803, where it is stated that it is only on the actual birth of the son that his co-ownership arises; and (*iii*) *Bamundoss Mookerjee* v. *Musammat Tarinee* (7), which is a judgment of the Privy Council in an appeal from a decision of the Sudder Dewanny Court of Bengal.

This last judgment appears to settle the question in dispute. Their Lordships of the Privy Council said that they entirely agreed in the principles laid down in the judgment of the Sudder Court, and expressed their entire concurrence in the judgment of that Court on the question of law. We have, therefore, to return to the judgment of the Sudder Court in that case to see what was decided.

The question in the case was whether a widow, who had been empowered by her husband to adopt a son, could sue in her own right for a share of the ancestral estate. The argument for the appellant was that a widow having permission to adopt was to be regarded as *enceinte*. The Court accordingly went into the question whether a son's rights in the estate commenced at birth or while he was in the mother's womb, remarking on page 181: "If no text can be shown for the suspension of the rights of a widow actually pregnant, it is still more certain that there is no similar provision for divestiture of right in the case of a widow held only to be constructively pregnant of a son through the effect of a permission to adopt." The learned Judges quoted the following passage from Colebrooke's translation of the Dayabhaga, Chapter 1, section 45: "They who are born and they who are yet unbegotton, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is ensured." With regard to this passage they observed that the very terms of the text providing for sons yet unbegotton referred to a contingent and future, and not to a present, right. At page 183 they said: "The afterborn son's right is to his share of the estate as it stands at the time of his birth, and not retrospectively with reference to its state at any supposed period of his conception." Further on, at page 184, with reference to a remark made by a certain commentator, they said: "Here is an express and indeed, to our minds, a conclusive reference to actual birth after the death of a father as the period of commencement of right." Again on page 189, the learned Judges remarked: "The truth is that the supposition of a positive and actual right vested in an embryo which may never come into full existence is one which must almost be rejected on the mere statement of it."

It is clear, therefore, from the above mentioned judgment of the Sudder Court of Bengal, which was adopted in its entirety by the Privy Council, that the rights of a son under Hindu Law in the estate left by his father commence at birth and not before. Even it this were not so, the widow would still be competent to make an alienation for the benefit of her unborn child. To hold that she cannot alienate any of the property left by her husband at all till the child is

(4) 8 M. 89; 9 Ind. Jur. 21; 3 Ind. Dec. (N. S.) 62.
(5) 1 Ind. Cas. 647; 33 B. 88; 10 Bom. L. R. 1029.
(6) 12 B. 105; 12 Ind. Jur. 274; 6 Ind. Dec. (N. S.) 556.
(7) 7 M. I. A. 169 (P. C.); 1 Sar. P. C. J. 616; 19 E. R. 273.

born would be anomalous, as the child may prove to be a daughter or may be still born, in which case an alienation made by her before the child's birth would, if made for necessity, be valid. Moreover, we do not think that there is anything in Hindu Law in support of the proposition that a pregnant widow in possession of the usual life-estate has no power to deal with it at all until she be delivered of her child, and has in fact less power than she has after the birth, when she can admittedly alienate for necessity.

Following *Bamundoss Mookerjee* v. *Musammat Tarinee* (7) we hold that *Musammat* Ralli's estate was divested only on the plaintiff's birth, and that she was the owner of the property on the date of the sale and was competent to alienate it for necessity.

The other question arising in the case has not been decided by the lower Court. We accordingly accept the appeal, set aside the decree of the lower Courts, and remand the case to the Court of first instance under Order XLI, rule 23, Civil Procedure Code, for disposal according to law. Stamps on the appeals in this Court and in the lower Appellate Court will be refunded, and other costs will be costs in the case.

Appeal accepted;
Case remanded.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 53 OF 1919.

December 8, 1919.

Present:—Mr. Pratt, J. C.

MAUNG SAW—APPLICANT

versus

INGRASWAMY BY HIS ASSIGNEE E. V. MAHOMED EBRAHIM—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 8—Pro-note—Stranger, whether can sue on note—Evidence Act (I of 1872), s. 92—Evidence to show that consideration for pro-note was advanced by person other than payee, admissiblitiy of.

Section 8 of the Negotiable Instruments Act prevents any person suing on a negotiable instrument, who is not named therein as the payee, or has not become entitled as endorsee or assignee.

Under section 92 of the Evidence Act, evidence is inadmissible to prove that the consideration for a promissory note was advanced by some person other than the payee of the note.

Mr. *L. Pillay*, for the Applicant.

Mr. *S. Vasudevan*, for the Respondent.

JUDGMENT.—Plaintiff Ingraswamy sued and obtained a decree on a promissory note drawn in favour of one Mahomed Ebrahim. The note had neither been assigned to nor endorsed in favour of plaintiff.

Evidence was adduced to show that plaintiff really lent the money and not Ebrahim. Both the lower Courts have entirely overlooked the effect of section 92 of the Evidence Act. The evidence that plaintiff lent the money was in contradiction of the terms of the document. There was no allegation of fraud or misrepresentation on the part of defendant and the evidence was, therefore, inadmissible.

Plaintiff was not entitled in his own name to the possession of the note and was not, therefore, the holder of the note under section 8 of the Negotiable Instruments Act.

The effect of the section is quite clear and prevents any person suing on a negotiable instrument, who is not named therein as the payee, or has not become entitled as endorsee or assignee.

I consider the matter is one of jurisdiction and that the Courts had no jurisdiction to give plaintiff a decree, unless the note had been endorsed in his favour or assigned to him by the nominal payee.

I set aside the finding and decrees of the lower Courts and direct that the suit be dismissed with costs throughout.

Decree set aside.

SESHAGIRI RAO v. SREENIVASA RAO.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 76 OF 1918.

August 19, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

SESHAGIRI RAO AND OTHERS—PETITIONERS—APPELLANTS

versus

SREENIVASA RAO AND OTHERS—RESPONDENTS

Limitation Act (IX of 1908), Sch I, Arts. 166, 181—Execution of decree—Sale of properties belonging to stranger—Application to set aside sale—Limitation.

Where the property of a stranger to execution proceedings, *i. e.* a person who was not a party to the decree, is attached and sold, the sale is void for want of jurisdiction, and an application to set aside such a sale would not be barred if made within the period prescribed by Article 181 of Schedule I to the Limitation Act. Article 166 has no application to such a case. [p. 261, col. 1.]

Appeal against appellate order of the District Court, Chingleput, in Appeal Suit No. 203 of 1917, preferred against the order of the Court of the District Munsif, Conjeevaram, in Civil Miscellaneous Petition No. 1046 of 1916, in Original Suit No. 19 of 1904.

FACTS.—The appellants were exonerated in the suit in execution of the decree wherein the suit properties were sold. They brought the present suit for possession of their share in the suit properties as having been not affected by the sale.

The contention was that they were "parties" and so the remedy was by application within the time allotted by Article 166 of the Limitation Act. The lower Appellate Court allowed the contention that Article 166 applied.

Mr. *C. V. Ananthakrishna Aiyar* (with him Mr. *C. Sitaramiah*), for the Appellants.—In view of the fact that the appellants were 'parties' to the original suit, the Court has power to treat a suit as a proceeding under section 47, Civil Procedure Code. Article 166 has no application. For the sale has no value so far as the share of the appellants is concerned, as the sale was without notice to these appellants. It has been repeatedly held that such a sale is void *in toto*. See *Raghunath Das* v. *Sundar Das Khetri* (1), *Syam Mandal* v. *Seti Nath Banerjee* (2) Second Appeal No. 389 of 1914. The scope of Article 165 is well defined by the Full Bench in Civil Miscellaneous Second Appeal No. 106 of 1917, [*Thattantavita* v. *Puthalathan Kandi Kombi Aliassan* (3).] Article 166 is similar. In the view that the sale is void, I submit also that the time limit is the same as that for a suit on title.

Mr. *S. Rangachariar*, for the Respondents.—Even granting that the appellants' contention is correct, there is really no injustice done to them which cannot be repaired by a proper partition and suitable allotment. See *Muthiah Chettiar* v. *Bawa Sahib* (4).

JUDGMENT.—There is no dispute as to the facts in this case. A suit for maintenance was brought by one Yamuna Boyee. Some of the present appellants were defendants Nos. 9 to 12 in the suit and were added as supplemental defendants, as they belonged to a divided branch of the family. Yamuna Boyee obtained a decree for maintenance against defendants Nos. 1 to 8, and the maintenance awarded was made a charge on the shares of defendants Nos. 1 to 8 in certain properties. The appellants and their three fourths share of the properties were expressly exonerated under the decree. In 1906 the decree-holder applied for execution of the decree against defendants Nos. 1 to 8 only, and no notice of the execution proceedings was taken out to the appellants Nos. 1 to 4. Certain lands were attached as belonging to the 1st defendant in the suit and on 26th January 1910, 3 acres and 84 cents of land in Shrotriem Thenambakkam village, including the three-fourths share of the appellants, were sold in Court auction and purchased by one Murugesan Chetty, the present 9th respondent. The sale was confirmed on the 1.th July 1910 and a sale certificate issued to the purchaser on 8th November 1910, delivery of the properties being given on 16th December 1910. On 25th July 1911 (a year and 7 months after the sale) the appellants filed a suit, Original Suit No. 378

(1) 24 Ind. Cas. 304; 42 C. 72 at p. 82; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 50; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 655; 13 A. L. J. 154; 41 I. A. 251 (P. C.).

(2) 38 Ind. Cas. 493; 44 C. 954 at p. 962; 24 C. L. J. 523; 21 C. W. N. 776.

(3) 53 Ind. Cas. 437; 37 M. L. J. 340; 10 L. W. 410; 26 M. L. T. 297; (1919) M. W. N. 734; 42 M. 758 (F. B.).

(4) 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 96

of 1911, in the Conjeevaram District Munsif's Court to set aside the auction sale and for partition and recovery of their three fourths share, alleging that the sale was invalid so far as their share of the properties was concerned. The District Munsif dismissed the suit on the ground that, as the plaintiffs were parties to the suit in execution of which the sale was held, it was barred by section 47 of the Code of Civil Procedure. The District Munsif's decision was affirmed on appeal by the District Judge. In Second Appeal No. 356 of 1914 the High Court remanded the suit to the Court of first instance for disposal as a proceeding under section 47 of the Civil Procedure Code, the question whether the application was barred by limitation being left open. The lower Courts have dismissed the application as barred by Article 166 of the Limitation Act. Hence the present appeal. Mr. Ananthakrishna Iyer, for the appellants, contends that the lower Court erred in applying Article 166 of the Limitation Act and that the article applicable is Article 181, which provides a period of 3 years from the time when the right to apply accrues in the case of applications for which no period of limitation is provided elsewhere in the Schedule or by section 48 of the Civil Procedure Code. In our opinion the application is governed by Article 181 and not by Article 166 of the Limitation Act and is consequently not barred by limitation, as it was made within the period prescribed by Article 181. The appellants were parties to the suit (see the explanation to section 47 of the Civil Procedure Code) but were not parties to the decree under which they were exonerated; no notice of the application for attachment and sale of the properties was admittedly given to them and they were strangers to the execution proceedings.

It is not disputed that, under the terms of the decree, the Court had no power to sell the appellants' three-fourths share in the properties. The sale was void for want of jurisdiction. *Vide Raghunath Das* v. *Sundar Das Khetri* (1), *Syam Mandal* v. *Sei Nath Banerjee* (2) and *Shivbai Balya Suami* v. *Yesu Cheso Nayakin* (5). If an execution sale is a nullity, *i. e.*, is made without jurisdiction or is void *ab initio*, Article 166 has, in our view, no application and the residuary Article 181 should be applied. We are justified in our conclusion by the decision in Second Appeal No. 381 of 1914. In that case the facts were that the plaintiff had taken a mortgage from a member of the judgment debtor's family and had obtained a decree for sale of the one sixth share of the joint family properties to which his mortgagor was entitled. Under the decree, however, a one fourth instead of a one sixth share was brought to sale and purchased by the plaintiff decree holder. The learned Judges (Wallis, C. J., and Spencer, J.) held that the sale, in so far as it purported to sell more than the one sixth share awarded by the decree was made without jurisdiction according to the principle laid down by the Privy Council in *Malkarjun* v. *Narhari* (5). The learned Vakils for the 9th respondent (the auction-purchaser) vendee relied on the decision in *Muthiah Chettiar* v. *Bawa Sahib* (4). In that case the decree directed the sale of items in a particular order. They were, however, sold in a different order. It was held that an application to set aside the sale on the ground that it took place contrary to the direction in the decree was one under section 47 of the Civil Procedure Code and would be governed by Article 166. The case of *Muthiah Chettiar* v. *Bawa Sahib* (4) is, however, clearly distinguishable as it was the judgment-debtor who moved the Court to have the sale set aside. The facts of the present case are certainly different. The appeal is accordingly allowed with costs payable by the 9th respondent.

The District Munsif is directed to restore the appellants' application to set aside the sale to his file and dispose of it according to law.

M. C. P.

Appeal allowed; Case remanded.

(5) 48 Ind. Cas. 130; 43 B. 235; 20 Bom. L. R. 925.

(6) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 997; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 102 OF 1918.

April 15, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice and Mr. Justice Coutts.

THE OFFICIAL TRUSTEE OF BENGAL AND AS SUCH TRUSTEE TO THE ESTATE OF THE LATE MR. JOSEPH CHATER IN CALCUTTA IN BENGAL—DEFENDANT No. 4—APPELLANT

versus

CHARLES JOSEPH SMITH—PLAINTIFF, AND KRISHNA KISHORE ADHIKARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 22, 33—Cross-objections against co-respondent, when can be entertained—Object of r. 22.

Order XLI, rule 22 (1), of the Civil Procedure Code, in so far as it relates to a cross-objection, was provided to meet the case where a respondent, although the decree is not entirely in his favour, is content to let matters rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him. [p. 266, col. 1.]

This rule should ordinarily be confined to cases of cross-objections urged against the appellant, but rule 33 of Order XLI gives the Court a very wide discretion and cases may arise where justice requires that cross-objections against a co-respondent should be heard, *e. g.*, where the appeal reopens the whole matter in controversy between the respondents *inter se*. Where, however, one of several defendants against whom a decree is passed has allowed the period for appealing to elapse without questioning the decree, rule 22 of Order XLI of the Civil Procedure Code cannot be construed so as to revive his right of appeal merely because a co-defendant has instituted an appeal against the plaintiff on entirely different grounds. [p. 266, cols. 1 & 2.]

Appeal from a decision of the Additional Subordinate Judge, Manbhum, dated the 14th September 1917.

Messrs. *P. K. Sen* and *G. D. Singh J. P. Singh*, for the Appellant.

Messrs. *Imam*, *N. C. Sinha*, *S. K. Mitter* and *N. Ghosh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal from a decision of the Additional Subordinate Judge of Manbhum, dated the 14th September 1917. The appellant, who is the defendant No. 4 in the suit, is the Official Trustee of Bengal and represents the estate of the late Mr. Joseph Chater. None of the other parties have appealed, but cross-objections have been filed by the defendant No. 1 not against the appellant but against his co respondent, the plaintiff. A preliminary objection was taken by the plaintiff to this cross-objection which will be dealt with later. The plaintiff Charles Joseph Smith is the proprietor of certain mining rights in Mauza Kusunda which he acquired by purchase from the Raja of Jharia on the 24th April 1907. The defendant No. 1 acquired a usufructuary mortgage of the mining rights from the plaintiff in consideration of a loan of Rs. 47,500 and was put in possession of the rents and royalties payable by the tenants by way of satisfying the loan and interest. The defendants Nos. 2 and 3 were added as defendants on the ground that they are interested in the mortgage, but they disclaimed all interest therein. The defendant No. 4 as Trustee of the estate of the late Mr. Chater and the defendants Nos. 5 to 10, who may be referred to as the Roy defendants, are tenants of the mining rights and as such liable to pay rent and royalty to the proprietor. The suit as against the defendants Nos. 4 to 10 claimed a declaration that those defendants were bound to pay the plaintiff rent and royalty under the terms of an agreement of compromise made in a suit brought by the Raja of Jharia against them, the Raja's proprietary interest having been subsequently acquired by the plaintiff, and for an account of the coal raised and despatched. As against the mortgagee-defendants the plaintiff's cause of action was of an entirely different nature. He claimed a declaration that the mortgage had been satisfied by collection by the mortgagees of the rent and royalty payable by the other defendants and for an account of the monies collected and delivery of possession of the mortgaged property.

In order to appreciate the nature of the defence to the suit upon which the appellant relies, it is necessary to state shortly the circumstances leading up to the present litigation. The Raja of Jharia was the proprietor of a 7 annas share in Mauza Kusunda, the remaining 9 annas belonging to the Zemindar of Katras. The entire village was in the possession of one Kenaram Sarkar as tenure-holder or Mahatradar. Sometime before the year 1894 Kenaram Sarkar granted a lease of the mining rights in the entire Mauza less an area of 100 *bighas* to Ashutosh Roy, the defendant No. 5, and his brother Gadhadar Roy deceased, the father of the other Roy

defendants, at an annual rental of Rs. 1,554-9 6. The lessees in turn in the year 1894 granted a sub-lease of the same less 150 *bighas* to Mr. Chater, who was to pay them a royalty of 4 annas 6 pies per ton on all coal raised and despatched as well as all coke manufactured. In 1895 Mr. Chater, by a registered instrument dated the 16th January that year, transferred a moiety of his rights under his sub-lease to the plaintiff. It is agreed that the deed of transfer impliedly covenanted for title and quiet enjoyment and that he was bound by the provisions of section 55 of the Transfer of Property Act. The plaintiff and Mr. Chater thereupon worked the mine in partnership. Three years later in 1898 they together purchased the mining rights in another Mauza called Bagdighi, which also formed part of the partnership assets to which they were entitled in equal shares. On the 7th March 1899 Mr. Chater died intestate leaving a wife and three daughters. One of his daughters and Mr. Aratoon Gregory Apear were granted Letters of Administration to his estate. A partition agreement as to the partnership assets was then entered into between the plaintiff and his late partner's administrators, whereby they agreed that in lieu of their respective undivided moieties in each of the two mining leases the plaintiff should take Bagdighi and Chater's estate should take Kusunda, the agreement to take effect from the 1st January 1900. No formal release appears to have been made by either party to the other and in 1902 a Suit No. 90 of 1902 was instituted by Chater's administrators against the plaintiff, in which by a compromise between the parties a decree was entered on the 29th April 1903 providing, *inter alia*, that the plaintiff should execute a registered deed of release in respect of Mauza Kusunda in favour of Chater's administrators. An indenture of release was consequently prepared by the administrators' Solicitor and executed by the plaintiff on the 17th December 1904, whereby the plaintiff transferred his undivided half share in the mining rights of Kusunda to the administrators of Chater's estate which the defendant No. 4 now represents. This document recites the grant to Chater by the Roys of the mining rights under a *patta* of the 16th June 1894 and the transfer of a moiety therein to the plaintiff on the 16th January 1895 and states that for purposes of carrying the said partition into effect the plaintiff "As to his undivided half part or share therein doth hereby grant, convey, transfer, assign, release and assure all mines, veins, seams and beds of coal and the mining and other rights comprised in or granted by the hereinbefore recited *pattas*." Mrs. Smith, the plaintiff's wife, also had some interest under two *muharari* leases, dated the 9th September 1894, in part of the same property and by the same instrument joined her husband in transferring her interest to Mr. Chater's administrators, but with her part in the transaction we are not concerned. The *patta* referred to so far as the plaintiff is concerned was the lease executed by the Roys in favour of Mr. Chater, dated the 16th June 1894, a moiety of which the latter had transferred to the plaintiff on the 16th January 1895. The deed also contained covenants by the plaintiff for title and quiet enjoyment and further assurance. Meantime the Raja of Jharia, having acquired under a *mukarari* lease from the Raja of Katras his 9 annas proprietary interest in Mouza Kusunda, had become the proprietor of the whole Mouza. On the 11th June 1906 he brought a Suit No. 66 of 1906 in the Court of the Subordinate Judge at Purulia against Kenaram Sarkar, Gadhadhar and Ashutosh Roy and the administrators of Chater's estate and others, claiming *khas* possession of the underground rights in Kusunda on the ground that Kenaram Sarkar, as tenure-holder, had not and never had any interest in the subsoil and that consequently the lease granted by him to Gadhadhar and Ashutosh Roy and the sub-lease granted by them to Chater passed no title. Although the question has since been definitely determined against the tenure-holder by the decisions of the Judicial Committee, at that time owing to certain decisions in the Courts of this country it was at least doubtful whether the tenure-holder had any rights in the sub-soil unless such rights were clearly expressed in his grant. In this state of affairs on the 2nd February 1907 a compromise agreement was entered into between the parties and the suit was subsequently decreed in the terms of the compromise. The decree provides that the lease granted by Kenaram to the Roys and the sub-lease granted by them to Chater shall remain in force, except that

the rent of Rs. 1,554 9 6 payable by the Roys to Kenaram shall in future be payable half to Kenaram and half to the Raja. The Roys also undertook to pay to the Raja a sum of Rs. 35,000 as well as a royalty of 4½ pies per ton in respect to the coal raised on the 150 *bighas* reserved by them and not sublet to Chater. Chater's administrators were to pay to the Raja a sum of Rs. 10,000 and an additional royalty of 6 pies per ton of steam coal and 2 annas on coke over and above that payable to the Roys under their sub-lease. Each party was to pay his own costs and the claim for mesne profits was withdrawn. After the compromise agreement had been come to, namely, on the 24th April 1907, the plaintiff by two registered instruments of that date acquired for consideration the 7 annas proprietary interest in the sub soil rights of the Mouza from the Raja of Jharia for a term of 999 years and an assignment of the latter's *dar mukarari* interest in the 9 annas share which he had acquired from the Zemindar of Kurras. Mr. Smith thereupon became entitled as proprietor to the rent and royalty payable to the Raja by the Roys and Chater's administrators respectively under the compromise decree in Suit No. 66 of 1906. Although the compromise agreement was dated the 2nd February 1907, the decree was not in fact made until the 25th April that year. On the 28th March 1908 Mr. Smith granted a usufructuary mortgage of his interest in the sub soil to the defendant No. 1 to secure re payment of an advance of Rs. 47,500 and interest and put in possession the mortgagee, who collected the rent and royalty due under the decree from the Roys and Chater's administrators.

Before the present suit was instituted on the 18th September 1916, disputes appear to have arisen between the plaintiff and the mortgagees as to whether the loan advanced had been satisfied by the collection of rent and royalty, and the tenants were apparently refusing to pay the rent and royalty to the plaintiff. The suit was accordingly instituted on the date mentioned, claiming as against the mortgagees delivery of possession of the mortgaged property and a declaration that the mortgage-debt had been satisfied by collection of the aforesaid rents and royalties. The plaintiff further claimed an account of the sums realised by the mortgagees whilst in possession and payment to him of any balance shown by the account to have been received in excess of the mortgage-debt. As against Chater's administrators and the Roys he claimed a declaration that they were bound to pay him as the transferee of the Raja of Jharia the rent and royalty payable to the latter under the terms of the compromise decree in Suit No. 66 of 1906 and an account of the coal raised and despatched by them from the date of that decree to the date of suit.

The suit was contested on behalf of both sets of defendants. The defence of the Trustee of Chater's estate was, *inter alia*, that the plaintiff by the indenture of the 17th December 1904, by which he released his half share in the lease of Kusunda to Chater's administrators, covenanted for title and quiet enjoyment and that the present suit was a breach of the covenants therein contained. With the defence of the mortgagees we are not immediately concerned in this appeal, but it may be stated that they denied that they had realised the full amount of the mortgage debt. Several defences were raised by the Roys, but these also are not material for present purposes as they have not appealed.

The learned Judge found that the mortgage of the defendant No. 1 had been satisfied by 1914 and that from that date the plaintiff was entitled to recover the commission and royalty claimed from the other defendants in accordance with the decree in Suit No. 66 of 1906. From this decree the defendant No. 4 has appealed and contends, as in the Court below, that the present suit is a breach of the covenants contained in the instrument of the 17th December 1904.

The interest which the plaintiff re-transferred to Chater's estate under the indenture mentioned was an interest which he had acquired from Chater himself and which he released to the latter's administrators on the termination of the partnership in pursuance of the partition agreement. It is at first sight difficult to see why the covenant for title should be enforced against the plaintiff, if in fact there is a breach, as Chater himself must have been

guilty of a breach of a similar covenant admittedly contained by implication in the instrument by which he transferred half his interest in the lease to the plaintiff. It is contended, however, that the instrument of the 17th December contained something more than the usual vendor's covenants for title and quiet enjoyment implied by law and that in fact covenanted against the acts not only of the covenantor and those claiming through him but against disturbance by any one possessing a paramount title. The plaintiff therein covenants that the lease of the 16th June 1894 is still subsisting in law and is not rendered void or voidable and also notwithstanding any act, deed, etc, of the covenantor he has good right to grant, convey, transfer, assure, release and assign the said premises. It also provides that the grantees shall quietly enjoy the same without interruption, etc., by the covenantor or any one lawfully claiming through him and free from all estates title, charges, etc, made, executed, occasioned or suffered by the said Charles J. Smith or any person claiming through or in trust for him. In my opinion it is not necessary to decide with precision what the exact legal effect of this document may be so far as the covenant for title is concerned, as it does not seem to me to impose any wider obligation than that contained in section 55 (2) of the Transfer of Property Act which must be deemed to be incorporated in the transfer by Chater to Smith, and the former cannot rely upon a representation as to title which must have been induced by his own act in warranting the same title to Smith when he transferred his interest to the latter. Moreover, the present suit is based upon a title created by the compromise to which the administrators of Chater's estate were themselves parties, and it is not suggested that the decree was obtained by fraud. As long as it subsists, it is binding upon the parties. The plaintiff has acquired the Raja of Jharia's rights therein and is entitled to stand in his shoes. Had the Raja of Jharia remained in possession, the appellant would have had no defence to the suit brought by him for the royalties due and his assignee must *prima facie* be entitled to the same rights. Some reliance was placed by the appellant on section 45 of the Transfer of Property Act, but I think the proper view of the instrument of the 17th December 1904 is that the plaintiff merely released to Chater's estate the right, title and interest, which he had previously acquired from Mr. Chater during his lifetime, and it is not open to the latter or his administrators to complain that there is a defect in the title which Mr. Chater himself represented to the plaintiff as subsisting and that he had power to transfer the same. If this view is right, it can make no difference that the plaintiff paid the Raja of Jharia the costs of the Suit No. 66 of 1906 and at or about the time of the compromise agreed to purchase his proprietary interest in the estate. In my opinion the decree of the lower Court should be affirmed.

There is a further matter which requires to be dealt with. The appeal was brought by the defendant No. 4 alone against the decree in so far as it affected his liability towards the plaintiff only. The plaintiff was the real respondent in the appeal, although the defendants other than the appellant were formally added as respondents and served with notice. The defendant No. 1 alone of the respondents other than the plaintiff has appeared. He as mortgagee was affected by the decree in so far as it declared that his mortgage debt had been satisfied and that the plaintiff was to recover possession of the mortgaged property. He, however, did not appeal from this decision and allowed the time for doing so to elapse without taking any step to prosecute an appeal. On being served with notice of the appellant's appeal he filed notice of a cross-objection not on any point which affected the appellant to whose appeal he was not a necessary party but against the decree in so far as it determined the rights between himself and the plaintiff, one of the other respondents. The question is whether in the circumstances he is entitled to do so under the provisions of Order XLI, rule 22, of the Civil Procedure Code. In my opinion he is not. The appellant has no objection to the decree in so far as it affects the defendant No 1 (respondent No. 2) and the word "cross-objection" in Order XLI, rule 22, appears to me inapplicable to a case like the present. As Sir George Jessel,

M. R., pointed out in *Cavander's Trusts, In re* (1), an appeal on a point which does not affect the original appellant cannot be a cross-appeal and a party who desires to put forward a case with which the appellant has nothing to do must serve notice of appeal in the prescribed manner. Where one of several defendants against whom a decree is passed has allowed the period for appealing to elapse, there seems to me no good ground for supposing that the rule intended to revive his right simply because a co-defendant has instituted an appeal against the plaintiff on entirely different grounds. If the grounds of the original appeal by one defendant are common to all, then the Court has power under Order XLI, rule 4, to vary or reverse the decree in favour of all and a party who has not appealed may in such a case reap the benefit. There may also be cases where the appeal indirectly re-opens the question of the rights of the respondents *inter se* and it may in such cases be necessary, in the interests of justice, to determine such questions, but beyond these limits I can see no reason why respondents should ordinarily be permitted to re open questions already determined as between themselves, and acquiesced in without appeal, simply because some other party has preferred an appeal upon a point in which they are not directly interested. In my opinion Order XLI, rule 22 (1), in so far as it relates to a cross-objection, was provided to meet the case where a respondent, although the decree is not entirely in his favour, is content to let matters rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him. He does not wish to set the Appellate Court in motion, but he cannot be certain until the last moment that his opponent will not do so. His object in accepting the lower Court's decision is one which should not be discouraged, as it puts an end to further litigation and it is just that he should not suffer by it. It is right that he should be allowed some extension of time for prosecuting his cross-appeal, if his opponent at the last moment defeats the object for which he delayed. In my opinion the rule should ordinarily be confined to cases of cross-objections urged against the appellant, but rule 33 of the same Order gives the Court a very wide discretion and cases may occasionally arise where justice requires that cross-objections against a co-respondent should be heard. An instance of this arose in the case of *Mathura Mohan Saha* v. *Ramkumar Saha* (2), but the Court there observed that the appeal re opened the whole matter in controversy and required them to re examine the questions in dispute from all possible points of view. In the case of *Shib Chandra Kar* v. *A. C. Dulcken* (3) decided by the same High Court about a month later, the Chief Justice and two other learned Judges affirmed and followed the principle laid down in *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (4), to the effect that as a general rule the right of any respondent to urge a cross-objection should be limited to his urging it only against the appellant and it is only by way of exception to this general rule that one respondent may urge a cross-objection as against another respondent. The exception, it is said, holds good in those cases where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. The exceptions in my opinion do not arise out of the construction of rule 22 of Order XLI, but are permissible only by reason of the powers given by rule 33 of the same Order. This rule, however, as pointed out by Mookerjee, J., in *Shib Chandra Kar* v. *A. C. Dulcken* (3) (*ubi sup.*), should be cautiously applied and generally speaking in cases where but for recourse to it the ends of justice would be defeated and it should not be allowed to be invoked in favour of a litigant so as to enable him to avoid the provisions of other Statutes such as the Limitation Act or the Court Fees Act. In that case as recourse to the other provisions of the Code would

(1) (1881) 16 Ch. D. 270; 50 L. J. Ch. 292; 29 W. R. 405.

(2) 35 Ind. Cas 305; 43 C. 790; 23 C. L. J. 26; 20 C. W. N 370.

(3 48 Ind. Cas. 78; 28 C. L. J. 123.

(4) 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612.

have been sufficient for the purposes of the respondent seeking to urge cross objections, she was not allowed to fall back upon Order XLI, rule 33. The Madras High Court, it is true, has taken a different view rather, as it seems to me, upon grounds of expediency than upon any considered interpretation of the rules. In *Munisami Madaly* v. *Abbu Reddy* (5) a Full Bench of the Madras High Court decided that cross-objections could be urged in any case by one respondent against another under the provisions of Order XLI, rule 22, and refused to follow the decision of the Calcutta High Court in *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (4), on the ground that it seemed more convenient to follow a fixed rule than to decide the question with reference to the particular facts of the case in which the question was raised. No reference was made in that decision to the effect of Order XLI, rule 33, or its bearing on the earlier rule, but it appears to me that rule 33 was expressly enacted for the purpose, *inter alia*, of providing for exceptional cases not covered by the wording of the earlier rule, and with great respect to those learned Judges I prefer to follow the decisions of the Calcutta High Court which are based upon a careful consideration of the rules themselves rather than upon grounds of expediency and convenience. The cross-objection should consequently be dismissed with costs to the plaintiff against whom it is directed. The appeal is also dismissed with costs to the plaintiff and the decree of the lower Court is affirmed.

COUTTS, J.—I agree.

Both Appeal and Cross objection dismissed.

(5) 27 Ind. Cas. 323; 38 M. 705; (1915) M. W. N. 45; 27 M. L. J. 740.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 107 OF 1918.

September 30, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

JANAKI NAGASAWMI IYER AND OTHERS—PETITIONERS—PLAINTIFFS—APPELLANTS

versus

T. S. RAMASAWMI IYENGAR, OFFICIAL RECEIVER, MALURA, AND OTHERS—OFFICIAL RECEIVER AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 6, 7, 8—Attachment before judgment—Release of property on security being furnished—Execution against property given as security—Preferential right, whether exists.

Where property is attached before judgment, but is released on the defendant giving security, the security comprising certain items of the attached property, the plaintiff on obtaining a decree is entitled to a preferential right, and can execute the decree against the property given as security. [p. 268, col. 2.]

Appeal against the order of the District Court, Madura, dated the 6th of August 1918, in Appeal Suit No. 344 of 1917, preferred against the order of the Court of the Principal District Munsif, Madura, in Miscellaneous Petition No. 342 of 1917, in Execution Petition No. 74 of 1917, in Ordinary Suit No. 553 of 1915.

FACTS appear from the judgment.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellants.—The lower Court erred in not allowing execution to issue against the property of the surety. Where bond is given for the party's appearance or for production of property, the case is different. The property is not ear marked and no charge or lien is secured over the property and the plaintiff acquires no preferential right. Here what is done is to earmark the security to the credit of the suit. Plaintiffs are entitled to execute the decree.

Mr. *K. S. Jayarama Aiyar*, for the Respondents.—The surety's property is not liable in execution of the decree. No charge or lien has been acquired by the plaintiff and he has no preferential right over other creditors.

JUDGMENT.—The facts are not in dispute in this case. The suit was for money and before the decree an application for attach-

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ment was made. Twenty items of property belonging to the defendants were attached before judgment. The defendants applied to the Court to release the properties from attachment and offered to give security. The security comprised five items of the attached property. Exhibit A was the bond given to the Court by the defendants.

After the plaintiffs obtained the decree, they proceeded to levy execution against the property given as security. The District Judge has held that the plaintiffs have not obtained a charge or lien over this property and are not entitled to get the decree amount realized out of this property. We are unable to agree with him There are two classes of cases, each of them well defined, and the question is under which of these classes the present bond comes. It was held in *Errikulappa Chetty* v. *Official Assignee, Madras* (1) that when a bond is given for the production of certain property in Court, the person who secures the giving of this bond is not entitled to any preferential right in the property comprised in the bond. Cases where security is given for appearance also belong to this class. In such cases, the person who enables the bond to be taken, obtains no preferential right. Again in cases in which there is a bare attachment under the Code of Civil Procedure it does not give a right of lien to the person who gets the property attached. The principle underlying all these decisions is that where a bond is given for appearance or where a bond is given for the production of property or where there is an attachment, the bond is not earmarked for the credit of the suit. The second class of cases, which is illustrated by the decision in *Seena Vana Ramiah Ayyar* v. *Gopala Ayyar* (2), lays down that where something has been done for the credit of the suit, then the party who procures that thing is entitled to a preferential right in the bond given. In *Seena Vana Ramiah Ayyar* v. *Gopala Ayyar* (2) money was deposited in Court and that was held to give the plaintiff a right over others. In *Subramania Chettiar* v. *Rajeswara Sethupathi* (3) the learned Chief Justice and Kumaraswami Sastriar, J., point out that the giving of a bond is on the same footing as depositing money in Court. Abdur Rahim and Oldfield, JJ. in *Gopala Iyar* v. *Thiruvengadam Pillai* (4) held that where money has been deposited to the credit of a suit, the plaintiff obtains a preferential right to it. So the distinction is clear that where money is deposited in Court or something is done to make the security earmarked for the particular suit in which the action was taken, then the person who gets the security is entitled to a preferential right over others who may subsequently come in. We are clear in the present case that, having regard to the terms of the bond, it must be taken to have been given for the credit of the plaintiffs in the suit, and that the plaintiffs are entitled to a preferential right and consequently ought to have been allowed to execute the decree against the property given as security.

We must reverse the decision of the District Judge and remand the petition for disposal according to law. Costs to abide the result. It was pointed out to us that the fixing of the Vakil's fee at the *ad valorem* scale of five per cent. was wrong. Both the Vakils are agreed upon that. The lower Appellate Court in allowing the Vakils fees will see that five per cent. is not allowed. This judgment will not prejudice any right which the Official Receiver may have to contest the validity or *bona fides* of the security.

M. C. P.

Appeal allowed;
Case remanded.

(1) 32 Ind .Cas 190 39 M 903.
(2) 49 Ind Cas. 70; 41 M. 1053; 35 M L. J. 355.
(3) 43 Ind. Cas. 187; 41 M. 327; (1917) M. W. N. 872; 6 L. W. 762; 34 M. L. J, 84.
(4) 38 Ind. Cas 481; 32 M. L. J. 503; 5 L. W. 407.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 19-B OF 1919.
November 19, 1919.
Present:— Mr. Mittra A. J. C.
Shri SITARAM MAHARAJ—PLAINTIFF—APPELLANT
versus
NARAYAN—DEFENDANT—RESPONDENT.

Lease—Sub-lease by lessee · Breach of covenant—Lessor, right of, to recover damages or rent from sub-lessee.

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Where a lessee in contravention of the terms of his lease grants a sub-lease, the lessor has no cause of action against the sub-lessee either for rent or for damages, his right to recover damages for breach of covenant being restricted to the lessee. [p. 264, col. 2.]

Appeal against the decree passed by the Additional District Judge, East Berar, in Civil Appeal No. 94 of 1918, dated the 18th September 1918, arising out of Civil Suit No. 28 of 1918 decided by the Additional Munsif, Amraoti, on the 15th July 1918.

Dr. *H. S. Gour*, for the Appellant.

Mr. *M. V. Joshi*, for the Respondent.

JUDGMENT.—The plaintiff appellant gave a registered lease to three persons for five years. One of the lessees sub let for one year part of the land to the defendant-respondent, who was the contesting defendant (defendant No. 5). The suit as originally framed was for rent of that year. In the course of further pleadings it was pointed out that the lease contains a covenant against sub letting without the plaintiff's consent, and hence a claim for damages was made against all the defendants. The Courts below have decreed the claim for rent against the lessees and have dismissed the suit against the 5th defendant, the sub-lessee.

It is admitted that there is no privity of contract between the sub lessee and the plaintiff. It is, however, contended that although the English Law is different in this respect, there is a privity of estate between the plaintiff and the sub-lessee. Reliance is placed upon section 108, clause (j), of the Transfer of Property Act, which lays down that a lessee remains liable for rent notwithstanding a transfer, whether absolute or by way of mortgage or sub lease. But the section does not say that the mortgagee or the sub lessee becomes liable for the period of occupation of the land. The learned Counsel for the appellant cited the following cases in support of his contention, *Kamala Nayak* v. *Ranga Rau* (1), *Kunhambu* v. *Anjelu* (2), *Kandapurazil Kunhisow* v. *Mulloli Ohathu* (3) and *Macnaghten* v. *Lila Mewa Lall* (4). I do not find any of the cases support the proposition that a sub-lessee is liable for rent to the lessor: on the contrary, the cases cited by the respondent's learned Advocate show that this is not so: *Venkat Rao* v. *Kohlu Gond* (5) and *Timmappa Kuppaya* v. *Rama Venkanna Naik* (6).

In *Lewis* v. *Baker* (7), Swinfen Eady, J., says:—

"Where a person parts with all his estate in land, as where he purports to demise for a period co extensive with his own interest, or longer, the transaction is in law an assignment, although purporting to be a demise; an underlease for the whole of the residue of a term is in law an assignment."

Here the sub lease was for one year of a portion of the demised land by one of the lessees. Hence it was not an assignment in law.

No authority has been shown to me under which I can hold the respondent liable for the rent.

The contention that the appellant is entitled to damages for breach of the covenant in the lease not to sub-let without the plaintiff's consent is correct. That is a breach on the part of the lessees and damages may be claimed against them, but I fail to see how the covenant gives a right of action against the sub-lessee. If there had been an assignment and a breach by the assignee by further transfer, a suit for damages would lie against such assignee, as held in *Williams* v. *Earle* (8). There has been no assignment or transfer of any kind by defendant No 5. Hence the case cited has no application. Assuming that the transfer to the respondent had been in the nature of an assignment, then the covenant not to alienate would run with the land and the assignee would be bound by the covenant. But there has been no assignment to defendant No. 5. Therefore, no action lies against him on the covenant.

There was no allegation nor suggestion in the pleadings about the defendant No. 5 procuring a breach of the covenant, hence this point cannot be entertained.

(1) 1 M. H. C. R. 24.
(2) 17 M. 296 6 Ind Dec. (N. S) 205.
(3) 17 Ind Cas. 933; 23 M. L. J. 695; 38 M. 86; 12 M. L. T. 665.
(4) 3 C. L. R. 285.
(5) 13 C. P. L R 19.
(6) 21 B. 341; 11 Ind. Dec. (N. S.) 210.
(7) (1905) 1 Ch. 46 at p 50; 74 L. J. Ch. 39; 91 L. T. 744; 21 T. L R 17; 54 W. R 146.
(8) (1868) 3 Q B. 739; 9 B. & S. 740; 37 L. J. Q. B. 231; 19 L. T. 238; 16 W. R. 1041.

KRISHNA DAYAL GIR *v.* LAKSHMI NARAIN.

It is contended that the defendant is in possession of the land and he is, therefore, liable for use and occupation. The case cited [*Ananda Chandra Roy* v. *Abdullah Hossein Chowdhury* (9)] is distinctly against the appellant: *vide* page 155. Whether a person is liable for use and occupation of land or not, I am aware of no authority in which a decree has been passed on this ground where there was a lease of the land to others and the person in possession derived his title from the lessee.

The result is that the appeal stands dismissed with costs.

Appeal dismissed.

(9) 20 Ind. Cas. 679; 41 C. 148.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1008 TO 1018 OF 1918.

April 8, 1920.

Present:—Mr. Justice Sultan Ahmed.

Mahanth KRISHNA DAYAL GIR—APPELLANT

versus

Babu LAKSHMI NARAIN AND OTHERS—RESPONDENTS.

Fraud—Ex parte *decree obtained by fraud, suit to set aside—Burden of proof.*

In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the Court. The dishonesty of a claim on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit. Therefore, if the plaintiff cannot prove that the decree was fraudulently obtained, he cannot succeed whether the original claim against him was true or false. [p. 271, col. 2; p. 272, col. 1.]

Appeals from a decision of the Subordinate Judge, Gaya.

Messrs. *S. N. Palit* and *Kailaspati*, for the Appellant.

Mr. *Sambhu Saran*, for the Respondents.

JUDGMENT.—These eleven appeals arise out of eleven analogous suits filed by the appellant to set aside eleven decrees obtained by one Babu Lakshmi Narain, who is the respondent in these appeals.

It appears that Lakshmi Narain is a co sharer of the appellant in the villages concerned in these suits. He brought 11 rent suits against certain tenants, making the appellant a party to those suits.

His case was that he, as landlord, was entitled to the rent of his share in the lands from the tenants. The first relief that he claimed from the Court was for the recovery of his rent from them; in the alternative he prayed that if the Court found that the tenants had made payments to the appellant or to the other landlords, he may be held entitled to recover the amount paid for his share by the tenants to them.

During the hearing of those suits the tenant defendants and the plaintiff, who is the respondent in this Court, compromised those suits, because he found that he could not get a decree against the tenants on the ground that they had already made payments to the other landlords. He, therefore, on the 9th December 1914, filed a petition, asking the Court to dismiss his claim against the tenants but prayed that *ex parte* decrees may be passed against the appellant and the other landlords.

The trial Court awarded him the decrees against the appellant. Subsequently the appellant applied under Order IX, rule 13, for the setting aside of those decrees on the ground of fraudulent suppression of summonses and on the ground that the decrees were illegally and fraudulently obtained. The Court, however, decided that there had been no fraudulent suppression of summonses, nor had the decrees been improperly or fraudulently obtained. The appellant thereupon filed these suits for setting aside those *ex parte* decrees.

The defence was that there was no suppression of summonses, fraudulent or otherwise, and that the decrees had not been fraudulently or illegally obtained. Both the Courts found that the evidence did not establish any ground for setting aside the decrees. Both the Courts went elaborately into the evidence adduced by the parties and arrived at the conclusion which I have stated above: that being so, in my opinion this is a case which is absolutely concluded by findings of facts.

I, however, proceed to examine the grounds urged by the learned Vakil appearing on behalf of the appellant and see whether he has made out any ground for interference by this Court in second appeal.

He *firstly* contends that both the Courts are in error in holding that the decision on the application under Order IX, rule 13, with respect to the suppression of summonses is *res judicata* in these suits. Even if this contention of the learned Vakil be sound and tenable, the finding of both the Courts is clear and convincing on the question of suppression of summonses. The Appellate Court observes that "there is practically not a scintilla of evidence worth the name to satisfy me that Lakshmi Narain had practised any act of fraud either upon the appellant or upon the Court in connection with those rent suits. It has been contended on behalf of the appellant that no summonses were served upon him as they had been all fraudulently suppressed. I am not at all satisfied on this point upon the evidence on the record. The plaintiff has entirely failed to prove any act of fraud in the matter of his alleged suppression of the summonses." This being the finding of the lower Appellate Court on this point, it is not at all necessary to consider whether the decision on the previous applications to set aside the *ex parte* decree was *res judicata* or not. If there had been no such clear finding as I find it, indeed I would have been constrained to consider this question: but in my opinion on these findings it is not necessary to do so. I should, however, not be understood to mean that the Courts below are wrong in holding that the previous decision on this point was *res judicata* in the present suits. On the other hand I am inclined to agree with the two Courts below, on the authorities reported as *Puran Chand* v. *Sheodat Rai* (1) and *Khirode Chandra Roy* v. *Srimati Ashtulla Bee* (2), that the previous decision was *res judicata* on this point.

The *second* ground urged is that the decree was obtained fraudulently by the respondent who, by filing a petition on the 9th December 1914, misled the Court to give him a decree against his co sharer landlords. The contention in the form in which it has been urged before me does not seem to have been urged before the lower Appellate Court. But even if it had been, in my opinion, there is no substance whatsoever in this contention. The plaintiff came to Court to have the *ex parte* decree set aside on the ground of fraud practised by the respondent. It was, therefore, necessary for him to establish that the fraud was actual, positive and intentional and was committed by the respondent, which resulted in the Court giving him an illegal and improper decree. It will not be sufficient to show that the decree was wrong or erroneous. That may be a very good ground on appeal against that decree, but it will not be sufficient for getting those decrees set aside on the ground of fraud. Though there is no doubt that a Civil Court has jurisdiction to set aside such decree on the ground of fraud, yet, in my opinion, this jurisdiction has to be exercised with great care and caution. Both the Courts have found, as I have stated above, that there was no fraudulent suppression of summonsee. As regards this petition, the first Court clearly found that there was nothing illegal or improper about it. The plaintiff had openly in his plaint claimed a relief in the alternative against the appellant. It is not contended before me that no such relief could be granted to the plaintiff, and, therefore, after the tenant defendants had compromised with him, the plaintiff was perfectly justified in asking the Court to grant him the alternative decree against the appellant and the other co-sharer landlords. I do not find anywhere the slightest trace of any fraud on the part of the respondent. If there was an error, it was an error of the Court which could only be rectified either on review or on appeal, but it could not be corrected in suits to set aside those decrees. As was laid down in the case reported as *Marochin* v. *Parsuram Maharaj* (3), "in a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the Court.

(1) 29 A. 212; A. W. N. (1907) 31; 4 A. L. J. 51.
(2) 35 Ind. Cas. 557; 20 C. W. N. 845.
(3) 10 Ind. Cas. 905.

The dishonesty of a claim on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit. Therefore, if the plaintiff cannot prove that a decree was fraudulently obtained, he cannot succeed whether the original claim against him was true or false."

Under all these circumstances I am of opinion that the appellant has not made out any case for setting aside the decrees which had been obtained by the respondent. I would, therefore, confirm the decrees of the Subordinate Judge and dismiss these appeals with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1036 OF 1915.

May 16, 1919.

Present:—Mr. Justice Scott Smith and Mr. Justice Martineau.

INDAR SINGH—DEFENDANT—APPELLANT

versus

MUNSHI—PLAINTIFF AND BHAGWAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Agreement by reversioner to transfer his rights, whether requires registration—Contract Act (IX of 1872), s. 2—Champertous agreement, validity of—Agreement to share property obtained by litigation in consideration of promisee providing funds, whether can be enforced.

An agreement by the reversioner of a holder of property to transfer a portion of it to the promisee after the vesting of the estate in the reversioner does not require registration. [p. 274, col. 1.]

The English Law of champerty is not in force in India and fair agreements made by claimants of property in litigation to share it with others on their obtaining decrees, in consideration of funds being supplied by the latter for carrying on their suits, are not in themselves opposed to public policy, nor are they necessarily void, but such agreements, when extortionate, are inequitable and in that case should not receive effect. [p. 273, col 2.]

In order to determine whether such an agreement is extortionate or inequitable, what has to be looked at is the actual value of the land in dispute at the time when the agreement was made. [p. 273, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 2nd August 1915, reversing that of the Subordinate Judge, 1st Class, Jullundur, dated the 15th November 1914.

The Hon'ble Mian *Muhammad Shafi*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts of the case out of which this second appeal arises are fully and clearly stated in the judgment of the lower Appellate Court and we need not report them at length. Briefly they are as follows:—Hamir Singh gifted half his land to his step son, Ram Singh, and half to one Kura, Jat. On the 9th of October 1888 his reversioners, Sundar Singh, Haku and Bhagwan Singh, executed an unregistered agreement whereby they undertook to hand over half the land to Indar Singh, defendant-appellant, on condition of his supplying funds for the litigation necessary to set aside the gifts. Suits were then brought and were successful, and on the 12th of September 1901 a second agreement was executed and registered, confirming the first one. Hamir Singh died some 12 years before suit and sometime thereafter Indar Singh obtained possession of the share agreed to be given to him. He had admittedly been in possession for some seven years before the present suit was brought by Munshi, son of Sundar Singh, one of the executant of the agreements. He brought the suit on the ground that the land had been sold by his father without any consideration or necessity. The first Court dismissed the plaintiff's suit, holding that the agreements were valid and had been duly carried out and that Indar Singh had performed his part of the bargain by supplying funds for the litigation. The learned District Judge on appeal decreed the plaintiff's suit. He held that the original agreement of the 9th of October 1888 required registration and that, therefore, the plaintiff, who was born after its execution but before the execution of the second agreement, could contest the alienation. He further found that there was no proof of the amount spent by Indar Singh on the suits brought with his assistance. He considered that the agreements were champertous and that Indar Singh took an undue advantage of the exe-

entants thereof who were in straitened circumstances. He also laid stress upon the fact that Indar Singh must have known that the land would subsequently increase in value and said that the bargain was altogether an unfair one. According to the pedigree-table Bhagwan Singh would be entitled to half of the land in suit and Sundar Singh to the other half and though Bhagwan Singh did not join in bringing the present suit, the District Judge gave Munshi a decree for the whole land claimed, being of opinion that as Bhagwan Singh had failed to press his rights, he might be held to have waived them in favour of the plaintiff.

Mr. Muhammad Shafi on behalf of Indar Singh has filed a second appeal in this Court, and the first point urged by him is that the agreement of the 9th of October 1883 did not require registration, because in the words of section 17 (2) (*h*) of the Registration Act, it did not itself create or declare any right, title or interest in the land, but merely created a right to obtain another document which would, when executed, create such right. *Jhandu Khan* v. *Barkhurdar* (1), quoted by the learned District Judge, is no doubt an authority in support of his decision, but the judgment is a very short one and has not been followed in the subsequent decisions of the Chief Court. At the time when the agreement was entered into, the executants were not entitled to any part of Hamir Singh's property. They had merely reversionary rights therein and reversionary rights cannot be alienated. The executants' rights in the property were only to come into existence after Hamir Singh's death and the agreement was to transfer a moiety of such rights when they came into existence, *i. e.*, after the death of Hamir Singh. The agreement was in the nature of an agreement to transfer and its registration as such is not compulsory [*Imam Bakhsh Khan* v. *Karim Shah* (2), *Shridhar Ballal* v. *Chintaman Sadashiv* (3), following *Chunilal Panalal* v. *Bomanji Mancherji* (4) and *Partab Singh* v. *Karam Chand* (5)]. It is, however, unnecessary to labour this point further, because Dr. Nand Lal on behalf of the respondents frankly admitted that the agreement of 1883 did not require registration because it did not itself create any rights at all. We, therefore, hold that the agreement, which was executed before the birth of the plaintiff, cannot be objected to by him.

As regards the question of champerty, it was held by their Lordships of the Privy Council in *Raghunath* v. *Nil Kanth* (6) that the English law of champerty was not in force in India and that fair agreements made by claimants of property in litigation to share it with others, on their obtaining decrees in consideration of funds being supplied by the latter for carrying on their suits, were not in themselves opposed to public policy, nor were they necessarily void, but that such agreements, when extortionate, were inequitable and in that case should not receive effect. Another Privy Council case to the same effect is *Raja Mohkam Singh* v. *Raja Rup Singh* (7).

Now, in the present case it has been proved that Indar Singh supplied money for the carrying on of the litigation by which Sundar Singh, Haku and Bhagwan Singh got the gifts made by Hamir Singh cancelled. The learned District Judge says that there is no proof of the amount spent by Indar Singh on the suits brought with his assistance, but we do not think that he should be called upon to prove how much he advanced: *prima facie* there was nothing unfair about the agreement. The learned District Judge says that Indar Singh must have known that the value of the land would increase and that, therefore, he derived an unfair advantage. We are unable to agree with him in this. What had to be looked at was the actual value of the land at the time when the agreement was made, and we see no reason to suppose that Indar Singh derived any unfair advantage. Moreover, the agreement was entered into before the birth of the

(1) 150 P. R. 1889.
(2) 16 P. R. 1895.
(3) 18 B. 326; 9 Ind. Dec. (N. S.) 772.
(4) 7 B. 310; 7 Ind. Jur. 607; 4 Ind. Dec. (N. S.) 209.
(5) 184 P. R. 1889 (F. B.).
(6) 21 C. 843 (P. C.); 20 I. A. 112; 6 Sar. P. C. J. 362; 17 Ind. Jur. 374; Rafique & Jackson's P. C. No. 129; 10 Ind. Dec. (N. S.) 567.
(7) 15 A. 352 (P. C.); 20 I. A. 127; 6 Sar. P. C. J. 327; 17 Ind. Jur. 376; 7 Ind. Dec. (N. S.) 943.

plaintiff and was duly given effect to after the death of Hamir Singh, Indar Singh obtaining possession of the land, and in the circumstances we do not see how the plaintiff can contest the consideration for the agreement. The transfer of the land to Indar Singh was the natural result of the agreement of 1888 which, having been entered into by all Hamir Singh's reversioners, cannot be objected to by the plaintiff who was subsequently born.

We, therefore, accept the appeal and setting aside the order of the lower Appellate Court, restore the decree of the first Court, dismissing the plaintiff's claim with costs throughout.

Appeal accepted.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 28, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

Lala GANPAT LAL—APPELLANT

versus

BINDBASINI PRASHAD NARAYAN SINGH AND OTHERS—RESPONDENTS.

Mortgage—Suit for sale—Failure to implead necessary parties—Sale in execution of mortgage decree—Suit to redeem by persons who should have been joined as parties, maintainability of.

In a suit for sale under a mortgage the mortgagee failed effectively to implead certain persons interested in the mortgaged property. A decree was passed and the mortgaged property was sold under it and was purchased by the mortgagee. The persons who should have been impleaded subsequently sued for a declaration that their right to redeem was not extinguished, but, to save Court-fees, abandoned the prayer to set aside the sale:

Held, that after the sale had taken place, the mortgagee held as purchaser and was entitled to raise all the defences that belonged to him as such, and that unless the claim to set aside the sale were made in a properly constituted action and properly raised in suitable pleadings in that action, the Court could not interfere with the possession which had been given him by the purchase. [p. 277, col. 2.]

Appeal from a decree of the High Court of Calcutta, dated the 25th March 1915, reversing a decree of the First Subordinate Judge, Gaya.

FACTS of the case sufficiently appear from their Lordships' judgment. The Subordinate Judge for reasons therein stated held that the sale extinguished the plaintiffs' right to redeem and dismissed their suit.

On appeal the High Court of Calcutta (Fletcher and Teunon, JJ.) reversed this decision and passed a decree for redemption.

Fletcher, J. (Teunon, J. concurring) observed as follows:—

"This case is a case that comes under section 85 of the Transfer of Property Act. The defendant No. 1, who was the plaintiff in the mortgage suit, knew of the interest of the present plaintiffs in the mortgaged property and he added them as defendants. He did not know apparently, however, that the two present plaintiffs were at the time of the mortgage suit both minors. This case, therefore, is clearly distinguishable from the case of *Sheo Shankar Ram* v. *Jaddo Kunwar* (1). The remarks of their Lordships in that case obviously turned upon the fact that the mortgagee did not know of the existence of the other members of the family who were not made parties and they seem to have recognised in the course of their judgment if the plaintiff in the mortgage suit had known of their interest, it would have been his duty to make them parties to the mortgage suit. But this case is a totally different case. Here the two infants were parties before the Court; but no guardian *ad litem* was appointed to represent them. That being so, it seems to me obvious that no decree could be passed in the mortgage suit that was binding on the two infants. I should have thought that the matter is not open to argument. If the decree was not binding on them, then the right of redeeming the property is still subsisting. In that connection I may refer in the first place to a case (R. A. No. 6 of 1906) decided by Mr. Justice Mitra and Mr. Justice Bell on the 15th May 1908. That case is very close to the present case. But there is another decision which obviously cannot be

(1) 24 Ind. Cas. 504; 41 I. A. 216; 18 C. W. N. 968; 16 M. L. T. 475; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1178; 16 Bom. L. R. 810 (P. C.).

distinguished from the present case, and that is the decision of Mr. Justice Mukerjee and Mr. Justice Carnduff in the case of *Bal Kishan Lal* v. *Topeswar Singh* (2). The facts of that case cannot be distinguished from the facts of the present case, and it seems to me that that decision is not only binding upon us but one which we should recognize and approve. It is quite obvious that once it is found that the two plaintiffs were at the time of the mortgage suit infants and were not properly represented in the suit, then the decree passed in that suit cannot be held to be binding on them. The learned Judge of the Court below seems to consider that there is a difference as to the rights of the plaintiffs before and after the sale of the property in execution of the mortgage decree. That obviously is a mistake because what the Court could pass in the execution proceedings would be subject to the rights of the two plaintiffs, whatever they might be, and, if the foreclosure against the two plaintiffs be incomplete, then the purchaser took from the Court subject to the liability to have the foreclosure re-opened on a proper application being made by the two infants. It seems to me that in this case it is manifest that the decree passed in the mortgage suit is not binding on the two plaintiffs and the two plaintiffs are, therefore, entitled to redeam the mortgage which their father executed. No case has been raised by the plaintiffs that they are not bound by the mortgage. All that they say is that they have got a right to pay off the mortgage. That being so, we ought to set aside the order of dismissal passed by the learned Subordinate Judge and in lieu thereof pass a decree for redemption in favour of the plaintiffs as mentioned in Order XXXIV, rule 7, Code of Civil Procedure, for the mortgaged property as well as the property which the defendant No. 1 has subsequently purchased for the balance of the decretal amount."

Hence this appeal.

Mr. *E. B. Raikes* (with him Mr. *Palat*), for the Appellants, submitted that the High Court had failed to observe the peculiar situation brought about by the amendment of the plaint. The plaintiffs could have redeemed before sale, and it might be that they could even after sale have sued to set aside the sale, but they were content to let the sale stand. It so happened that the mortgagee had himself bought the property, but he was in no worse position than a third party purchaser would be, and while the sale held good he could not be disturbed.

Respondents did not appear.

JUDGMENT.

LORD MOULTON.—The facts leading up to the litigation out of which this appeal arises may be briefly stated as follows:—On the 5th April 1896 one Jehangir Prashad Singh, the father of the first respondent, mortgaged to the present appellant's grandfather, Lala Ganpat Lal (hereinafter termed the mortgagee), certain immovable property forming part of the family property of an undivided Hindu family (of whom Jehangir Prashad Singh was the head) in order to secure the payment of a debt of Rs. 300. It is not now in controversy that this debt was rightfully incurred by him as head of the family in order to pay monies due to the Government in respect of the family property, and that, therefore, he had full power to mortgage or sell the said property in order to raise the funds necessary for that purpose.

The money due on the mortgage was not repaid, and on the 27th July 1901 the mortgagee instituted a mortgage suit against the mortgagor and his two brothers, joining also as defendants the two sons of the mortgagor, the elder of whom was one of the plaintiffs in the present action, Bindbasini Prashad Narayan Singh. The other defendant was his younger brother who has since died and whose interest is now represented by the plaintiff. These two sons were joined by reason of their being interested in the family property, inasmuch as the joint family was governed by the Mitakshara Law.

In this suit the usual mortgage decree was made on the 20th January 1902 and in execution of this decree the mortgaged property was sold on the 18th September 1902. At this sale it was purchased by the mortgagee. The sale-proceeds were insufficient to cover the mortgage debt, and accordingly certain other property belong-

(2) 14 Ind. Cas. 815; 15 C. L. J. 443; 17 C. W. N. 819.

ing to the joint family was also sold in execution of a personal decree which the mortgagee had obtained against the mortgagor under section 90 of the Transfer of Property Act, 1882. This property was also purchased by the mortgagee, who thereupon took possession of both properties.

On the 6th April 1909 the first respondent and his brother instituted the present suit against the mortgagee, joining as defendants the mortgagor, and their uncle Mahindar Prashad Singh (who has since died and is now represented in this suit by two minors, acting by Partangir Prashad Singh) and Partangir Prashad Singh. The two defendants Mahindar Prashad Singh and Partangir Prashad Singh were the two brothers of the mortgagor who had been joined as defendants in the original mortgage suit.

The plaint in the present suit as first framed contained very wide allegations of fact, many of which have not been persisted in, and claimed very extensive relief, including a claim that the property should be handed over to the present plaintiffs, on the ground that the mortgagee's possession of it was and had always been unlawful. But on the 7th August 1909 the plaint was radically amended, and it is this amended plaint which thereafter formed the foundation of the action and has alone to be considered.

In this plaint the plaintiffs withdrew all objections to the validity of the mortgage bond, and formally admitted that they did not "object to the validity of the said bond and as to its being binding upon them in this suit." Accordingly in the relief prayed they raised no objection to the validity of the decree for sale granted in the mortgage suit, but claimed a declaration that their right of redemption had not been extinguished by it or by the sales that had taken place under it or under the decree passed under section 90 of the Transfer of Property Act, 1882.

The ground upon which the plaintiffs based their amended claim was that they were minors at the date of the original mortgage suit, and that they should have been represented therein by duly apponited guardians *ad litem* instead of being joined in their own names as being majors. It is on the issue of fact as to the age of the plaintiffs and the legal consequences thereof that the decision in this case wholly turns.

The plaintiffs originally added a prayer that the sales that had taken place under the decree should be set aside But it was pointed out to them that in such case they would have to pay certain *ad valorem* Court-fees, whereupon the plaintiffs elected to strike out their prayer to set aside the sales, and accordingly were not required to pay the fees in question.

At the hearing before the Subordinate Judge evidence as to the age of the plaintiffs was adduced by both parties. In the end the Subordinate Judge found in favour of the plaintiffs on this issue, though he has left a note to the effect that the plaintiff who gave evidence before him and who was then according to his evidence 24 years old, appeared to be a man of 30. It was of course admitted that upon this finding the plaintiffs had not been effectively joined in the original mortgage suit, and that if they had the right so to be joined the suit was irregularly constituted in that respect.

Before considering the conclusions of law of the Subordinate Judge, it will be convenient to add here that on the appeal to the High Court this finding of fact was supported, and their Lordships see no reason to doubt its correctness.

Turning to the legal questions that thereupon arise in this case, the appellant did not dispute the proposition that if a person interested in mortgaged property, who should have been joined as a party to a mortgage suit, but has not been so joined, comes in before foreclosure or sale, he has all the rights of redemption that his interest in the property gives him and may exercise them notwithstanding the decree.

But the present case is a very different one. Here the third party impeaches neither the debt nor the mortgage but, on the contrary, admits that they are binding on him in this suit. He admits that the mortgagor had the right to bind his interest in the property by the mortgage and that he did so, and that the debt was due and owing at the date of the mortgage decree. Nay, further, he does not seek either by

his plaint or by his prayer to impeach the mortgage decree itself, and he has deliberately chosen not to impeach the sales that have taken place under it. His claim is, therefore, in effect a claim to come in and exercise a right to redeem the whole property without setting aside either the mortgage decree or the sales.

The Judge of the Subordinate Court took the view that unless the sales were set aside there could be no right to redeem. He held that the father had the right to mortgage the family property for the debt in question and had done so, so as to bind the whole property, including the plaintiffs' interest in it; that on the mortgage money being unpaid he had the right to sue the mortgagor and had done so, and had obtained a valid decree for sale against him of the property mortgaged and had proceeded to sale thereunder in the ordinary way; that the plaintiffs who never represented the family property could before sale have exercised such right to redeem as they possessed, though they could not at any time have questioned either the mortgage or the decree made upon it, seeing that it was for a lawful debt incurred by their father and chargeable on the mortgaged property, but that the sale extinguished their father's right of redemption and in so doing extinguished their own, and that unless that sale were set aside they could not redeem. He, therefore, gave judgment for the defendants.

An appeal from this decision was brought to the High Court of Judicature at Fort William in Bengal. The learned Judges of that Court agreed with the finding of the Judge of the Subordinate Court on the question of fact, but took a contrary view on the questions of law, and accordingly gave judgment for the plaintiffs. In their Lordships' opinion these learned Judges failed to appreciate the effect on the proceedings of the altered plaint and thus misunderstood the real issues involved in the action. The Subordinate Judge rightly says that the plaintiffs do not "impeach the mortgage decree." Their pleadings show that they could not at any time have done so and their prayer does not ask to do so. All that they ask is to exercise their alleged right to redeem. And here they have to face the fact that they refused to seek to set aside the sales. Their Lordships have no doubt that while the decree for sale stands and sale has taken place under it, the right to redeem is extinguished unless the sale be set aside. After the sale has taken place the owner holds as purchaser, and is entitled to raise all the defences that belong to him as such, and unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in that action, the Court cannot interfere with the possession which has been given him by the purchase.

It follows, therefore, that the plaintiffs can no longer exercise any right of redemption that they may have possessed, so that it is not necessary to decide as to the extent of that right if they had properly asserted it.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the decree of the High Court should be set aside and that of the Subordinate Judge restored, and that the respondent here the plaintiff Bindbasini Prashad Narayan Singh should pay the costs in the Courts below and also the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant:—Messrs. *T. L. Wilson and Co.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 240 OF 1917.

March 30, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

DEB LAL JHA—PLAINTIFF—APPELLANT

versus

BALDEO JHA—DEFENDANT—RESPONDENT.

Part performance, doctrine of, applicability of, to India—Conditions necessary for exercise of jurisdiction.

There is nothing in the Law of India inconsistent with the doctrine of part performance on which Courts of Equity in England have acted for many years. [p. 278, col. 2.]

DEB LAL JHA v. BALDEO JHA.

The jurisdiction to carry into execution transactions clothed imperfectly in legal forms being purely equitable, Courts of Equity have imposed on themselves certain limits for the exercise of the jurisdiction. Those limits must be clearly recognised and carefully guarded. [p. 278, col. 2; p. 279, col. 1.]

The first essential condition for the exercise of the jurisdiction is that there must be a final engagement between the parties. If the circumstances in the case suggest that the matter still rested in negotiation, there is no room to charge a person on the equities resulting from the acts done in execution of the contract. [p. 279, col. 1.]

The second essential condition is that there are such actings of the parties as must be unequivocally and in their own nature referable to the agreement alleged. If the alleged part performance cannot be connected with the alleged agreement, then there is nothing which the Court has to undo and consequently nothing which has been left undone and which ought to be carried into further execution. [p. 279, col. 1]

Appeal from a decision of the Subordinate Judge, Purneah.

Messrs. *Rajendra Prashad* and *Sambhu Saran*, for the Appellant.

Messrs. *Manuk*, *Agarwala*, *Gangadhar Das* and *B. C. Mittra*, for the Respondent.

JUDGMENT.—The dispute between the parties principally relates to two Mouzahs known as Banaily and Matcopa. It is admitted that the plaintiff and the defendant were members of a joint family and continued to be joint until Baisak 1318 Mulki. It is the common case between the parties that after an infructuous attempt at partition by arrangement, a suit for partition of the Ijmali properties was instituted by the defendant against the plaintiff, as a result of which the properties in dispute were allotted to the parties in equal shares. The plaintiff relies upon the decree of Court allotting him an eight anna share in the Mouzahs in question, and says: "I have an 8-anna share in these properties by virtue of a decree of Court. Nothing that happened subsequently could take away my properties and give them to the defendant. I was dispossessed of these properties in Baisak 1322 Mulki. I claim to be put in possession of these properties with mesne profits payable by the defendant."

The suit was, therefore, of a simple nature and, unless the defendant could show that something did happen subsequently which had the effect of transferring the title in the properties to the defendant, the plaintiff was, on the pleadings in the case, entitled to a decree for possession. The defendant says, however, that there was a re arrangement between the parties in January 1915 as a result of which the defendant secured 16 annas interest in the properties in dispute. The subsequent re-arrangement is set out in Exhibit A, *furdbutwara*, as it is called, prepared by Bhek Nath Misser, arbitrator, and signed by both the parties. It is the validity of this transaction that is in debate before us.

This document shows a complete partition between the parties. Certain properties were allotted absolutely to the plaintiff, and certain other properties including the properties in dispute were allotted to the defendant. This document was, however, not registered, but Mr. Manuk on behalf of the respondent argues that though he cannot defend his title on the conveyance, since none took place and the *furdbutwara* was not registered, still he can defend it on the equities resulting from *res gestæ* subsequent to and arising out of the agreement between the parties. On behalf of the plaintiff it was argued that the *furdbutwara* did not represent the final engagement between the parties, that the matter rested in negotiation and never ripened into an agreement, and that, in any event, the alleged agreement was never acted upon by the parties.

The doctrine of part performance rests on the principle that Courts of Equity will not permit the Statute of Frauds to be made an instrument of fraud. There is no Statute of Frauds in India, but there is a Registration Act and the doubt which at one time existed on the question whether the equitable doctrine of part performance was applicable to India has now been set at rest by the decision of the Judicial Committee in the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (1). The Judicial Committee in the case cited thought that there was nothing in the Law of India inconsistent with the doctrine of part performance on which Courts of Equity in England have acted for many years.

But the jurisdiction to carry into execution transactions clothed imperfectly in legal forms being purely equitable, it is necessary to see what are the limits which the Courts

(1) 28 Ind. Cas. 930; 21 C. L. J. 231; 17 Bom. L. R. 420; 28 M. L. J. 548; 19 C. W. N. 250; 18 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 42 C. 501; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

of Equity have imposed on themselves for the exercise of the jurisdiction. Those limits must be clearly recognised and carefully guarded, for it is well settled that the doctrine cannot be extended beyond the limits within which it has hitherto been confined. The first essential condition for the exercise of the jurisdiction is that there must be a final engagement between the parties. If the circumstances in the case suggest that the matter still rested in negotiation, clearly there is no room for charging a person on the equities resulting from the acts done in execution of the contract. The second essential condition is that there are such actings of the parties as must be unequivocally and in their own nature referable to the agreement alleged. If the alleged part performance cannot be connected with the alleged agreement, then clearly there is nothing which the Court has to undo and consequently nothing which has been left undone and which ought to be carried into further execution.

The principles being well established, it is necessary now to consider whether circumstances exist in this case which make it obligatory on the Court to apply the doctrine of part performance.

First, as to the alleged agreement. The defendant relies upon Exhibit. A, the *furdbutwara*, which shows that the allotment made by Bheknath Misser was accepted by the plaintiff; but, in my view, Exhibit A cannot be read apart from Exhibit B, a draft of a partition deed which ought to have been, but was not, executed by the parties. It will be noticed on a reference to Exhibits A and B that Bheknath Misser's partition had reference to the properties kept joint by the Pleader Commissioner Sheo Prasad in the previous partition suit instituted by the defendant against the plaintiff. Apart from the properties which were specifically dealt with by Bheknath Misser, there were other properties as to which there were disputes, and I am satisfied on a perusal of Exhibit B that it was the object of the parties by a fresh arrangement to settle all their disputes once for all. Now, what does Exhibit B show? It shows that there were various other disputes which were not finally settled between the parties. It is sufficient for this purpose to refer to paragraphs 3 and 4 of the draft deed of partition. It appears that in addition to the properties specifically dealt with by Bheknath Misser, the parties did want to alter the arrangement with reference to certain other properties effected by the Pleader Sheo Prasad. The parties intended that certain lands in a certain Mouza which had been allotted by Sheo Prasad to the defendant should be transferred to the plaintiff. But neither the *bigha* area nor the name of the Mouza is filled in in the draft deed of partition. They are represented by dots in Exhibit B. Exhibit B further shows that in respect of the properties kept joint by the previous partition decree and dealt with by Bheknath Misser, the intention of the parties was that there should be an adjustment of account as to the rents realized, and that the liability of the party found on the taking of such accounts to have realized rent in excess of his share not only definitely ascertained, but discharged by the final arrangement between the parties. Paragraph 4, however, shows that the adjustment of account never took place between the parties and that it was never ascertained who was liable to whom and in what amount, for these important matters are not filled in in the draft deed but are only represented by dots. The plaintiff says: "The whole object of the new arrangement was to settle every dispute between us. Ought it in equity to stand good as to part, when it is clear that we never came to an arrangement as to many important disputes between us?" The answer is furnished by the defendant's own evidence. The defendant in his evidence said, "At the time when we signed the Exhibit A it was settled that a formal deed of partition should be executed." Bheknath Misser said, "It was settled that a partition deed will be executed according to the *furdbutwara*." In my view, the partition of the *ijmali* properties, being an item in the disputes between the parties, cannot stand, when it is shown that there were various other disputes which remained unadjusted. I hold that the matter rested in negotiation and that the *furdbutwara* cannot confer a title on the defendant as to the properties in dispute.

The next point is equally clear, namely, whether there have been such actings as are unequivocally and in their own

nature referable to the agreement alleged.

On referring to Exhibit A it will apprear that Mouza Barhara Gopal was allotted to the defendant. It is the defendant's case that the parties took possession according to the partition effected by Bheknath Misser. Exhibit 9 shows that the plaintiff, in a suit to which the defendant as co-proprietor was a party, recovered a decree for rent in respect of his 8 annas for a period up to March 1915. The alleged partition was effected on 7th January 1915. In my view the actings of the parties at a period immediately following the date of the alleged agreement are very important for considering whether there was such an agreement at all. If this view be correct, then there is no explanation why the plaintiff was allowed to sue for rent in respect of a property as to which he ceased to be a proprietor on the 7th of January 1915. Exhibit 7 is a petition for re-hearing of the case filed by the defendant, on the ground that summons was not served on him. There is no suggestion in the petition that the plaintiff's suit was fraudulent inasmuch as he ceased to have any title to the property after 7th January 1915. On the other hand, there is an admission of the plaintiff's title by implication. In my view, it has not been shown that the defendant got exclusive possession of Mouza Barhara Gopal on the 7th January 1915. I now come to Milik Dhaneshri which, it will be noticed, was allotted to the plaintiff. Exhibits 13 and 14 are plaints filed by the defendant for recovery of his share of rent in respect of Dhaneshri up to March 1916 The suits were filed on the 9th September 1916. They are absolutely inconsistent with the defendant's case that the parties took possession according to the *furdbutwara*. They show that, inspite of the *furdbutwara*, the parties were in possession according to their shares

With reference to Matcopa, the property allotted to the defendant, the position is the same. In this village, the family had 8 annas share, the remaining 8 annas being held by a stranger. Exhibit 11 is a plaint filed by the defendant on 13th April 1916 to recover rent in respect of his four-annas share of rent, and not eight annas to which he would have been entitled had the *furdbutwara* been given effect to. Exhibit 12 is a similar suit filed by the defendant on 11th April 1917 for recovery of his 4-annas share of rent up to March 1917. The plaintiff was added as a party defendant to these suits on the allegation that he was entitled to 4 annas interest in the village. These documents are, in my opinion inconsistent with the case set up by the defendant, namely, that the parties acted on the *furdbutwara* and took possession in accordance therewith.

I now come to Pachira, the property allotted to the plaintiff. This property was purchased by the family in the name of one Manna Lal Jha. After the decree in the partition suit, the result of which was to give each of the parties 8 annas share in the village, the defendant set up the heirs of Manna Lall to claim this village as their own. The heirs of Manna Lal filed a suit for rent which was resisted by the tenant on the ground that they were not the proprietors of the village at all. In the Appellate Court, the heirs of Manna Lal succeeded in getting a decree for rent. Thereupon, Deb Lal Jha, the plaintiff in this action, filed a title suit against the heirs of Manna Lal and brought the defendant on the record as defendant No. 5. A compromise decree was passed in this action on 2nd February 1915, that is to say, nearly a month after the date of the *furdbutwara*. By this decree the title of the plaintiff to eight annas share of the village was declared, the defendant being declared entitled to the remaining 8 annas share of the village It is impossible to think that the plaintiff would have consented to this decree if the *furdbutwara*, which gave him 16 annas interest in the village, was intended to be acted upon.

The last item of property which I have to consider in this connection is Dhusar Tika Patti, which was allotted to the plaintiff. Portion of the village was leased out to a *darpatnidar* and portion was held *khas* by the family. So far as the *darpatni* interest is concerned, the documents establish conclusively that, inspite of the *furdbutwara*, the parties continued to be in possession according to their

shares as determined by the partition decree. It is necessary to remember that, in this village, the family had 8-annas interest, so that by the partition decree the plaintiff and the defendant were each entitled to collect his 4-annas share of the rent By the *furdbutwara* the plaintiff became entitled to collect his 8-annas share of the rent, but the documents show that the *furdbutwara* made no difference to the rights of the parties. Exhibits 4 (7), 4 (8), 4 (9), 4 (10), 4 (11), 4 (12) and 4 (13) show realization of 4-annas share of the rent by the plaintiff up to 1917. There are similar rent receipts showing realization of 4-annas share of rent by the defendant. This is absolutely inconsistent with the whole interest of the family in the village having been allotted to the plaintiff.

With regard to that portion of the village which was held *khas* by the family, the rent receipts produced in the case show that the plaintiff collected the entire rent due to the family after the *furdbutwara*. This is in favour of the plaintiff, but, in favour of the defendant, this may be said that all these rent receipts were granted by the *patwari* who was the common *patwari* of both the parties, whereas the receipts granted in respect of the *darpatni* were all granted by the parties themselves. I will assume, however, that the plaintiff took possession of the entire village Dhusartika Patti held *khas* by the family, but this, in my view, does not affect the question. It is the defendant who is relying on the doctrine of part performance, and the defendant must, therefore, show such acts on his part as are unequivocally and in their own nature referable to the agreement alleged. The evidence, in my judgment, does not establish such actings on the part of the plaintiff, and I must accordingly hold that the *furdbutwara*, not being a registered document, cannot be relied upon by the defendant as giving him title over the plaintiff's 8-annas share of the properties in dispute, namely Matoopa and Banaily.

Apart from the properties dealt with by Bhekrath Misser, there are disputes between the parties with reference to some other properties. But Mr. Rajendra Prosad, on behalf of the appellant, has confined his arguments to one of them, namely, a plot of land comprising an area of 9B. 1K. 4Dh. in Khata No. 97. The appellant relies upon a Kebala, Exhibit 8, but the learned Subordinate Judge has rejected the appellant's claim on the ground that the identity of the property, the subject matter of Exhibit 8, has not been established. I am wholly unable to agree with the learned Subordinate Judge, and Mr. Manuk, on behalf of the respondent, concedes that the finding of the Subordinate Judge is not correct, but he argues that Exhibit 8 has not been legally proved. Mr. Manuk frankly stated before us that his objection was a purely technical one. His argument was that the certified copy of the document was not admissible in evidence. The plaintiff's case on this point is that the original document is with the defendant, but Mr. Manuk shows that the 9th clause of the original partition deed (Exhibit 3) provided that all documents of title of the properties dealt with by that deed shall remain in the custody of the plaintiff. Mr. Manuk's argument is that the original of Exhibit 8 must accordingly be with the plaintiff. To this technical argument, there is, however, a technical answer; and it is this, that the property, the subject matter of Exhibit 8, was not included in the previous partition, and the document of title would not, therefore, be with the plaintiff by virtue of Exhibit 8. In my view the document was properly admitted in evidence, and the identity being established, the plaintiff is entitled to recover his 8 annas share of this property.

There only remains the question of mesne profits. As between co-owners, the question of mesne profits does not arise, but the defendant must account to the plaintiff for his share of the profits from the date of dispossession alleged in the plaint. Mr. Manuk urged before us that the story of dispossession as alleged in the plaint is an impossible one and ought not to be accepted. But if we disbelieve the story of the defendant, as we do, that he got possession of the properties in dispute by virtue of the *furdbutwara*, there is no reason why we should not accept the plaintiff's case on this point. He was

undoutedly dispossessed. He was not dispossessed by virtue of the *furdbutwara*. He says that the plaintiff with the assistance of the Srinagar Raj dispossessed him in Baisak 1322 Mulki corresponding with May 1914. There is no reason to discredit this evidence, especially as there were undoubtedly disputes between the plaintiff and the Srinagar Raj.

In the result, then, we allow this appeal and set aside the judgment and decree of the Court below. The plaintiff is entitled to recover possession of Mouzahs Jaingunj Matcopa and Kemat Banailly and 9B. 1K. 4Dh. of land comprised in *khata* No. 97 to the extent of eight-annas share in each of them. The defendant must also account to the plaintiff for his share of the profits from Baisakh 1322 Mulki up to the time he delivers up quiet and peaceful possession of their properties to the plaintiff. The plaintiff is entitled to the costs in both the Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1733 OF 1918.

July 25, 1919.

Present:—Justice Sir Syed Shamsul Huda, KT.

NALINAKSHYA DUTTA—PLAINTIFF—APPELLANT

versus

DHAN KRISHNA MONDAL AND ANOTHER —DEFENDANTS—RESPONDENTS.

Jurisdiction—Connected suits—Appeal in one—Appellate Court, whether can arrive at conflicting findings.

Where in a case the plaintiff instituted a suit for rent as also a title suit, but an appeal was preferred against the decision in the rent suit only and the udge came to certain findings different from those arrived at by the Munsif in the title suit:

Held, ... that the fact that no appeal was preferred from the decision in the title suit did not preclude the Judge from dealing with the appeal before him and going into such matters as were necessary for the decision of the appeal; [p. 283, col. 1.]

(2) that in doing so the Judge had not decided anything that was outside the scope of the suit or appeal. [p. 283, col. 1.]

Appeal against the decree of the District Judge, Murshidabad, dated the 26th March 1918, reversing that of the Munsif, 2nd Court, at Kandi, dated the 25th of May 1917.

FACTS appear from the judgment.

Babu *Brojo Lal Chakerbutty* (with him Babu *Gurudas Sinha*), for the Appellant.—The appeal arises out of a suit for arrears of rent at the rate of Re. 1-6 per annum. The defendant averred that he did not hold any such holding but that the land held by him appertained to a different holding. The first Court decreed the suit. On appeal we took an objection that no appeal lay under section 153, Bengal Tenancy Act, which was overruled and the suit dismissed. My submission here also would be that the appeal was incompetent, as it did not involve either the question of the amount of rent or that of the relationship of landlord and tenant. Hence section 153 would operate as a bar to an appeal. My next point is that there were two connected suits, *viz.*, the rent suit out of which this appeal asises and a title suit, the decision of which was not appealed against. Now, the learned Judge in deciding the appeal before him has arrived at certain findings, which are inconsistent with those of the Munsif in the connected title suit from which no appeal was preferred by the parties. I submit the learned Judge erred in law in deciding those points which were obviously out of the scope of the appeal that was actually before him.

Babu *Kalidas Sarkar*, for the Respondent, was not called upon to reply.

JUDGMENT.—In this case the appeal is mainly based on the ground that having regard to the provisions of section 153 of the Bengal Tenancy Act, no appeal lay before the learned District Judge, and that, therefore, his decision reversing the decree of the first Court was without jurisdiction. The Court below relied upon an unreported decision of this Court which was referred to in Mr. Sen's book on the Bengal Tenancy Act. I had the advantage of reading the judgment of Mr. Justice Mitra in that case and it seems to me that on the authority of that decision, with which

I agree, an appeal lay to the Court below. Therefore, the main ground of appeal fails.

It has been next argued that the learned Judge in dealing with the appeal came to certain findings different from those arrived at by the first Court in connection with a title suit connected with the rent suit out of which this appeal arises. In that suit the decision of the Munsif was accepted by the parties and no one appealed. But that did not preclude the learned Judge from dealing with the appeal that was filed before him and from going into such matters as were necessary for the decision of the appeal. In doing so he has not decided anything that was outside the scope of the suit or of the appeal.

This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 326 OF 1919.

April 14, 1920.

Present:—Mr. Justice Sultan Ahmed.

TRALOKHYA NATH MAZUMDAR—PLAINTIFF—APPELLANT

versus

SARAT KUMAR SINGH—DEFENDANT—RESPONDENT.

Construction of decree—Appellate decree, ambiguity in—Decree of first Court and pleadings, whether can be looked into—Executing Court, powers of.

A decree must be construed in a fair and reasonable spirit so as to advance and not to impede its execution [p. 285, col. 1.]

An executing Court cannot vary or alter a decree under execution, but it must be satisfied as to what it is called upon to execute, and in order to find that out, when the decree is not clear and it is an appellate decree, the Court is justified in referring to the pleadings and the decree of the trial Court. [p. 284, col. 2; p. 285, col. 1.]

Appeal against the order of the District Judge, Patna.

Messrs *Kulwant Sahai* and *Achalendra Nath Das*, for the Appellant.

Messrs. *Hem Chandra Mitter*, *B. N. Mitter* and *Punchanan Banerjee*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Patna arresting the execution of a certain decree on the ground that it is incapable of execution.

The circumstances and facts of this appeal may be shortly stated.

The appellant and the respondent are neighbours. The house of the plaintiff-appellant is to the west of the house of the defendant. On the second story of the plaintiff's house there are two windows which have been in existence from a long time.

Sometime in the year 1894 or 1895 the defendant wanted to construct a house on the east of the plaintiff's house. The plaintiff's allegation was that the way in which the defendant was constructing his house would obstruct the passage of light and air into the house of the plaintiff through the two windows. So in 1895 the plaintiff instituted a suit, which was numbered Suit No. 122 of 1895, in the Court of the Munsif of Patna for a perpetual injunction restraining the defendant from building a wall so as to obstruct the passage of light and air into the plaintiff's house through the windows, and he succeeded in obtaining a decree from the Munsif on the 2nd March 1896 perpetually restraining the defendant from building a wall which may in any way obstruct the passage of light and air into the house of the plaintiff.

An appeal was preferred to the learned Judge against that decree, and, while that appeal was pending, it appears that both parties settled their differences, and on the 26th August 1896 a decree was passed by the learned Judge.

In order to satisfactorily decide the point that has been raised before me it is necessary to quote the decree *in extenso*:—

"This appeal coming on for decision on this the 26th June 1896 before Mr. J. Knoxwight, District Judge of Patna, in the presence of Mr. Sutherland, Babu Purnendu Narayan Singh and Babu Prasana Kumar, Pleaders for the appellant, and of Babu Guru Prasad Sen and Gangadhar Das, Pleaders for the respondent, it is ordered that

(1) the defendant do construct his wall at a distance of not less than 2 feet and

nine inches from that of the plaintiff. This distance to be measured from wall to wall;

(2) the defendant shall not raise his wall including parapet higher than that of the plaintiff;

(3) the defendant shall not build on the west side of the western wall any projecting cornice;

(4) the southern space between the plaintiff's wall and the defendant's wall be left open so as to admit a maximum of light and air.

To pay costs of this appeal amounting to Rs.....as detailed below. To pay the costs of *de novo* suit."

Nothing happened from 1896 till 1918 but in 1918 the plaintiff, on the allegation that the decree of the Civil Court had been contravened, applied for execution of that decree and the removal of a portion of the wall which obstructed the passage of light and air into the house of the plaintiff.

The judgment-debtor filed an objection and the learned Munsif on the 13th January 1919 disposed of the preliminary objection that the decree was incapable of execution. He held that the decree of the Aprellate Court was in fact a decree for perpetual injunction, and, as such, was capable of execution. He then subsequently proceeded to dispose of the other points which arose on the objection.

An appeal was preferred to the learned Judge against both the order on the preliminary point as well as the final order of the Munsif, dated the 19th May 1919.

The learned Judge in appeal held that the decree was incapable of execution and so convinced was he of the correctness of his decision that he declined to consider the other points which arose out of the objection. He accordingly allowed the appeal and in effect arrested the further execution of that decree.

This appeal has now been filed against the order of the learned District Judge. The only point which I have to consider is, whether the decree sought to be executed is capable of execution or not. There can be absolutely no doubt that the decree of the Appellate Court in the suit is the only decree which has to be executed, and the first Court's decree has merged into the decree of the Appellate Court. I do not think that this proposition of law can ever be contested, nor indeed has it been contested by the learned Vakil appearing for the appellant. But he contends that the decree of the Appellate Court is substantially a decree for prepetual injunction, and if there be any doubt about it, the Court is perfectly entitled to go into the decree of the first Court as well as the pleadings in the suit in order to properly construe the appellate decree.

The learned Vakil appearing on behalf of the respondent, however, contends that the decree of the Appellate Court after the compromise was merely a declaratory decree, and as such not capable of execution as a decree for prepetual injunction.

It will be noticed that the decree of the Appellate Court itself does not in any part of it say that it is a declaratory decree. No declarations are made and the decree clearly says that it is ordered that the defendant do construct the wall at a distance of not less than 2 feet 9 inches from that of the plaintiff and that the defendant shall not raise his wall including the parapet higher than that of the plaintiff, and that the defendant shall not build on the west side of the western wall any projecting cornice and so on. In my opinion it is idle to contend that an order like that is not mandatory.

The decree does not pretend to declare any right or title of the parties; the decree orders the defendant to do or not to do something. Therefore, on the face of the decree itself, in my opinion, it is a decree for injunction. And I am confirmed in the view that I take of this matter by a reference to the decree of the first Court as well as the pleadings in the suit.

The learned Vakil appearing on behalf of the respondent, however, denies the right of the Court to go beyond the decree itself which is under execution. In my opinion the executing Court is perfectly justified in referring to the decree of the first Court as well as to the pleadings in order to construe the decree under execution. It is an elementary principle of law that the executing Court cannot vary or alter the decree, but it must be satisfied as to what it is called upon to execute, and in order to find that out

when the decree is not clear, the Court is perfectly justified in referring to the pleadings and the decree of the trial Court; and as was laid down in the case of *Ahilyabai* v *Kashinath* (1), a decree must be construed in a fair and reasonable spirit so as to advance and not to impede its execution.

The learned Judge held that though the plaintiff had obtained a decree he had simply secured a bag of wind, inasmuch as that decree was incapable of execution.

The learned Vakil appearing on behalf of the respondent submitted that the proper course for the plaintiff to adopt under such circumstances would be for him to institute a suit for specific performance of contract, or apply for review of the decree in order to make that decree a decree for perpetual injunction. In my opinion the plaintiff can in execution of the Appellate Court's decree get the relief that he seeks.

I now proceed to consider whether the proposition that I have laid down above, that the executing Court can in case of doubt refer to the decree of the first Court and the pleadings in order to construe the decree which it is called upon to execute, is supported by authorities.

In the Full Bench case of *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (2) Mr. Justice Mahmood observed that "according to the Privy Council ruling, as well as the Full Bench ruling of this Court, as explained by Oldfield, J., in the case of *Gobardhan Das* v. *Gopal Ram* (3) and as now understood by us, the decree of the first Court when affirmed by the Appellate Court's decree may be referred to in executing the appellate decree." In the case of *Lachmi Narain* v. *Jwala Nath* (4) the case reported as *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (2) was followed; and it was held that "Where a decree is in its terms ambiguous, it is competent to the Court executing it to refer to the pleadings in the suit in which such decree was passed to ascertain its precise meaning." All these cases as a matter of fact follow the principle laid down by Lord James in *Robinson* v *Dulcep Singh* (5). Lord James laid down that "in order to determine what the decree really decides, it is essential to see what were the rights which were in dispute between the parties and which were alleged between them." The same view was taken in the cases of *Amolak Ram* v. *Lachmi Narain* (6) and *Srinath Dass* v. *Hari Pada Mitter* (7).

Analysing the principle laid down in these cases it comes to this that if the appellate decree under execution is clear, a reference to the decree of the trial Court or to the pleadings is not permissible. As I have already stated, in my opinion, the decree of the Appellate Court is perfectly clear. It is not a declaratory decree, because it does not pretend to be so; it is a mandatory decree which gives orders to the defendant to do or to abstain from doing certain things. If, however, the Court thought that there was an ambiguity as to the nature of the appellate decree, a reference to the decree passed by the trial Court as well as to the pleadings in the case would be perfectly justified. A reference to the pleadings and the decree of the trial Court can lead one to the irresistible conclusion that the decree of the Appellate Court was a decree for perpetual injunction. This being my view on the preliminary point on which the learned Judge has disposed of the appeal, I decree this appeal and hold that the appellate decree in the suit is capable of execution. I, therefore, remit the case back to the learned Judge for a full consideration of all the points that arose on appeal before him.

The result is that this appeal is allowed and decreed with costs.

Appeal allowed;
Case remanded.

(1) 5 Bom L. R. 802.

(2) 11 A. 267 at p 283 (F B); A. W N. (1889) 55; 13 Ind Jur. 427; 6 Ind. Dec. (N. s.) 598.

(3) 7 A. 366; A. W. N. (1885) 57; 4 Ind. Dec. (N. s.) 604.

(4) 18 A. 344 at p. 347; A. W. N. (1896) 87; 8 Ind. Dec. (N. s) 936.

(5) (1879) 11 Ch. D. 798; 48 L. J. Ch. 758; 39 L. T. 312; 27 W. R. 21.

(6) 19 A. 174; A. W. N. (1897) 9; 9 Ind. Dec. (N. s) 115.

(7) 3 C. W. N. 637.

DARSAN SINGH *v.* SHEORAJ SINGH.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 101 OF 1918 19.

November 14, 1919.

Present:—Mr. Ferard, S. M.

DARSAN SINGH—APPELLANT

versus

SHEORAJ SINGH AND OTHERS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 62 (1)—Land let for cultivating purposes, whether can be used for groves.

Lands given to tenants for cultivating purposes must not be used for cultivating groves without the landlord's consent.

Second appeal from the order of the Commissioner, Lucknow Division, dated the 11th of July 1919, in the case of ejectment.

JUDGMENT.—The case is clear. As regards ground No. 2, the decree of the 1916 case is on the record and there is abundance of evidence to show that the old trees were cut down. Rent was then assessed under that decree.

The trees now are 3 years old and were not planted with consent of landlord.

It is an attempt to reconvert agricultural land into grove.

It is not argued before me that to do so does not come under section 62 (1), Oudh Rent Act, and I consider it does. Lands given to tenants for cultivating purposes must not be used for planting groves without the landlord's consent.

Appeal dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 28 OF 1920.

April 22, 1920.

Present:—Mr. Justice Coutts.

SHAMANANDAN PRASAD—PETITIONER

versus

MULCHAND RAM—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Application to withdraw suit with leave to bring fresh suit—Procedure—Court, duty of.

SHAMANANDAN PRASAD *v.* MULCHAND RAM.

Where an application is made to withdraw a suit with leave to bring a fresh suit and the Court thinks that permission to file a fresh suit should not be granted, it should dismiss the application and hear the suit on the merits, or dismiss it for want of prosecution if the plaintiff refuses to proceed.

Application against the order of the Munsif, Sitamarhi, District Darbhanga.

Mr. *Nawal Kishore Prasad*, II, for the Petitioner.

Mr. *Chandra Shekhar Banerji*, for the Opposite Party.

JUDGMENT.—This is an application against an order of the Munsif of Sitamarih allowing the plaintiff to withdraw his suit without permission to file a fresh suit.

The facts are that the plaintiff prayed for permission to withdraw his suit with permission to bring a fresh suit, but the Munsif has simply allowed him to withdraw his suit and has refused him permission to bring a fresh suit. This is obviously a wrong order. The Munsif, if he thought that permission to file a fresh suit should not be granted, should have dismissed the application and have either heard the suit on the merits or have dismissed it for want of prosecution if the plaintiff refused to proceed. Instead of doing this, however, he has divided the petition into two parts and has attempted to treat the application as one under the first part of Order XXIII, rule 1, clause (1). This he was clearly not entitled to do, and in this view I am supported by the decision in the case of *Bhagwat Pershad* v. *Lachmi Pershad* (1), which is on all fours with the present case. The Munsif has clearly acted without jurisdiction, his order must be set aside and the suit remanded for re hearing on the merits or for dismissal in accordance with law. The petitioner is entitled to costs. Hearing fee one gold *mohur*.

Suit remanded.

(1) 10 Ind. Cas. 346.

CHAKARPAN *v.* NATHUA.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION No. 8 OF 1918-19.

August 28, 1919.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

CHAKARPAN—APPLICANT

versus

NATHUA AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 185—Material irregularity, what amounts to—Burden of proof, wrong allocation of.

The failure to consider a finding on remand and basing an order upon a wrong allocation of the burden of proof are material irregularities within the meaning of section 187 of the Agra Tenancy Act.

JUDGMENT.—The application refers to field No. 152 only.

This is an application for revision under section 185, Tenancy Act. Plaintiff-applicant is landlord. He sued to eject respondents as non-occupancy tenants. They are so recorded since 1310 Fasli. Before that they are recorded as the sub-tenants of *Musammat* Jaini, occupancy tenant. The Assistant Collector found that they had been paying rent direct to the superior landlord (plaintiff-applicant) since 1309 Fasli and were, therefore, tenants-in-chief then and had occupancy rights. In first appeal the Commissioner, Mr. Fremantle, very properly found that the Assistant Collector's decision was based on a "nonsequitur" and remanded the case for finding as to when *Musammat* Jaini abandoned her holding. He placed onus on the tenant defendants. This was quite right, as the onus clearly lay on them to show that Musammat Jaini had ceased to be occupancy tenant at a much earlier date than recorded in the papers. Mr. Fremantle, Commissioner, also in his remand order allowed 10 days for objection. The Assistant Collector in his return to the remand on 5th June 1918 found definitely for the landlord, plaintiff-applicant, that *Musammat* Jaini's occupancy right had not ceased till 1320 Fasli and that the respondents were tenants-in-chief only since then. The remand finding came before Mr. Fremantle's successor, Mr. Silberad, who did not take the trouble even to discuss the remand finding and held that the onus which his predecessor had, quite rightly as I have said, placed on the tenants really lay on

the landlord, and dismissed the landlord's appeal. I consider that Mr. Silberad's action, in failing to consider the remand finding and basing his order on a reasoning in which he placed the burden of proof quite wrongly, were material irregularities within the meaning of section 185, Tenancy Act. I need not discuss his confused idea about the position of an occupancy tenant mortgagee with which he starts his judgment, as it does not enter into the case and Pleaders before me both admit it is beside the point.

I would allow the application for revision, set aside the finding of both the lower Courts and decree the applicant's suit for ejectment as regards field No. 152.

Costs to applicant throughout.

Application allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 85 OF 1919.

January 30, 1920.

Present:—Pandit Kanhaiya Lal, A. J. C.

Musammat CHAURAS KUNWAR —PLAINTIFF—APPELLANT

versus

JAGANNATH SINGH—DEFENDANT —RESPONDENT.

Hindu Law—Female, grant in favour of—Presumption—Absolute estate, grant of—Succession Act (X of 1865), s. 82, applicability of—Custom—Family custom set up—Tribal custom, evidence as to, whether relevant.

Where a grant is made by a person governed by the Hindu Law in favour of a female, there is no necessary presumption that an absolute estate is intended to be granted, and section 82 of the Succession Act has no application to such a case. [p. 288, col. 2.]

Where only a family custom is set up, evidence as to a tribal custom may in certain circumstances be relevant as showing that a family belonging to that tribe observed it. [p. 288, col. 2.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 14th March 1919, reversing that of the Subordinate Judge, Partabgarh, dated the 27th June 1918.

CHAURAS KUNWAR v. JAGANNATH SINGH.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—Binda Singh was the owner of certain property, a half share of which is now in dispute. He had two daughters, *Musammat* Gulab Kunwar and *Musammat* Chauras Kunwar. The former had a son, Mahadeo Singh. The latter had a son, Durga Bakhsh Singh. On the 23rd May 1900 Binda Singh executed a Will, whereby he devised a moiety of his estate to Mahadeo Singh and another moiety to Durga Bakhsh Singh. Mahadeo Singh, however, died in the lifetime of the testator. The allegation of each party is that thereafter Binda Singh made an oral bequest. The exact time or date when the oral bequest was made is not stated. *Musammat* Gulab Kunwar was given an absolute estate in the half-share which the testator had bequeathed to Mahadeo Singh. The other party states that that half share was given to *Musammat* Gulab Kunwar for her life. Binda Singh did not live long enough to execute a formal Will, evidencing the manner in which he wanted that half share to devolve. On his death that half share was entered in the name of *Musammat* Gulab Kunwar. *Musammat* Gulab Kunwar died in 1907. Her husband, Jagannath Singh, succeeded in getting mutation of names effected in respect of that share in his favour.

The present suit has been filed by *Musammat* Chauras Kunwar and her son, Durga Bakhsh Singh, for the possession of that share. The Court of first instance decreed the claim. Its finding was that Jagannath Singh had failed to prove the oral Will set up by him and that *Musammat* Chauras Kunwar was entitled to the disputed share by right of intestate succession.

There were two questions in issue before it. The *first* was whether there was a custom prevailing in the family to which Binda Singh belonged by which a daughter was excluded from inheritance. The *second* was whether Binda Singh had made any oral bequest of the kind set up by the plaintiffs. The lower Appellate Court observed that the point mainly pressed was the first one. It nevertheless went on to discuss the other point which it considered to be of importance and came to a conclusion adverse to the plaintiffs. If the second point was not pressed, the Court below need not have discussed it, or should have at all events given the plaintiffs an opportunity of discussing it before proceeding to express any opinion on its merits. The opinion which it expressed was also vitiated by the wrong perspective from which the question was examined. The alleged oral Will set up by the plaintiffs may not have been identical with the alleged oral Will set up by Jagannath Singh. Each of them may have had in their view an oral Will said to have been made on a date different from that referred to or intended by the other. Between the date of the death of Mahadeo Singh and his own death, Binda Singh may have made many oral bequests, changing his mind each time in the state of affection in which he found himself when one of his grandsons died. Section 82 of the Indian Succession Act (X of 1865) has no application, because where a grant is made by a person governed by the Hindu Law in favour of a female, there is no necessary presumption that an absolute estate was intended to be granted. The main plank of the defendant's case is that by virtue of the oral bequest relied on by him, an absolute estate was granted to *Musammat* Gulab Kunwar. That case must succeed or fail on the merits of the evidence which has been adduced in support of it. The plaintiffs gave no evidence in support of their allegation. The defendant did in support of his.

The question of custom has similarly been approached from a wrong standpoint. The defendant had set up a family custom excluding daughters from inheritance. He had asserted that Binda Singh was a Sombansi Thakur and filed certain *wajib-ul-arzes* and a number of decisions in support of his contention that such a custom prevailed among all Sombansi Thakurs of that locality or neighbourhood. He also produced some oral evidence in support of that allegation. The lower Appellate Court does not say that it disbelieved that evidence. It merely set aside that evidence out of its consideration, on the ground that it was beside the mark inasmuch as only a family custom was set up. But a tribal custom may in certain circumstances be relevant as showing that a family belonging to that tribe observed it.

It is desirable, therefore, that a proper finding should be obtained on each of these

matters from the lower Appellate Court after a due consideration of the evidence which each party has adduced and which is already on the record. That Court is accordingly directed to determine on that evidence:—

(1) Whether Binda Singh made any oral bequest devising the half share in dispute to *Musammat* Gulab Kunwar by way of an absolute estate after the death of Mahadeo Singh?

(2) Whether by virtue of any custom prevailing in the family to which Binda Singh belonged *Musammat* Chauras Kunwar was excluded from inheritance?

Two months' time will be allowed for a return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

Issues remitted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 248 OF 1918.

December 11, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

MAZUMDAR RAMAKRISHNA RAO PANTHULU—PETITIONER—APPELLANT

versus

MAZUMDAR BALAKRISHNA RAO PANTHULU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Applicability of rule to cases of decrees other than those for payment of money—Adjustment relating to partition of immoveable property, whether within rule.

An adjustment relating to partition of immoveable property provided for by a decree of Court falls within Order XXI, rule 2, Civil Procedure Code. The rule is not restricted in its application to provisions for payment of money. [p. 289, col. 2; p. 290, col. 1.]

Kelu Nair v. *Meenakshi*, 21 Ind. Cas. 639; 25 M. L. J. 586; 14 M. L. T. 574, not followed.

Abdul Latif Sahib v. *Bathula Bibi Ammal*, 23 Ind. Cas. 530; 15 M. L. T. 338; (1914) M. W. N. 346; *Sethurama Sahib* v. *Srimantha Chotta Raja Sahib*, 40 Ind. Cas. 820; (1917) M. W. N. 327, followed.

Appeal against the order of the District Court, Ganjam at Berhampore, dated the 27th March 1918, made in Original Execution Petition No. 50 of 1915, in Original Suit No. 19 of 1909.

Mr. *N. Rama Row*, for the Appellant.

Mr. *P. J. Suppanna Row*, for the Respondent.

This appeal coming on for hearing on the 8th April 1919, the Court delivered the following

JUDGMENT.

OLDFIELD, J.—The lower Court's conclusion as to items Nos. 2, 3, 7, 8, 9 is based on petitioner's admission in evidence and we have been shown no reason for dissent. The appeal on this point fails.

The remaining argument is as to Exhibit I and the question whether it constitutes an adjustment and the Court can take notice of it, if it was never certified to it, as Order XXI, rule 2, Civil Procedure Code, requires. It was a sale by petitioner to the other decree-holder, respondent, of part of the property, which was to be divided; and we have no doubt that the transfer was an adjustment of the decree. On the question whether Exhibit I should have been certified to the Court, several decisions have been quoted regarding the application of Order XXI, rule 2, to decrees, which, like the case before us, include provision for payment of money as well as for other relief. Of the two cases referred to by the lower Court, it is not clear that the decree in *Kristna Hande* v. *Padmanabha Hande* (1) contained any provision of the former description and in *Abdul Latif Sahib* v. *Bathula Bibi Ammal* (2) Order XXI, rule 2, is applied to all decrees, under which money is payable; and there is nothing in it to support the restriction of its application proposed by the lower Court to provisions for payment of money. That interpretation of it was in fact rejected in *Sethurama Sahib* v. *Srimantha Chotta Raja Sahib* (3). In the latter case a previous unreported decision of my own is referred to, Civil Miscellaneous Second Appeal No. 11 of 1915; but it was founded on a judgment of Sadasiva Aiyar, J., in *Kelu Nair* v. *Meenakshi* (4), the principle of which he statedly reconsidered in *Sethurama Sahib* v. *Srimantha Chotta Raja Sahib* (3). The recent course of decisions of this Court is strongly marked and in a matter of this nature, I should not depart

(1) 21 Ind. Cas. 177; 25 M. L. J. 442; 14 M. L. T. 233; (1913) M. W. N. 802.

(2) 23 Ind. Cas. 530; 15 M. L. T. 338; (1914) M. W. N. 346.

(3) 40 Ind. Cas. 820; (1917) M. W. N. 327.

(4) 21 Ind. Cas. 639; 25 M. L. J. 586; 14 M. L. T. 574.

from it except for far stronger reason than is available. In these circumstances, following the case last mentioned, I think that the lower Court should have applied Order XXI, rule 2, to the adjustment evidenced by Exhibit I. It is said, however, that in fact the decree, so far as the properties dealt with in Exhibit I are concerned, was adjusted at a later date by the presentation by all the parties to it of Execution Appeal No. 369 of 1913 dated 8th July 1913. That application certainly certifies satisfaction as between the present parties and their brother, the defendant in the suit. But it is not possible to say on the information before us whether it involved any satisfaction as between the present parties, or whether all the properties in Exhibit I being in the schedule A referred in Execution Appeal No. 369 of 1913, the divisions of schedule A properties between them still have to be effected and the decree in respect thereof remained unexecuted.

Again respondent asks for an opportunity to ascertain whether Exhibit I was certified to the Court within the time allowed by Order XXI, rule 2; and in the absence of any categorical statement by the lower Court on the point, we think that he should be allowed an opportunity to show that there was such certification by production of documentary evidence regarding it.

We, therefore, call on the lower Court to submit findings on the issues:—

1. "Did Execution Appeal No. 369 of 1913 effect a valid satisfaction of the decree, so far as it related to immoveable properties, which renders it unnecessary for respondent to prove that Exhibit I was certified to the Court?"

2. "Was Exhibit I ever certified to the Court and, if so, were the provision of Order XXI, rule 2, complied with?"

Fresh evidence may be taken with reference to the first issue and fresh documentary evidence with reference to the second. The finding should be submitted within six weeks after the re-opening of the lower Court after the midsummer vacation and seven days will be allowed for filing objections.

SESHAGIRI AIYAR, J.—As regards Exhibit I, the learned District Judge was right in holding on the authority of *Kelu Nair* v. *Meenakshi* (4) that the adjustment relating to the partition of the immoveable properties was not within the mischief of Order XXI, rule 2. But one of the learned Judges who decided that case, has receded from the position taken up by him, following the decision of the learned Chief Justice and Aiyng, J., and my learned brother who followed *Kelu Nair* v. *Meenakshi* (4) in C. M. S. A. No. 11 of 1915 is prepared to accept the later view.

If the matter were *res integra* I would have had some hesitation in holding that the words in Order XXI, rule 2 (1), "or the decree is otherwise adjusted in whole or in part," related to portions of a decree in respect of which "money is not payable." However, acting on the principle that there should be uniformity on a question of procedure, I follow the two later decisions, namely, *Abdul Latif Sahib* v. *Bathula Bibi Ammal* (2) and *Sethurama Sahib* v. *Srimantha Chotta Raja Sahib* (3) and hold that the present case is covered by Order XXI, rule 2, clause (1). I agree with my learned brother in his conclusion and direction on the other points argued before us.

In compliance with the order contained in the above judgment the District Judge of Ganjam at Berhampore submitted the following

FINDINGS.—With regard to the first of the two issues referred to me, it has been admitted before me on behalf of the counter-petitioner that Execution Appeal No. 369 of 1913 did not effect a satisfaction of the decree as between petitioner and counter-petitioner; and this is shown too by the terms of the petition filed in those proceedings. The settlement was between the petitioner and counter-petitioner, collectively on the one side, and the defendant Narasinga Row on the other. My reply to this issue is accordingly in the negative.

2. On the second issue, also, it is admitted that no documentary evidence exists to show that Exhibit I was ever certified to the Court. This issue too, therefore, I answer in the negative.

No costs have been incurred in this Court after remand.

This appeal coming on for final hearing after the return of the findings of the lower Court upon the issues referred to by this Court for trial, the Court delivered the following

BHARATH SINGH v. MUNNU SINGH.

JUDGMEMT. The appeal is allowed to the extent that the lower Court's order will be modified by insertion of a direction that the immoveable properties mentioned in Exhibit I should be divided in addition to those already specified. There will be proportionate costs here and in the lower Court.

M. C. P.

Appeal partly allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 29 AND 30 OF 1918.

December 18, 1919.

Present:—Mr Stuart, A. J C., and Pandit Kanhaiya Lal, A. J. C.

BHARATH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUNNU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, alienation by—Necessity, proof of—Consideration, small portion of, not shown for necessity, effect of.

Where in the case of a sale effected by a Hindu widow, the entire consideration with the exception of a small portion is shown to have been taken for legal necessity, the vendee cannot be deprived of the benefit of his purchase. [p 293, cols. 1 & 2.]

Girdharee Lall v. *Kantoo Lall*, 1 I A. 32 ; 14 B, L. R. 87: 22 W. R. 56; 3 Sar. P. C. J. 380; *Buniyad Husain* v. *Mata Din Singh*, 36 Ind. Cas. 5?; 19 O. C. 122; 3 O. L. J. 318 and *Gur Sahai* v. *Girdhar Lal*, 52 Ind. Cas. 75: 22 O. C. 84: 1 U. P. L. R. (J. C) 54; 6 O L. J. 411, followed.

In the case of a mortgage no such question arises, because it is open to the reversioners to sue for redemption on payment of the amount for which they may be held liable. [p. 293, col. 2.]

Appeals from the decree of the Subordinate Judge, Sitapur, dated the 9th March 1918.

Mr. *J. N. Chak* for Mr. *M. N. Chak*, for Appellant No. 2 in Appeal No. 29.

The Hon'ble Pandit *Gokaran Nath Misra* and Messrs. *Chand Narain Harkauli* and *Dwarka Singh*, for Respondents Nos. 1, 2, 4, 5 and 6 in Appeal No. 29.

Babu *Basudeo Lal*, for Respondent No. 7 in Appeal No. 29.

Mr. *J. N. Chak* for Mr. *M. N. Chak*, for Apnellant No. 2 in Appeal No. 30.

The Hon'ble Pandit *Gokaran Nath Misra* and Messrs. *Chand Narain Harkauli* and *Dwarka Singh*, for all the Respondents except No. 3 in Appeal No. 30.

JUDGMENT.—The dispute in these appeals relates to certain properties which belonged to Mitan Singh, who died leaving a widow, *Musammat* Jaswant Kuar. On the 11th July 1898 *Musammat* Jaswant Kuar mortgaged a 5 *biswas* share in the village Bhitia with possession in favour of Chandra Singh, the ancestor of the defendants, for a consideration of Rs. 2,500 out of which Rs. 2,154 have been held by the Court below to have been taken for legal necessity. On the same date she sold the remaining property in dispute to Chandra Singh for a consideration of Rs. 13,196-11-3, out of which Rs. 12,378-9-4 have been held by the Court below to have been taken for legal necessity. *Musammat* Jaswant Kuar died on the 5th November 1916. The plaintiffs, Bharath Singh, Balbhadra Singh and Lalta Singh, are the nearest reversionary heirs of Mitan Singh deceased. Two of them, Bharath Singh and Lalta Singh, have withdrawn their appeals and accepted a payment of Rs. 4,000 from Munnu Singh, one of the defendants-respondents, in satisfaction of their claims. Their appeals will be dismissed as withdrawn in terms of the compromise. The remaining appellant, Balbhadra Singh, proposes to proceed with these appeals.

With regard to the sale effected by *Musammat* Jaswant Kuar, he disputes the existence of any legal necessity with reference to some of the items allowed by the Court below and contends that inasmuch as the property comprised in the sale was of much greater value than the consideration mentioned in the sale-deed, he should be allowed to recover the property on payment of such amount, for which the Court might find the legal necessity to be established. With regard to the mortgage effected by *Musammat* Jaswant Kuar he contends that the terms of the mortgage were onerous and unreasonable and could not bind the property mortgaged in the hands of the reversionary heirs of Mitan Singh and that he was entitled to redeem the same on payment of such amount, for which the

legal necessity may be found to be established.

The sale deed purports to have been executed by *Musammat* Jaswant Kuar to discharge certain debts due by Mitan Singh subject to a provision to secure her maintenance. Out of the total consideration of Rs. 13,196-11-3, Rs. 4,937 were stated to be due to the vendee on account of certain mortgages made in his favour by Mitan Singh, Rs. 409-11-3 were alleged to have been due to him by Mitan Singh on account of oral debts and Rs. 7,650 were left for payment to other creditors on account of the mortgages made by Mitan Singh. The names of the creditors, the dates of the mortgages or the amounts due on them were not specified in the sale-deed, but the villages comprised in those mortgages are mentioned. The learned Counsel for the plaintiffs-appellants dispute the existence of legal necessity in regard to items aggregating Rs. 4,870 1 11 only.

The first of these items is a debt of Rs. 231 due by Mitan Singh on account of a deed of further charge executed on his behalf by his general agent, Balak Ram, on the 30th January 1895 (Exhibit A7). The evidence of Balak Ram shows that Mitan Singh executed the deed of further charge for Rs. 155 in favour of Behari Lal with respect to the village Baniapur and that he, Balak Ram, signed the deed at the instance of Mitan Singh. Badri Prasad, son of Behari Lal, deposes that the money due on that deed was paid by Chandra Singh along with the money due on the principal deed of mortgage. The power-of attorney held by Balak Ram has not been filed, but the evidence of Balak Ram coupled with the endorsement of the Sub Registrar is sufficient to establish that he had authority to execute and sign the deed on behalf of Mitan Singh. The plaintiffs appellants have been rightly made liable for this amount.

The second item is a sum of Rs. 471 due on a registered mortgage deed executed by Balak Ram on behalf of Mitan Singh as his general agent in favour of Pratap Singh on the 14th August 1894 (Exhibit A5). Balak Ram had authority to execute and sign the above deed on behalf of Mitan Singh. Pratap Singh deposes that he received the money due on it from Chandra Singh. The plaintiffs-appellants are liable for this item also.

The third item is a sum of Rs. 540 paid on account of a deed of mortgage executed by Mitan Singh in favour of Daryao Gir on the 12th June 1893 (Exhibit A11). Balak Ram deposes that Chandra Singh paid Rs. 530 or Rs. 540 out of the purchase money on account of that mortgage to Ram Adhin Gir, the disciple and successor of Daryao Gir. Ram Adhin Gir corroborates him. This item also has, therefore, been properly included in the account.

An item of Rs. 925 12-0 is stated to have been paid on account of a deed of mortgage executed by Mitan Singh in favour of Munna Lal on the 12th June 1890 (Exhibit A12) and another item of Rs. 665 is stated to have been paid on account of a deed of further charge executed by him in favour of the same person on the 3rd July 1891 (Exhibit A13). Jamna Din, son of Munna Lal, deposes that Chandra Singh paid him Rs. 1,400 or Rs. 1,500 on account of those deeds. The defendants stated that Rs. 1,475 were paid on account of those deeds by Chandra Singh; inasmuch as there was no evidence to prove that any sum was relinquished by Jamna Din, that statement has been rightly accepted by the Court below as the measure of the liability of the plaintiffs-appellants on account of those debts.

An item of Rs. 335 is stated to have been paid on account of a deed of mortgage, executed by Mitan Singh in favour of Ambar Singh on the 10th June 1892 (Exhibit A67). Ambar Singh transferred his mortgagee right to Dilipat Singh. The evidence of Din Dayal, who was in the service of Dilipat Singh, proves that Munna Lal, the Diwan of Chandra Singh, gave Rs. 335 to Dilipat Singh on account of that mortgage. Hazari Singh corroborates him. The plaintiffs-appellants are, therefore, liable for this item too.

Another item of Rs. 800 is stated to have been paid on account of a deed of usufructuary mortgage executed by Mitan Singh in favour of Pratap Singh on the 21st May 1894 (Exhibit A69). Chandra Singh paid that amount by depositing it in Court under section 83 of Act IV of 1882, Pratap Singh admits having received that money through Court after a decree for redemption had been obtained by Chandra Singh in respect of the

said mortgage (Exhibit. A18). The plaintiffs-appellnts are liable for this amount too.

A sum of Rs. 200 is stated to have been paid to *Musammat* Jaswant Kuar in cash for the expenses connected with the execution, stamp and registration of the sale-deed. The Court below was of opinion that having regard to the stamp duty paid and the other expenses usually incurred, the above expenditure cannot be considered to be unreasonable and we see no reason to take a different view.

The plaintiffs-appellants are also liable for an item of Rs. 194 due on account of an oral debt due by Mitan Singh, the existence of which has been proved. The existence of legal necessity for Rs. 4,361 out of Rs 4,870-1-11 is thus established. The legal necessity with regard to Rs. 8,326-9 4, allowed by the Court below, is not disputed.

The evidence produced by the plaintiffs-appellants to prove that the property sold was worth Rs. 75,000 is very unsatisfactory. Taking the profits of the property sold as are ascertainable from the assessment papers prepared at the time of the last settlement, the Court below rightly came to the conclusion that the property sold could have not fetched more than what was offered by Chandra Singh, particularly as the vendor was allowed to retain possession of the best villages, the profits of which amounted to one-third of the profits of the entire property sold, for her life as a provision for her maintenance. She lived for eighteen years after the execution of the sale-deed and enjoyed the profits of the said villages, and that fact must have materially affected the price which the property sold might otherwise have fetched.

In regard to the deed of mortgage, Rs. 2,154 were taken to pay a previous mortgage deed for Rs. 1,000 executed by Mitan Singh on the 29th November 1898. That liability has been properly charged against the plaintiffs appellants. The propriety of the terms on which the loan was taken cannot be considered till a suit is filed by the plaintiffs for the redemption of that mortgage, which is binding on them to the extent of Rs. 2, 154. As observed by their Lordships of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1), where the entire consideration with the exception of a small portion is shown to have been taken for legal necessity, the vendee cannot be deprived of the benefit of his purchase. In *Buniyad Husain* v. *Mata Din Singh* (2) and *Gur Sahai* v. *Girdhar Lal* (3) a similar view was taken. The Court below has directed the vendee or his legal representatives to pay to the plaintiffs a sum of Rs. 818-1-1 with interest at 1 per cent. per mensem to recoup them for the portion of the consideration for which no legal necessity was found to have been proved. In the case of a mortgage no such question arises, because it is open to the plaintiffs to sue for redemption on payment of the amount for which they may be held liable. If the mortgage contains onerous terms, the propriety of those terms can be challenged when the suit for redemption is brought. The other pleas taken in the memoranda of appeal have not been pressed. The learned Counsel, who appears for *Musammat* Munna Kuar, does not press the cross objections filed by him on her behalf.

The appeals are, therefore, dismissed with costs. The cross-objections are also dismissed as withdrawn with costs.

Appeals dismissed.

(1) 1 I. A. 321; 14 B. L. R. 187; 22 W. R. 56; 3 Sar. P. C. J. 380.

(2) 36 Ind. Cas. 57; 19 O C. 122; 3 O. L. J. 313.

(3) 52 Ind. Cas. 75; 22 O. C. 84; 1 U. P. L. R. (J. C.) 54; 5 O. L. J. 411.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

January 20, 1920.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

GIRDHAR DAS, SINCE DECEASED (NOW REPRESENTED BY BRIJ MOHAN DASS) —APPELLANT

versus

Raja SRI KRISHNA DATT DUBE AND OTHERS—RESPONDENTS.

Hindu Law—Mitakshara—Partition, requisites of —Division of interest—Intention to separate, whether sufficient—Burden of proof.

In a Hindu joint family a disruption of the status of jointness may take place by agreement, without division of the estate by metes and bounds. Even an unambiguous expression of an intention

by one member of the joint family to separate and hold his share separately will suffice But the question is one of fact, and the onus is on the party alleging separation of interest or the intention to separate to affirmatively establish it. [p. 297, col. 1.]

Appeal from a decree of the Allahabad High Court, dated the 18th February 1914, affirming a decree of the Subordinate Judge, Benares.

FACTS of the case sufficiently appear from their Lordships' judgment. The trial Court dismissed the suit of the plaintiff-appellant, and an appeal to the High Court (Sir H. Richards, C. J., and Sir P. C. Banerji, J.) was dismissed. Hence this appeal.

Messrs. *De Gruyther* and *Garth*, for the Appellant, submitted that a partition had taken place between Harihar Dutt and his brother Shankar Dutt. To effect a partition it is not necessary there should be a separation by metes and bounds: directly the members agree to hold their shares separately, it operates as a partition.

Balkishen Das v. *Ram Narain Sahu* (1).

It is not necessary the other members of the joint family should agree: without any agreement any member may indicate that he will hold his share separately: that alone operates as a partition.

Girja Bai v. *Sadashiv Dhundiraj* (2).

The communication of an unequivocal desire to separate amounts to partition.

Kawal Nain v. *Prabhu Lal* (*Budh Singh*) (3).

The evidence here shows the two brothers had ceased to be joint. In the *ekrarnama* of 17th June 1889 Shankar Dutt reserves his right of recovery against Harihar: that was incompatible with the property being joint. Paragraph 5 of the deed is a conveyance by Harihar to Shankar of the whole of his interest for a consideration previously arranged.

[LORD PHILLIMORE:—You must say this deed was void, or you would have no interest at all: I suppose you use it as evidence of the state of the family.]

That is so. The whole of the provisions of the deed are contractual: the brothers could not contract except on the basis of the separation which we contend had occurred If the property were joint, Harihar could not deal with the succession.

The deed of 1889 did not divest Harihar of title: it was altogether void. The deed required the sanction of the Court of Wards. Harihar Dutt and Shankar Dutt being disqualified proprietors, section 205B of Act XIX of 1873 required the sanction of the Court of Wards to any disposition of the property by either of them. The High Court have wrongly assumed that such sanction was given. It has never even been alleged that it was given: and we submit, first, that there is no presumption that it was given, second, that the burden of proving such sanction as a condition precedent to the validity of the deed lies on the persons claiming under it, and that such burden has not been discharged.

Messrs. *Dunne* and *Parikh*, for the Respondents.—The question whether there has indeed been a separation between these two is a question of fact. There is no question of any unequivocal expression of intention here, the only question is, was there an agreement to separate? That is a question of fact, to be decided by way of inference from facts. It is not enough to say that the documents are incompatible with the property being joint: it must be shown they were inconsistent with any such proposition. If there had been a separation of interests, the Court of Wards would have kept separate accounts. The presumption is that the brothers remained joint: that presumption has not been rebutted.

The property being joint, Haribar could not mortgage it except for necessity; it has been found that there was no necessity.

If, however, it be held that the brothers were separate, the High Court have rightly held that the deed of 1889 was valid. By that deed Harihar transferred his interest to Shankar: he had nothing left to mortgage. As the High Court point out, it was never questioned in the trial Court that the Court of Wards sanctioned the arrangement, and

(1) 30 I. A. 189; 30 C. 738; 7 C. W. N. 578; 5 Bom. L. R. 461; 8 Sar. P. C. J. 489.

(2) 37 Ind. Cas. 821; 43 I. A. 151; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 118; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 465; 48 C. 1031 (P. C.).

(3) 40 Ind. Cas. 286; 44 I. A. 159; 15 A. L. J. 581; 2 P. L. W. 57; 21 C. W. N. 986; 33 M. L. J. 42; 19 Bom. L. R. 642; 26 C. L. J. 101; (1917) M. W. N. 514; 6 L. W. 230; 39 A. 496 (P. C.).

the question being one of fact, it was not open to appellant to raise it for the first time in appeal.

JUDGMENT.

MR. AMEER ALI.—The suit which has given rise to this appeal was brought in the Court of the Subordinate Judge of Benares on the 8th August 1910 to enforce a mortgage bond for Rs. 50,000 executed by one Raja Harihar Dut Dube in favour of Bisambhar Das, the plaintiff's father, since deceased. By this bond, which bears date the 6th October 1889, Harihar Dut purported to hypothecate a half share of a large property commonly known as the Jaunpur Estate in the Jaunpur District, then in his possession. Harihar Dut died in 1892 and on his decease the property came into the possession of his younger brother, Raja Shankar Dut Dube. Shankar Dut died three years later. The minior defendant Kishen Dut was adopted after Raja Shankar Dut's death by his widow under his authority.

The Court of Wards have assumed charge of the estate during Kishen Dut's minority.

The Jaunpur Estate owes its origin to one Sheo Lal Dube who lived towards the end of the eighteenth and the beginning of the nineteenth century, and appears to have been a man of considerable business ability. For his services to the British Government he had received the title of Raja, which has continued in his family as all its heads in succession seem to have enjoyed it. Harihar Dut and Shankar Dut were fourth in descent from Sheo Lal, and in 1879 they were the only persons interested in the Jaunpur Estate. Harihar Dut was admittedly a person of extravagant habits; he had, in the course of the few years during which he had been in possession of the property, contracted debts amounting to several lakhs of rupees. Shankar Dut was evidently more prudent and anxious to preserve intact the ancestral estate and dignity. In order to save the property from ruin in consequence of Harihar Dut's extravagance the two brothers jointly applied in October 1878 to the Court of Wards to assume charge of the estate and to discharge the debts with which it had become encumbered. The application was acceded to, and the Court of Wards held the estate for ten years, during which all the debts were paid off and the property was once more solvent. The law which vests in the Board of Revenue as the chief revenue authority in the Province the powers of a Court of Wards defines the class of proprietors disqualified to manage their property and of whose estate it may assume charge. Among these proprietors are included persons declared by the Local Government on their own application to be "disqualified" (Act XIX of 1873, Land Revenue, N. W. P., sections 193 and 194). Harihar Dut and Shankar Dut came within this category. By a later Act (VIII of 1879, section 24), a further section (205B) was inserted in Act XIX of 1873 which introduced the wholesome provision that:—

"Persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon, or interest in, such property or any part thereof.

"And no such property shall be liable to be taken in execution of a decree made in respect of any contract entered into by any such person while his property is under such superintendence."

This provision of the law prevented Harihar Dut from encumbering the estate during the management of the Court of Wards. But Shankar Dut was, evidently and not without reason, apprehensive that his brother would resume his habits of extravagance on the release of the property by the Court of Wards. In order to prevent so far as possible his burdening the estate, Shankar Dut obtained from him an agreement by which among other conditions Harihar bound himself not to contract any debt without Shankar's consent. It was agreed that on a breach of this condition Harihar should forfeit his right to the possession and management of the estate, which should devolve on Shankar. This document was executed on the 13th June 1889 but was not registered until January 1890. Whilst the property was under the administration of the Court of Wards, Harihar had borrowed Rs. 50,000 from Bisambhar Das on five promissory notes. The estate was released on the 1st October 1889 and five days after, that is, on the 6th October, he executed the mortgage bond in suit, in substitution of the promissory notes.

Bisambhar Das appears to have brought an action on this bond in the lifetime of

Shankar Dutt, but it was withdrawn, owing, it is said, to some technical defect, with liberty to bring another suit.

The present action was instituted as already stated on the 9th August 1910. The plaintiff Girdhar Das (who is insane and sues by his committee or certificated guardian, his wife) and the defendants other than the Collector and Kishen Dutt are the heirs and representatives of the original mortgagee, Bisambhar. The plaintiff's claim to bring to sale the half share of the Jaunpur Estate under the mortgage rests on three grounds:—Firstly, that it is an impartible estate, and that, therefore, Harihar Dut had absolute power of alienation over it; secondly, that even if it was not an impartible Raj but a property subject to the ordinary rules of the Hindu Law, it had been partitioned between the two brothers, and that at the time of the mortgage, Harihar was holding possession of his share separately from Shankar; and thirdly that even if there was no partition, the debt was incurred by Harihar Dut as the managing member for legal necessity and the benefit of the joint family.

The Collector, representing the Court of Wards, joined issue with the plaintiff on all these points. He contended further that at the time of the mortgage Harihar had no right in the property, as he had under the agreement of the 13th June 1889 relinquished all his rights in the estate in favour of Shankar Dut, and that even if for any reason the agreement was not enforceable, Harihar Dut as a member of the joint family was incompetent under the Hindu Law to execute the mortgage in question.

It appears that in a suit instituted in 1893 against Raja Shankar Dut by one of Raja Harihar Dut's creditors named Bithal Das, the validity of the agreement of the 13th June 1889 was put in issue, and the High Court in that case had decided that it was a valid agreement made for valuable consideration and binding on Harihar Dut and all persons deriving title from him.

In the present case the Subordinate Judge, before whom it came for trial in the first instance, held that the Jaunpur Estate in question was "not an impartible Raj, but an ordinary estate of a joint Hindu family," and as there was no proof of any legal necessity, the mortgage-deed on which the suit was brought was "invalid." He referred to the decision of the High Court in *Bithal Das* v. *Shankar Dat* (4) with regard to the effect of the agreement of the 13th June 1889, but properly observed that the parties were not the same in the present action, and that the pronouncement made in that case could not, therefore, operate as *res judicata*. Upon the findings of fact at which he arrived the Subordinate Judge dismissed the plaintiff's suit.

The learned Judges of the High Court of Allahabad on appeal, after disposing of the question whether the estate in suit was an impartible "Raj" or not, proceeded to deal with the case on the basis of the agreement of the 13th June 1889. They first expressed their agreement with the view of the first Court on the plaintiff's contention that the estate was impartible. They then went on to say as follows:—

"There is no evidence of partition save certain recitals in applications and other documents, including the agreement to which we have just now referred, to the effect that they were owners in equal shares. We do not think that it is necessary, having regard to the view we take of the case, to decide that there had been what amounted in law to a partition between the brothers."

It is to be regretted that the learned Judges did not express more decisively their opinion on the contention of partition, as it would have saved much discussion before this Board. In the result they held that the agreement was valid and binding, and accordingly affirmed the decree of the Subordinate Judge dismissing the suit.

On appeal before this Board it is admitted that the concurrent finding of the two Courts in India on the question of impartibility is conclusive. The debate, therefore, has been confined to two points—*viz.*, whether, accepting that the estate was at one time a joint family property, the plaintiff has succeeded in establishing that at the time of the mortgage the brothers were separate; and secondly, whether the agreement of the 13th June 1889 was invalid and inoperative as it was not entered

(4) 17 A. 264 at pp 272, 273; A. W. N. (1895) 57; 8 Ind. Dec. (N. s.) 494.

into with the sanction of the Court of Wards. It is clear, however, that the latter question would require determination only if separation is established.

The Dube family, it should be observed, are subject to the Mitakshara Law of the Benares School. Admittedly there has been no actual partition between the brothers; nor is it alleged, much less proved, that they enjoyed separately the rents and profits of their respective shares. It is not suggested that they were separate in mess and worship. What is contended for is that by their acts they had agreed to a "division of interest," which amounted in law to a separation. No doubt a disruption of the status of jointness may take place by agreement, without division of the estate by metes and bounds. Even an unambiguous expression of an intention by one member of the joint family to separate and hold his share separately will suffice. But the question is one of fact, and the onus is on the party alleging separation of interest or the intention to separate to affirmatively establish it.

The plaintiff in support of his contention relies principally on two documents. One is a deed of compromise bearing date the 2nd January 1875, entered into between Raja Lachmi Narain Dube on one side, and the two brothers (Harihar and Shankar) on the other. Lachmi Narain was a cousin of Harihar and Shankar, and was at the time the head of the Dube family. Shankar was then a minor and was represented on the compromise by the Collector, the share of these two being apparently in 1875 in charge of the Court of Wards. The document recites that "a dispute relative to a partition of the *riasat*," meaning thereby the estate, "had been going on for a long time between the parties owing to which no benefit whatever had been derived, but on the contrary losses sustained, and that, therefore, they were entering into a compromise with the object of maintaining the *riasat*." The parties then proceed to make the following declaration:—

"The *riasat* is a Raj which was acquired by the ancestors of the parties, that we or our heirs will never express a wish to have the profits or anything else partitioned, if we make a partition, it will not be entertained and this *riasat* will always continue joint and we, both the parties, namely, Raja Lachmi Narayan Dubey, first party, and Raja Haribar Dut Dubey and Shankar Dut Dubey, the second parties, have equal rights. The matters relating to *gaddinashini*, management of affairs, the expenses of the *riasat* and family, and possession of Lachmi Narayan Dube will continue as hereafter in accordance with ancient custom. After the present *gaddinashin* the person who may be the eldest in age and qualified, will be the *gaddinashin* in future. Matters connected with the management of *riasat* will also be attended to by us, the second parties, in concurrence with the others. The debts that are due up to this day by the parties will be paid from the whole of the *riasat*, and debts must on no account be contracted in future without the consent of the parties."

The parties to this document certainly do not evince any desire or intention to separate or to divide their respective interests in the joint estate; on the contrary, they insist on the continued existence of the estate as the joint property of the three executants. They call the estate a "Raj," and the head of the family for the time being "the eldest in age and qualified" as the *gaddinashin*; but that in no way affects the status of the family as a joint Mitakshara family.

Particular stress, however, is laid on the terms of a document executed by Shankar Dut on the 13th June 1879, shortly after the Court of Wards had assumed charge of the Jaunpur Estate. It is called an *ikrarnama* or agreement and is in the nature of a deed-poll. By this deed Shankar Dut binds himself and his heirs not to raise any objection to the sale or transfer by the Collector, or any other duly authorised officer of the Court of Wards, of any Zamindari *ilaka* "appertaining to the estate" and belonging to him, for the purpose of liquidating the debts with which it was burdened. At the same time he reserves his right to compensation against his brother. It is urged that the declarations contained in this document show a pre existing severance of interest between the two brothers. It becomes necessary, therefore, to refer shortly to the terms of the document. It begins with the statement that the "executant" had presented an application jointly with Haribar

on the 25th October 1878 to the Collector, and the Zamindari property belonging to him "which is held jointly with Raja Harihar Dut Dube has been placed under the management of the Court of Wards." It then goes on to say :—

"As the debts are heavy...and as Raja Harihar Dut Dube, and I, the executant, are the proprietors of a moiety share each, and if any *ilaka* belonging to the *riasat* is disposed of, then owing to the property being held in shares (jointly) there is no hope of getting a fair price owing to apprehensions of future objections being raised either by us, or our heirs, I, the executant, do hereby agree and give it in writing that if the Collector of the District of Jaunpur, the officer of the Court of Wards, or with the permission of the said officer, the manager transfers by sale any Zamindari *ilaka* appertaining to the *riasat* belonging to me, the executant, with the object of liquidating the debts and applies the proceeds in liquidating the debts, then I, the executant, or my heirs and successors will raise no objections in future in respect of such transfer, and I, the executant, or my heirs and successors will make no objection (after the management of the Court of Wards has been removed) in respect of the transfer aforesaid either against the Court of Wards or the persons to whom the Court of Wards may transfer the property. But it must be understood that this *ikrarnama* (deed of agreement) will in no way be detrimental to any of my rights which I had against Raja Harihar Dut Dube before its execution ; because after the transfer of some of the *ilakas*, appertaining to the *riasat* only a large portion of the *riasat* will be left free from incumbrance, and then whatever claim I may have with reference to the *imlak* which may be in existence I will make it against the *imlak* which is left and against my partner."

This document was executed, as it clearly states, with the object of enabling the Collector or the Court of Wards to give good title to the transferees unhampered by the possibility of future litigation by any reversioner. It was the only mode by which a fair price could be assured. There is no statement that the properties were held separately or that the interests of the two brothers were separate or separately enjoyed ; nor that any severance of interest was intended. On the contrary, it distinctly states that the estate was held "jointly" and that the two brothers were entitled to it in equal shares. The reservation by Shankar Dut of his rights is a natural corollary to the right of every joint tenant to claim upon partition compensation from his co-parceners in the event of unequal division. Reference has also been made to the joint agreement executed by Harihar and Shankar on the 13th June 1889. Their Lordships have examined this document also with great care and given due weight to the considerations urged on behalf of the appellant, but they find no trace of any previous separation or intended separation. On the contrary, the whole policy of the agreement is to keep the estate undivided in the family. There is an evident and natural desire to raise the prestige of the estate by calling it a Raj, and by styling the head or *karta* of the family the *gaddinashin*. But, as already stated, there is no indication throughout the document that there was an intention to disrupt the status of the family. The Court of Wards assumed charge of the estate as a joint estate, and throughout its administration treated it on that footing (*ide* for example the sale notification of the 15th August 1879). The village administration papers (*wajib-ul-arz*) for 1886 contain statements to the same effect.

Their Lordships do not think it necessary to refer to any of the documents executed by Harihar Dut or Shankar Dut after the date of the mortgage of the 6th October 1889, as its validity and enforcibility against the estate must be determined on the basis of the status of the family at the time it was executed and of the powers of Harihar Dut to bind the property. On a careful examination of the evidence their Lordships have come to the conclusion that the plaintiff has utterly failed to establish the separation on which he rested his claim. Admittedly there is no proof of such legal necessity as would justify the creation of the mortgage in respect of the joint family property. In this view of the case their Lordships do not consider it necessary

to enter upon a discussion of the validity of the agreement of the 13th June 1889.

A number of decisions by this Board was were referred to on behalf of the appellant but having regard to the facts of this case they require no examination.

In their Lordships' judgment this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellant.—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent.—Mr. *E. Dalgado.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 176 OF 1919.

January 20, 1920.

Present:—Mr. Lindsay, J. C.

DRIGPAL SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUKHNANDAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Guardian ad litem, *appointment of—Disqualified person appointed guardian—Minor, whether represented—Hindu Law—Joint family—Mortgage by father—Decree against father—Sale of mortgaged property—Redemption, suit for, by sons, maintainability of.*

If the law absolutely disqualifies certain persons from being appointed guardians *ad litem*, the appointment of any such person in that capacity is a nullity, and the minor is not at all represented in the litigation. [p 300, col. 2.]

Dammar Singh v. *Pirbhu Singh*, 4 A. L. J. 155; A W. N. 1907 70; 29 A. 29[illegible], distinguished.

A Hindu father executed a mortgage which was binding on his sons. The mortgagees obtained a decree on the basis of that mortgage against the father alone, without making the sons parties to the suit, and themselves purchased the mortgaged property in execution of their decree Subsequently the sons sued the mortgagees-purchasers, seeking *inter alia* redemption of the property:

Held, that the suit was maintainable for redemption of the mortgaged property. [p 301, col. 1.]

Debi Singh v *Jia Ram*, 25 A. 214; A. W. N. (1903) 21, distinguished

Hard cases must not be allowed to make bad law. [p. 302, col. 1.]

Appeal from the decree of the District Judge, Hardoi, dated the 29th March 1919, confirming the decree of the Subordinate Judge, Hardoi, dated the 2nd April 1918.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for Respondents Nos. 1—4 and 6—9.

JUDGMENT.—The two appellants in this case are the sons of one Gopal Singh, who was impleaded in the suit as defendant No. 5. On the 17th of November 1891 Gopal Singh executed a simple mortgage of certain property in favour of the defendants or their predecessors-in-title. On the 6th of January 1904 a suit was brought on this mortgage to which Gopal Singh and his two sons, the present plaintiffs, were made parties as defendants. At the time this suit was brought the sons were minors and it is proved that their mother was appointed their guardian *ad litem*. The suit was contested on a variety of pleas, the principal defence set up by the minors' guardian being that the mortgage was not binding on account of want of legal necessity. The issues were fully tried out and the Court came to the conclusion that the mortgage was binding on the minors and decreed the claim. Subsequently the property was sold in execution of the mortgage decree and purchased by the mortgagees themselves. The present suit has been brought by these sons of Gopal Singh for the purpose of recovering the property which was sold in execution of the mortgage decree. The allegation was that the property was joint ancestral property, that their father Gopal Singh who made the mortgage was a man of profligate habits, that the mortgage debt was in no way binding on them, and that they were entitled to have the decree in the previous suit set aside on the ground that they were not duly represented in the litigation. They claimed possession of the property with an account for mesne profits. In the concluding portion of the 12th paragraph of the plaint the plaintiffs offered to pay any part of the mortgage debt which the Court might find to be binding upon them.

Both the Courts below have dismissed the plaintiffs' claim. The Subordinate Judge was of opinion that the plaintiffs were not duly represented in the litigation of 1904; nevertheless he held that they were bound by the mortgage, it having been proved

that at the time the mortgage was made these sons of Gopal Singh were not in existence. The Subordinate Judge held, and I think rightly, that in these circumstances the sons could not challenge the validity of the mortgage deed.

Regarding the right of the plaintiffs to recover the property by redemption, he held that such a claim was not tenable for, although the plaintiffs were not properly represented in the mortgage suit, nevertheless, according to the Subordinate Judge, the decree which was passed in the earlier suit is a wholly good decree at least against the mortgagor and the sale of the mortgaged property under the decree was effective. He held that as the mortgage had merged into the decree and sale, there was no longer any case for redemption.

In appeal the learned District Judge did not expressly decide the question whether these plaintiffs had been properly represented in the earlier litigation. He refers to the finding of the learned Subordinate Judge, however, and does not express any dissent from the finding. He agreed with the Subordinate Judge that the plaintiffs were born after the mortgage had been executed and so were not in a position to attack the validity of the mortgage. On the question of redemption which was distinctly raised in the lower Appellate Court, the District Judge agreed with the first Court on the ground that the mortgage had merged in the decree. He says in the concluding portion of his judgment that the validity of the decree cannot be impeached because the validity of the mortgage itself is unshaken. This latter expression of opinion cannot be accepted, for obviously there may be a good and valid mortgage and yet a decree passed on the mortgage may not be valid in the sense that it is not binding upon the plaintiffs as in this case.

The first point which was argued here was regarding the position of these plaintiffs in the earlier suit. Section 457 of the old Code of Civil Procedure laid down expressly that no married woman could be appointed guardian *ad litem* of minor defendants and there is no question now that the mother of the plaintiffs at the time of the suit was a married woman. Her husband was still alive and was one of the defendants in the suit. It seems quite clear, therefore, that the mother was not a person who could legally be appointed a guardian *ad litem* in the case and if that is so, I am unable to understand how it can be contended that these plaintiffs were duly represented in the litigation. I agree with the opinion expressed on this point by the learned Subordinate Judge. A number of cases have been cited to me on behalf of the respondents here, but it seems to me that they are clearly distinguishable. They are cases in which an irregularity was committed in the matter of appointing a guardian *ad litem*, such for example as the omission to record a formal order of appointment. Cases of irregularity seem to me to stand upon an entirely different footing from the case which I have now to deal with. If the law says that certain persons cannot be appointed guardians *ad litem*, it necessarily follows that the appointment of any such person in that capacity is a nullity, and the minor is not represented at all in the litigation. The nearest case to the present which the learned Counsel for the respondents could refer me to was one reported as *Dammar Singh* v. *Pirbhu Singh* (1). There it was held that an irregularity under section 443 of the Code of Civil Procedure did not vitiate the decree. That was a case in which the mother of minors had been appointed guardian *ad litem*, although there was in existence at the time a certificated guardian who had been appointed by the Civil Court under the Guardians and Wards Act. If that case was rightly decided it is nevertheless distinguishable from the case before me, for a reference to section 443 shows that even where a certificated guardian has been appointed, another guardian *ad litem* may be appointed by the Court for special reasons to be put on the record. There is no absolute disqualification in that case, but in the case contemplated by section 457 of the old Code there is an absolute disqualification. A married woman is declared to be a person who cannot be legally appointed as a guardian *ad litem*.

I am quite clear, therefore, that the plea of the plaintiffs in the present suit, that they were not represented in the earlier

(1) 4 A. L. J. 155; A. W. N. (1907) 70; 29 A. 290.

litigation, must prevail. It necessarily follows from this finding that the decree is not binding upon them. On the other hand it is not to be supposed that these minors are now in a position to re-open the whole question which was litigated in the earlier suit. They cannot be heard to attack the mortgage upon which the decree was passed for, as already explained, that mortgage is binding upon them. It was executed before they came into existence. The only right, it seems to me, which these plaintiffs can be said to retain, is the right of redeeming the mortgage. It is true that in the mortgage decree, which was passed in 1904, the defendants were given an opportunity of redeeming the mortgage before the sale took place. but then, as it has been found, the present plaintiffs were not parties to that decree and so it cannot be said that they were given an opportunity of exercising their right of redemption.

It has been strongly contended on behalf of the respondents here that the right to redeem is now gone, and certain cases have been cited to me, the strongest of which in favour of the respondents is a Full Bench ruling of the Allahabad High Court reported as *Debi Singh* v. *Jia Ram* (2). It was there held in a suit similar to the present that "Where property belonging to a joint Hindu family has been sold by auction in execution of a decree obtained upon a mortgage of such property executed by the father of the joint family, it is open to the sons to sue for the recovery of their shares in the property so sold, if they were not made parties to the suit in which the decree against their father was obtained, provided that the mortgagee had at the time of the suit notice of their interests in the property. But their suit must be based upon some ground which under the Hindu Law would free them from liability as sons in a Hindu joint family to pay their father's debt. A sale once having taken place, the sons cannot succeed in a suit to recover the property sold upon the sole ground that they were not made parties to the original suit." It is argued here that this case covers the facts of the case now before me. It is, however, to be noticed that in the Allahabad case the property had been sold in execution and had been purchased by third parties. It is also material to notice that in that suit the sons did not make any offer to redeem the property. They wanted the mortgage decree set aside and asked for no other relief except recovery of possession of the property which had been sold. In my opinion there is a distinction between this Full Bench case and the case which I am now considering. Here, as I have pointed out in an earlier portion of the judgment, the plaintiffs have offered to pay up any portion of the mortgage debt which may be found to be owing from them. This case is not to be decided solely upon the principles of Hindu Law referred to in the Full Bench case of the Allahabad Court. A question of mortgage law is also involved, and I am unable to hold in favour of the respondents that a party who is interested in the right to redeem and who was not made a party to the mortgage suit can be deprived of his right of redemption. There is no question that, although these sons of Gopal Singh were born subsequent to the date of the mortgage, they were at the date of the mortgage suit persons interested in the mortgage property. They had acquired an interest by birth. They were, therefore, necessary parties to a suit for sale, and although they were nominally parties I have, for the reasons already given, decided that they were not parties in law. Their right to redeem the mortgage, therefore, seems to me to be unaffected by the decree, and this is the error in which I think both the Courts below have fallen. They talk about the mortgage having merged into the decree, forgetting that the decree is not binding upon the plaintiffs, who were no legal parties to it.

Another argument put forward here is this, namely, that the sons were really represented in the suit which was brought against their father the managing member of the joint Hindu family. On this it is sufficient to observe that it cannot be presumed that the mortgagees brought the suit against the father in his capacity as managing member and as representing the rest of the family, for the fact remains that in addition to the father the mortgagees-plaintiffs impleaded both the sons as defendants. Further it is apparent from the nature of the defence which was put forward in the

(2) 25 A. 214; A. W. N. (1903) 21.

mortgage suit that the father did not put forward a defence which represented the defence open to his own sons. It is, therefore, not one of those cases in which a mortgage decree obtained against the father of a joint Hindu family binds the rest of the family. The case is perhaps a hard one in many ways, for there is no reason to doubt that every possible plea which these plaintiffs could have raised in the mortgage suit was taken and decided against them. On the other hand hard cases must not be allowed to make bad law, and there can be no question that the plaintiffs had no legal guardian representing their interest in the previous litigation. The respondents, moreover, cannot be heard to complain on this score, for after all they were the persons who had the conduct of the suit and upon whom lay the legal obligation of seeing that a properly constituted legal guardian was appointed for the minors. I have decided, therefore, that this appeal must be allowed to this extent, namely, that the plaintiffs must be given an opportunity to redeem the mortgage. It will, I fear, be necessary to remit the case to the lower Court for a finding upon the amount payable by these plaintiffs, for the defendants-mortgagees have been in possession since the date of the sale, and it will be necessary in making up the account between the parties to take into consideration the mesne profits which the mortgagees have received since they took over possession. I send down the case accordingly to the lower Appellate Court for a finding upon the amount payable by the plaintiffs-appellants in respect of the mortgage after taking a full account between the parties. The finding of the Court below will be returned to this Court within two months, and ten days to run from the date of the lower Court's finding will be allowed to the parties to file objections.

Appeal partly allowed;
Case remanded.

PRIVY COUNCIL.

APPEALS FROM THE SIND JUDICIAL COMMISSIONER'S COURT

February 17, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

FIRM OF RAMCHAND MANJIMAL AND OTHERS—APPELLANTS

versus

FIRM OF GOVERDHANDAS VISHINDAS RATANCHAND AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 109, 110—Arbitration Act (IX of 1899), s. 19—Appeal to Privy Council—Final order, what is—Order refusing to stay suit, whether final.

An order is "final" within the meaning of section 109 of the Civil Procedure Code only if it finally disposes of the rights of the parties. [p. 303, col. 1]

An order refusing to stay a suit under section 19 of the Arbitration Act does not finally dispose of the rights of the parties, but leaves them to be determined by the Courts in the ordinary way. It is not, therefore, a "final order" within the meaning of section 109 of the Civil Procedure Code. [p. 303, col. 2.]

Consolidated appeals from six orders of the Court of the Judicial Commissioner, Sind, dated the 16th April 1918, reversing the orders of the Additional Judicial Commissioner, Sind, the acting as District Judge.

FACTS.—The plaintiffs-respondents opposed the defendants' application to stay proceedings in these suits, mainly on the ground that an umpire would have to be appointed under the arbitration clause, and that an umpire so appointed was not likely to be impartial. The first Court granted a stay, but on appeal the Judicial Commissioner's Court (Pratt and Fawcett), after a remand for evidence, found that there was a strong probability that an umpire would have to be appointed and that such umpire would not be impartial, they, therefore, held that it was a case where the Courts should retain their jurisdiction; reversed the trial Judge's order, and directed that the suits should proceed in the usual way. An application was made for leave to appeal to His Majesty in Council. Respondents opposed this application on the ground that the order refusing a stay was not a final order, but the Judicial Commissioner's Court (Fawcett and Raymond), mainly on the authority of *Secretary of State for India in Council* v. *British*

India Steam Navigation Co. (1), held otherwise and gave leave to appeal.

Sir *John Simon*, *K. C.*, and Mr. *E. B. Raikes*, for the Respondents, took the preliminary objection that the appeal was incompetent, inasmuch as the order appealed from was not a final order within the meaning of section 109 (*a*) of the Code of Civil Procedure, 1908.

Mr. *Upjohn*, *K. C.*, and Mr. *Kenworthy Brown*, for the Appellants, submitted that this point was no longer open to respondents. They had raised it on the application for leave to appeal: it had been decided against them, and they had not appealed against the decision.

The Board held that the point as to the competency of the appeal was still open.

Sir *John Simon* submitted that the orders under appeal merely decided what tribunal was to adjudicate upon the rights of the parties: they did not determine those rights at all, but merely left them to be determined by the Courts in the ordinary way instead of by arbitration. An order is final only if it finally disposes of the rights of the parties.

Salaman v. *Warner* (2) and *Bozson* v. *Altrincham Urban District Council* (3).

Mr. *Upjohn*, *K. C.*, for the Appellants.—The order is final within the meaning of section 109 (*a*) of the Code of Civil Procedure. If the stay had been granted, it would have finally disposed of the suit. The refusal of the stay finally deprived the defendants of the right which they claimed to refer the matters in dispute to arbitration.

JUDGMENT.

VISCOUNT CAVE.—These are suits for alleged breaches of certain contracts for the sale of cotton. Each contract contained an arbitration clause, and the defendants in each suit applied under section 19 of the Indian Arbitration Act of 1899 for a stay of proceedings with a view to the issues being referred to arbitration under the clause. The first Court granted a stay, but on appeal the Judicial Commissioner at Sind reversed the orders and refused a stay of proceedings. Applications were made to the Judicial Commissioner for certificates under section 109 (*a*), or in the alternative under section 109 (*c*) of the Civil Procedure Code of 1908, with a view to an appeal to this Board. The learned Judges of the Judicial Commissioner's Court took the view that the orders refusing a stay were final orders and, accordingly, granted a certificate under section 110 to the effect that the value of the matter in dispute exceeded Rs. 10,000. Thereupon the appeals were brought to His Majesty in Council, and the objection is raised that the orders refusing a stay were in fact not final, and, accordingly, that the appeals do not lie.

Their Lordships have considered the matter, and are of opinion that the preliminary objection succeeds. The question as to what is a final order was considered by the Court of Appeal in the case of *Salaman* v. *Warner* (2), and that decision was followed by the same Court in the case of *Bozson* v. *Altrincham Urban District Council* (3). The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the Courts in the ordinary way.

In their Lordships' view the orders were not final, and accordingly the appeals cannot proceed, and their Lordships will, therefore, humbly advise His Majesty that they should be dismissed with costs.

Two of the appeals have already been withdrawn, as regards certain of the parties, and, therefore, the order will not apply to those.

Appeals dismissed.

Solicitors for the Appellants.—Messrs. *Wontner & Sons.*

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

(1) 9 Ind. Cas. 183; 13 C. L. J. 90; 15 C. W. N. 848.
(2) (1891) 1 Q. B. 734; 60 L. J. Q. B. 624; 39 W. R. 547.
(3) (1903) 1 K. B. 547; 72 L. J. K. B. 271; 51 W. R. 337; 67 J. P. 397; 19 T. L. R. 266; 1 L. G. R. 639.

MOHAMMAD AHMAD *v.* ANSAR MOHAMMAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 37 OF 1919.

January 5, 1920.

Present:—Mr. Lindsay, J. C.

MOHAMMAD AHMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANSAR MOHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Succession—Co-heirs, position of—Suit by one heir to recover his share—Some co-heirs not made parties to suit—Non-joinder, effect of—Partition, suit for—Parties necessary.

In a suit for partition it is necessary that all interested parties should be joined either as plaintiffs or as defendants.

On the death of a Muhammadan all his heirs become tenants-in-common of his estate. [p. 305, col. 2.]

A suit by one of several heirs of a deceased Muhammadan to recover his share in the estate left by the deceased is practically a suit for partition, and all the other heirs of the deceased must be impleaded as parties to the suit. If some of the heirs are not joined, the suit cannot proceed. Where their joinder becomes impossible, the suit must be dismissed. [p. 306, col. 1.]

Appeal from the decree of the First Additional District Judge, Lucknow, dated the 11th November 1918, confirming that of the Subordinate Judge, Unao, dated the 7th December 1917.

The Hon'ble Syed *Wazir Hasan* and Syed *Ali Mohammad*, for the Appellants.

Syed *Zahur Ahmad*, for Respondents Nos. 1—4.

JUDGMENT.—The dispute in this case relates to certain property which belonged once to Dildar Mohammad, who died on the 14th of April 1905. At the time of his death Dildar Mohammad left a widow *Musammat* Habib-un-nisa and a son by her named Anwar Mohammad. By another wife, who had predeceased him, he left four sons defendants Nos. 1 to 4 in this suit and a daughter *Musammat* Ashraf-un-nisa, who died on the 14th of September 1915. The plaintiffs in the suit are the husband and children of Ashraf-un nisa.

It appears that after the death of Dildar Mohammad a dispute arose between the members of the family regarding the division of the property. The parties went to the mutation Court and Anwar Mohammad, the son of the deceased, claimed half of his father's estate on the ground that the custom of the family was that the property should descend according to the number of wives (*stribhag*). The other sons of the deceased resisted this claim and alleged that their father had left a Will directing the division of the property in equal shares among the sons. The daughter Ashraf-un-nisa also put in a claim, saying that all the children of the deceased should be admitted to inherit according to the shares appointed by the Muhammadan Law. Anwar Mohammad and his step-brothers made some sort of a compromise agreeing to divide the property in the proportion of 7 annas and 9 annas. An arrangement was made by which a sum of Rs. 10 a month was to be made payable to Ashraf-un-nisa by the brothers, Anwar Mohammad undertaking to contribute one-half and the four step-brothers the remaining half. This agreement, however, was repudiated before effect could be given to it and an order was passed by the mutation Court directing mutation in accordance with the shares laid down by the Muhammadan Law. There was then an appeal to the Deputy Commissioner in which Ashraf-un-nisa was impleaded. In this Court the brothers again came to an arrangement for a division of the property, by which Anwar Mohammad was to be given possession of a 6-annas 6-pies share while the step-brothers were to have a 9-annas 6 pies share. It was also provided that the step-brothers were to pay Ashraf-un nisa a sum of Rs. 10 a month.

The present suit has been brought by the husband and children of Ashraf-un nisa demanding the share in the property which belonged to the lady. For some reason or other which is not explained, Anwar Mohammad was not made a party to the suit although he is admitted to be alive. The facts just referred to were all set out in the plaint, and it was the case of the plaintiffs that they were not bound by the compromise which was effected in the Court of the Deputy Commissioner and in accordance with which the order for mutation was passed. It was said that the lady herself had not consented to the compromise and that the Pleader who was acting for her had no authority to accept any compromise on her behalf. After setting out that the defendants Nos. 1 to 4 (the brothers of Ashraf-un-nisa) were in possession of a 9½

annas share the plaintiffs asked for a decree for proprietary possession of a share in this property, the extent of which was said to be 1·67 annas. There was also a claim for mesne profits. As an alternative relief the plaintiffs prayed that if the compromise come to in the Court of the Deputy Commissioner were held to be binding on Ashraf-un-nisa and the plaintiffs, the plaintiffs should get a decree for possession of land out of the defendants' share which would yield them a profit of Rs. 120 a year. A further prayer was included in the plaint asking the Court in any event to give a decree for the payment by the defendants of an annuity of Rs. 120 a year chargeable on the land in their possession.

The defendants resisted the claim. The first two defendants pleaded that the agreement come to in the Court of the Deputy Commissioner was binding upon *Musammat* Asharaf un nisa and persons claiming through her. It was further pleaded that under a custom prevailing in the family daughters were excluded from inheritance and lastly a defence was put forward to the effect that the annuity which was payable under the compromise was only for the lifetime of Ashraf-un-nisa. The third and the fourth defendants pleaded that the agreement before the Deputy Commissioner was not binding, but otherwise they made common cause with the defendants Nos. 1 and 2. All the defendants, it may be noted here, raised the plea that Anwar Mohammad and his mother *Musammat* Habib-un-nisa were necessary parties to the case and that the plaintiffs ought to have joined them.

As issue regarding the non-joinder of these two persons was raised by the Subordinate Judge but was not decided by him. He dismissed the plaintiff's suit on other grounds, holding in the first place that the compromise was binding and in the next place that the annuity of Rs. 10 a month was payable only during the lifetime of Ashraf-un nisa

In appeal the learned Additional Judge has dismissed the plaintiffs' claim on the broad ground that they were not entitled to any decree because the suit had not been framed in the proper manner. It is clear that the plaintiffs failed to implead Anwar Mohammad and his mother, and it is also clear that the Subordinate Judge took no action for the purpose of bringing them upon the record as defendants. By the time the case came before the learned District Judge, any claim against Anwar Mohammad and his mother had become barred by limitation and so it was not possible for him to make any order for joinder of them as parties. The learned Judge dismissed the suit, on the ground that no decree could be given in the absence of persons who were interested in the property and whose rights would necessarily be affected by any decree passed in the plaintiff's favour.

In appeal it has been argued here that the decision of the Court below was wrong and that even if the plaintiffs failed to make Anwar Mohammad and his mother parties, they were nevertheless entitled to receive their legal share in the property at present in the possession of the defendants Nos. 1 to 4, namely, a 9-annas and 6-pies share. The learned Advocate was unable to give any explanation for the omission of the plaintiffs to join Anwar Mohammad and his mother as defendants in the suit. He admitted that the plaintiffs were wrong in not doing so, but he contended at the same time that they were not liable to the penalty of having their suit dismissed in its entirety. It seems to me that the decision of the Court below is correct and that in the absence of Anwar Mohammad and his mother who admittedly are heirs of the deceased Dildar Mohammad, it was not possible to give the plaintiffs the relief they asked for.

It has been admitted before me that there has been no physical division of the immoveable property left by Dildar Mohammad and consequently if the so-called compromise is to be ignored, the position is that after the death of Dildar Mohammad all his legal heirs under the Muhammadan Law became tenants in common of the estate, each of them having a definite share in the property.

The question of the compromise needs no longer to be considered. The first and second defendants, who resisted the plea that this compromise was binding, abandoned it in the Court of the Subordinate Judge before the case was tried out and the subordinate Judge was wrong in treating the compromise as binding. After the withdrawal of this

plea by the first and second defendants the question of the compromise went out altogether.

The position then is that in 1905 when Dildar Mohammad died, his heirs including Ashraf-un-nisa became tenants-in-common of the estate. Each of the heirs was the holder of an undivided share of the property and as the lands have not been divided, each of them was a part owner of every *bigha* of the whole land and by virtue of that right of ownership each of them was entitled to claim either to occupy the lands jointly or to insist that the lands should not be used and occupied by any person otherwise than with their assent. I have already referred to the statements in the plaint and to the nature of the relief claimed by the plaintiffs. The claim, it will be observed, was not a claim for joint possession but for separate and exclusive possession of a certain share of the property alleged to be in the possession of the defendants Nos. 1 to 4. It is argued by the learned Advocate for the appellants that the plaintiffs are entitled to their share in every *bigha* of land in possession of the defendants, but as there has been no division by metes and bounds, Anwar Mohammad and his mother, who are also heirs, are equally entitled to a share in any lands which may be in the defendants' possession; and it is, therefore, difficult to see how any division of the property could be made in the absence of Anwar Mohammad and his mother. In short the position is that the plaintiffs cannot maintain that the defendants are solely in possession of the property to which claim is laid. On the facts as stated it is clear that no partition by metes and bounds having been made, the legal position is that Anwar Mohammad and his mother are also in joint possession with the defendants Nos. 1 to 4. The mistake of the plaintiffs in not impleading Anwar Mohammad and his mother is a fatal one, which cannot now be remedied because, as I have already said, any claim against these two persons is barred by limitation. The Judge was, in my opinion, perfectly right. The suit was in substance a suit for partition, and it is an inflexible rule of law that in such a suit it is necessary that all interested parties should be joined either as plaintiffs or defendants.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

December 14, 1919.

Present :—Lord Shaw, Lord Pillimore, Mr. Ameer Ali and Sir Lawrence Jenkins.

Thakur NAGESHAR BAKHSH SINGH —DEFENDANT—APPELLANT

versus

Musammat GANESHA—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Presumption of jointness—Separation, proof of—Settlement records, value of, as evidence of title or possession—Settlement of Oudh after Mutiny, entries in, whether recognised existing rights or constituted a fresh root of title.

Given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father. [p. 312, col. 2.]

It is not any part of the law of India that settlement records are by themselves conclusive evidence of the facts which they purport to record. They have merely to be considered with other evidence. The broad question of partition of rights or separation of interests is not dealt with in such records, and the inference of such a transaction from entries therein may be weak or strong according to circumstances. A definition of shares in revenue and village papers is by itself very slight evidence of an actual separation in a Hindu family and generally quite insufficient to overcome the presumption against partition. [p. 312, cols. 1 & 2.]

Observations of Edge, C. J. in *Gajendar Singh* v. *Sardar Singh*, 18 A. 176; A. W. N. (1896) 23; 8 Ind. Dec. (N. S.) 824, approved.

Lord Canning's Proclamation after the Mutiny swept away all prior titles in Oudh. But the Government officers conducting the settlements did not proceed upon the notion that prior rights were to go for nothing, and in most cases their proceedings were rather a recognition of those rights than a fresh root of title. [p. 311, cols. 1 & 2.]

Appeal from a decree of the Judicial Commissioner, Oudh, dated the 8th August 1916, reported as 36 Ind. Cas. 780, reversing a decree of the Subordinate Judge, Gonda, dated the 23rd December 1913.

FACTS.—The suit here was brought to set aside a sale deed executed in favour of the appellant's predecessor by three Hindu Pardanashin ladies, *Musammats* Basanta, Rani and Maharani. The relationships of the parties and the material facts are set out in their Lordships' judgment. The respondent Ganesha is daughter of Rani. It was con-

currently found by the lower Courts that the sale-deed was without consideration or legal necessity, and hence respondent would ordinarily be entitled to succeed, the grantors of the deed, all Hindu widows, being dead. But it was contended for the appellant that there had been a partition or separation of shares either between Sheo Dayal and Gokaran themselves or between their widows, and hence that respondent, who was not alleged to be Gokaran's heiress, had no title to anything but the share of Sheo Dayal or his widows, which was taken to be a half. The substantial question on this appeal was whether any such partition or separation had in fact taken place. As to this the Appellate Court found against appellant and accordingly decreed the suit as to the whole of the land in dispute. Hence the present appeal.

Mr. *DeGruyther, K.C.*, and Mr. *G. S. Saunders*, for the Appellant, contended, in the first place, that the vendors under the sale-deed impeached had absolute ownership and not merely a Hindu widow's estate. Secondly, the documents in the case and especially the *khewat* and *wajib ul arz* show that Sheo Dayal and Gokaran were separate in estate.

That the vendors were absolute owners appears from the settlement decree of December 6, 1869, which shows Basanta as owning 8 annas in her own right and Rani and Maharani the other 8 annas jointly. The effect of Lord Canning's Proclamation of March 15, 1858, was to divest all landed property from the proprietors in Oudh: when a re-grant was made to a proprietor, the new title depends entirely on the terms of the re-grant: *Nawab Malka Jahan Sahiba* v. *Deputy Commissioner of Lucknow* (1), *Prince Mirza Jehan Kudr Bahadur* v. *Nawab Afsur Bahu Begum* (2) and *Prince Mirza Jehan Kadr Bahadoor* v. *Nawab Badshoo Bahoo Sahiba* (3); Oudh Sub Settlement Act (XXVI of 1866); Sykes' Compendium, paragraphs 286, 386.

If Sheo Dayal took by survivorship from Gokaran, as contended for respondents, Basanta's name would not be in the decree at all, whereas she is shown as holding 8 annas: this is consistent only with all three having absolute estates. The *khewat* and *wajib-ul-arz* support this view and also prove there had been a separation of interests: Basanta holding half the village and Sheo Dayal's widows the other half. "Khewat" is defined in Act XVII of 1876: *vide* also Oudh Circulars Nos. 20 of 1863 and 24 of 1864.

Mr. *Dunne, K. C.*, and Mr. *Dube*, for the Respondent.—The Judicial Commissioner's Court has rightly held that Sheo Dayal and Gokaran were joint. The same finding was come to thirty years ago with regard to the Harsinghpur village. Sheo Dayal took not by inheritance but by survivorship, and the respondent is his successor. The settlement decree expressly reserves "the rights of the other shareholders." Upon its true construction it does not confer an absolute estate. As the Judicial Commissioners have pointed out, the reversioners had at the time of the settlement no right to claim possession: till the widows' estate came to an end, it was impossible to say who they would be. "The decree did not profess to confer on the widows greater rights than they had before. The *khewat* merely records the supposed effect of the decree: it carries matters no further.

Mr. *De Gruyther, K. C.*, in reply.—A settlement decree in Oudh is a root of title and determines proprietary rights: it is not merely based upon possession, as is the case in other parts of India: *Mohammed Mumtaz Ali Khan* v. *Partab Singh* (4).

The Settlement Officer did not recognize Rani and Maharani as owners of the whole 16 annas, he included Basanta as being entitled to 8 annas. Under the rules, no one who was not a co-sharer would be included as Lambardar: Basanta's name being mentioned shows that she was deemed to be a co-sharer. He referred to Cursia's Land Revenue Manual, pages 107, 235, and Circular No. 1123 C of 1862—see Parliamentary Papers relating to Oudh, 1865.

JUDGMENT.

LORD SHAW.—This is an appeal from a judgment and decree of date the 8th August 1916 of the Court of the Judicial Commissioner of Oudh, which reversed a judgment and decree, dated the 33rd December 1913, of the Subordinate Judge of Gonda.

(1) 6 I. A. 63; 3 Sar. P. C. J. 244; Rafique & Jackson's P. C. No. 55.

(2) 6 I. A. 76; 4 C. 727; 3 Sar. P. C. J. 865; Rafique & Jackson's P. C. No. 54; 3 Ind. Jur. 222; 2 Ind. Dec. (N. S.) 462.

(3) 12 I A. 124; 12 C. 1; 4 Sar. P. C. J. 630; 9 Ind. Jur. 322; Rafique & Jackson's P. C. No. 91; 6 Ind. Dec. (N. S.) 1.

(4) Sel. Cas. No. 233 of 1893.

NAGESHAR BAKHSH SINGH *v.* GANESHA.

In the suit which is brought the plaintiffs pray for a decree for possession of the village of Sonahra, Pargana Paharapur, Tahsil and District Gonda, by cancellation of a certain sale deed thereof executed on the 3 th December 1871 in favour of Thakur Mirtunjai Bakhsh Singh, now represented by the appellant. The grantors of the deed were three Hindu Pardanashin ladies, *Musammats* Basanta, Rani and Maharani.

A pedigree is given in the papers, which gives the family descent from one Bishan Pershad. Bishan was the owner of, *inter alia*, two villages, Harsingbpur and Sonahra. No question arises with regard to Harsingbpur in this appeal. It appears, however, that a question analogous to that now raised was settled relative to that village over thirty years ago, and was answered in a sense adverse to the present appellant. It was held in that suit that the sale-deed had not been granted for consideration or with legal necessity, and that Harsinghpur was part of a joint undivided family property with reference to which the deed was ineffective. Their Lordships have, however, considered the present appeal, which is confined to the case of Sonahra, on its own merits.

Bishan Pershad owned, as already mentioned, these two villages. The pedigree as flowing from him is as follows:—

BISHAN PRASAD (dead.)

- Raghubans dead
  - Debi Bakhsh
    - Sheo Dayal died 1865 married
      - (1) Rani died 1908
      - (2) Maharani died 1888.
        - Ganesha (Plaintiff No. 1 Respondent)
          - Kedar Nath (Plaintiff No. 2).
- Jai Gobind (dead)
  - Gokaran died 1858 married *Musammat* Basanta died 1885.
  - Somant (dead).
- Parmeshar Das (dead)
  - Jawahar (dead).

The facts of the case and relative dates are stated in a judgment passed by the Court of the Judicial Commissioner, dated the 17th December, 1915*:—

"The village in question originally belonged to Santokhi, to whom it was granted under a *birt patta* by Raja Dut Singh, the Talugdar of the village, in 1128 Fasli. From Santokhi the property passed to his lineal male descendants, the last of whom were Gokaran, . . . representing one branch of his line and Sheo Dayal,.....representing another branch of his line. The summary settlement was made with Gokaran. Gokaran died some time in 1858, leaving a widow *Musammat* Basanta. Sheo Dayal died in 1865, leaving two widows, *Musammat* Rani and *Musammat* Maharani, and a daughter by the former named *Musammat* Ganesha On the 30th December 1871 *Musammat* Basanta, *Musammat* Rani and *Musammat* Maharani sold the village in dispute to the father of the defendant-respondent. *Musammat* Basanta died in 1885, *Musammat* Maharani in 1888 and *Musammat* Rani in 1903. *Musammat* Ganesha, the daughter of Sheo Dayal, is alive and one of the plaintiffs to the suit."

It is manifest that if the three ladies, grantors of the deed under challenge, were fully vested owners, the one of an 8 annas share and the other two of a 4-annas share each, of the village, they were in a position to grant a proper title. But of course, on the accepted facts, such ownership in the ladies would be impossible.

Even although, however, they had possessed the village, not as complete owners but as enjoying the same in shares as widows of former proprietors, and also enjoying, it may be, all the powers attaching to that status, it might also be that a valid sale could have been effected under the deed in question. The condition of such

*The judgment is reported in 34 Ind. Cas. 257.—[*Ed.*]

validity would, of course, be that the deed was for consideration and was granted by reason of legal necessity.

It is possible at once to disburden the case of much of the material which entered into the procedure of the Courts below on this last-mentioned issue. For it has been found, after a special remit by the Court of the Judicial Commissioner to the Court of the Subordinate Judge on that topic, that the deed challenged was granted without consideration and without legal necessity. There are concurrent findings to that effect. Were the deed, accordingly, a deed of the widows of deceased owners, with no further rights in or over the village than such widows would have, the challenge must prevail. To this the retort was made that the plaintiffs had not proved that they were reversioners to Gokaran, and as there had been a separation of shares they must fail as to Gokaran's moiety. They alleged such separation. This raises a question fundamental to the case and anterior to the issues just mentioned. That question is one upon which very careful and exhaustive argument was presented to the Board. Was the village or was it not joint undivided family property at the date of the sale? The appellant strongly contends that it was not. It must stand admitted that the village was ancestral property since the early portion of the eighteenth century. But it was maintained that a partition of this joint undivided family property was made. No deed expressly to that effect was executed. The argument, however, is that the facts of the case are sufficient to show that a definite separation of family interests took place, the shares being correctly stated in the Government Returns and papers to be afterwards mentioned as an 8 annas share to *Musammat* Basanta, widow of Gokaran, who died in 1858, and a 4-annas share to each of *Musammats* Rani and Maharani, widows of Sheo Dayal, who died in 1865.

Upon this issue, whether it be named "partition," or whether it be named "separation of interests," it is important to ascertain at what date it is alleged that the transaction took place. Upon this subject the Board, notwithstanding repeated enquiries, has found itself unable to ascertain what is the attitude definitely adopted by the appellant. The difficulties are, of course, considerable. Apart from separation, the descent of the property would in ordinary course be, up till the year 1858, to Gokaran, Basanta's husband. When Gokaram died in 1858, the property in its entirety would then pass to Sheo, his nephew, the only other male representative, and Sheo died in 1865. There is nothing in the case to suggest that there was any transaction of the nature of partition between Gokaran and Sheo. If, however, there was no such partition, the ancestral property of this village became that of Sheo in ordinary course, and the whole right of *Musammat* Basanta therein was a right as Gokaran's widow to maintenance therefrom.

During this period, that is to say, when Sheo was proprietor, it would be impossible to maintain that he executed any deeds of partition of this property; such partition would in short have been in the nature of a conveyance from himself, as owner in entirety, of a certain part of the property to another not in the line of his succession. There is no such evidence. If there had been, serious questions with regard to it might have been raised. Therefore, the whole question is still further postponed to that period of time subsequent to Sheo's death.

Sheo left two widows, and the fact cannot be disputed that in so far as light can be thrown upon the subject by the village records, Basanta did have in her enjoyment an 8 annas share, and Sheo's two widows did each have a 4-annas share of the enjoyment of this village. The real facts appear to be that the three ladies lived together, the dominating personality, if any, among them being naturally the much senior widow Basanta. From these facts and specially from the records the appellant has stoutly argued that separation as a fact is proved. He forcibly founds upon the settlement decree obtained by the three widows, passed by the Settlement Assistant Commissioner of Gonda, and dated the 6th December 1859. In this judgment that officer ordered that "a decree for superior proprietary rights in favour of Rani and

Maharani, wives of Sheo Dayal, and *Musammat* Basanta, wife of Gokaran, be passed."

To this it is instantly answered, first, that to found upon that decree as either a root of title or as conclusively settling it, is to mistake the true nature of the decree itself; and secondly, that the decree not only does not deal with other rights in the property, but expressly reserves these other rights.

On this latter point of reservation there can be no question. It is contained *in gremio* of the decree. It is no doubt true that, as already mentioned, the decree is in name for superior proprietary rights in favour of the widows, but it is expressly declared that that decree should "be passed subject to the rights of the other share-holders." If it be correct, as alleged by the appellant, that the property had at that time been *de facto* separated into one 8 annas and two 4-annas shares, and that this decree of December 1869 was a *de jure* recognition of that fact, then the entirety of the property was disposed of and language of reservation, or the mention of other share-holders, was hardly appropriate, but might be contended to be repugnant to the transaction which is pleaded.

In the opinion of their Lordships, the terms of this decree must be looked upon as a whole. When on the one hand it declares for superior proprietary rights in favour of the widows, and on the other that these are to be given subject to the rights of the other share-holders, it completely conserves such reversionary and other ownership rights as are inherent in the succession to a joint family property and it negatives the idea that partition or separation had been effectuated by law in such a manner as to extinguish other proprietary rights. In short, in the view of the Board, this decree is not equivalent to an affirmation of a partition or separation having taken place, but is entirely consistent with the existence of the property as joint and undivided, and, therefore, with no prejudice being effected to the right of the reversioner therein, who is represented by the respondent.

But the decree of December 1869 has a much more solid value by the testimony which it itself affords of what was the true nature of the property and what was the exact point in dispute in the competition for it. There were three separate claims to the property. One was by Partab Bali and others. Their claim was got rid of (the Commissioner remarking that it would certainly have failed) by a small payment. The second claimant was Rai Sadhan Lal, and after enquiry it was found that his interference with the village was regarded as unlawful, and his claim completely failed. He had been *muafi* holder and his right expired with the settlement. The third party to the proceeding was the three widows, and their right without any question is dealt with as a right in ancestral property. "To the satisfaction of the Court" they "have been proved to be the old Zamindars." Then an examination of the title is made, and it is solemnly affirmed:—

"Let it be known that on their behalf a *birt patra sanad* bearing the seal of Raja Dat Singh, dated Jeth Sudi 2nd, 1128, Fasli, has been produced, which shows that the villages Sonahra and Harsinghpur were given by way of Birt to their common ancestor, Santokhi Avasthi, on Rs. 3,562. Its genuineness is proved... ..And fourthly it appears from the evidence on record that their ancestors always remained in possession within and beyond limitation; and lastly, that both the Summary Settlements were made with them."

It thus appears that the property was treated as a *unum quid*, as ancestral, and as property to which, as an ancestral undivided property, the three widows vindicated their right. Upon the whole this would have been sound evidence in any Court in favour of the continuance as and from that date of the property as joint and undivided. Their Lordships are of opinion that the Court of the Judicial Commissioner was right in so treating it.

The use of the term "superior proprietary rights" in the decree is, in their Lordships' opinion, to distinguish these from any under-proprietary tenure and from any other inferior rights. In short, the possession by these ladies of the whole of the village among them was a broad fact which permitted the Government to make the entry in such a way as to have the full representation of the entirety of the village, with all the responsibilities attached to that representation,

on the record. It is and has for many years, under the decisions, been acknowledged that even one or two names may be inserted as representatives of a community of ownership, the details of which need not be minutely recorded.

But, furthermore, it must be remembered that the policy set forth in Lord Canning's Circular of the 28th January 1859, in which it was stated that the rights conferred "on each holder of land are the free and incontestable grant from the paramount power and cannot be called into question by subordinate officers," and that the decision approved by the Chief Commissioner "is considered to be final and lasting," was greatly modified as regards Zamindars and others not being Taluqdars. In a letter issued on the 10th October 1859, which was afterwards appended to Act I of 1860, it was directed:—

"As regards Zamindars and others, not being Taluqdars, with whom a Summary Settlement has been made, the orders conveyed in the Limitation Circular No. 31 of the 28th January 1859 must not be strictly observed. Opportunity must be allowed at the next settlement to all disappointed claimants to bring forward their claims, and all such claims must be heard and disposed of in the usual manner."

The authoritative exposition of this subject was made in *Prince Mirza Jehan Kadr Bahadoor* v. *Nawab Badshoo Bahoo Sahiba* (3), and the passage rightly founded upon in the Court below from the judgment of the Privy Council as delivered by Sir Arthur Hobhouse, is here repeated: —

"The first observation on these proceedings is that the Settlement Courts were clearly enquiring into the old titles, as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. Lincoln suggests, whether in 1863 that effect was realized to the minds of the Government Officers as it has become since the legal decisions, which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary or wholly new, re-distribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they enquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three lower Settlement Courts were engaged with regard to Sohrawan when the case came before Sir Charles Wingfield as the highest Court of Appeal."

The Board does not think it necessary to enter upon much detail with reference to the enjoyment of the property in the time of Sheo Dayal, but they simply note that one document not without importance is printed applicable to the year 1861, that is to say, to the period after the death of Gokaran in 1858. It is dated the 31st December 1861, and is a copy of a Rubkar of the Collectorate of Gonda issued by Captain Ross. The plaintiff in the proceedings was Sheo Dayal himself; the defendant was Ray Sadhan Lal, already mentioned; and the judgment discloses as follows: that "on a perusal of the file it appears that Sheo Dayal Avasthi claims the lease (*patta*) of villages Sonahra and Harsinghpur on the basis of the Zamindari right set up by him, and by right of inheritance from Gokaran, deceased, with whom the villages were settled in" 1857. The language used is not strictly accurate. Sheo could not claim by right of inheritance, but solely by right of survivorship. But otherwise the proceeding is instructive. It contains a warning to the *muafidar* to respect Sheo's rights, and there is not a trace of question that the property was treated as having been succeeded to in its entirety by Sheo as successor to Gokaran.

There are further elements in the case which need not be dwelt upon, as, for instance, a transaction by way of mortgage of the whole subject by the three widows themselves, in the year 1865. In this mortgage, dated the 9th November of that year, the property is referred to simply as the village Sonahra, and it is mortgaged as "our ancestral Zamindari under a Birt Patra which has been in our possession and occupation without the co-partnership of anybody else from the time of our ancestors."

But the Board is unwilling to enter into further details and contents itself with expressing the view that no partition as

separation of this joint ancestral property has been proved. It should be said, however, that in December 1871, when the sale deed now under challenge was executed, the very form of the deed is somewhat inconsistent with the transaction of shares of divided property. The village is sold as "the entire village." No reference is made to shares of 8 annas or 4 annas. There are circumstances of considerable suspicion attached to the deed, and it seems somewhat surprising that Mathura Nath, their general agent, should not have incorporated in the deed some reference to this transaction of partition (if true) of which so much has been made in the subsequent proceedings.

The state of the records was much pressed upon the Board by the Counsel for the appellant; that is to say, the entries which were contained in the *wajib-ul-arz* and in the *khewat* of the village. Of the two the claim made with regard to the *khewat* is the stronger. Under the *wajib-ul arz* entries it is pretty clear that the village was treated as a *unum quid*, even although the shares in the possession were stated as so many annas respectively.

The Court of the Judicial Commissioner, which is no doubt acquainted with entries in such records, does not attach to them the importance which the appellant seeks, and the Board is of opinion that in this it was right. The broad question of partition of rights or separation of interests is not, of course, dealt with in such entries, and the inference of such a transaction from such records may be weak or may be strong according to circumstances.

Records of that character take their place as part of the evidence in the case They do no more. Their importance may vary with circumstances, and it is not any part of the law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case; they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice and afford temptation to the manipulation of records, or even of the materials for the first entry. Birdwood, J., in the Bombay case *Bhagoji* v. *Bapuji* (5) said as follows:—

"At the re-hearing the lower Appellate Court should have its attention directed to the ruling in *Fatma* v. *Darya Saheb* (6), in which it was held that the Collector's book is kept for purposes of revenue, not for purposes of title. The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person."

And the Board refer in particular to the judgment of Sir John Edge in *Gajendar Singh* v. *Sardar Singh* (7). In their opinion the statements of principle now to be quoted are of significance and are sound as applied not only to Allahabad but to other Provinces in India as a whole. The main proposition is, of course, widely familiar, namely, that "given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father." The learned Judge further refers to "experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares;" and the Board sees no reason to differ from, but approves of, his pronouncement to the following effect:—

"A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated."

The Board is, on a review of the whole of this case, of opinion that the presumption against partition of this ancestral property has not been overcome and that the property accordingly remains joint, with the consequence that the appeal fails. As to the attempted case of adverse possession by Basanta, it is, in their Lordships' opinion, wholly without foundation. On the facts disclosed as to the actual enjoyment of the pro-

(5) 13 B 75; 7 Ind Dec. (N s. 51.
(6) 10 B H. C R. 87.
(7) 18 A. 176; A. W. N. (1896) 23; 8 Ind. Dec. (N. s.) 824.

perty and the conduct of all parties, including Basanta, with regard to it, no plea of adverse possession could be successfully put forward.

Their Lordships will humbly advise His Majesty that the appeal stand dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant.—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondent.—Messrs. *T. L. Wilson & Co.*

OUDH JUDICIAL COMMISSIONER'S COURT.

First Civil Appeal No 7 of 1919.

February 27, 1920.

Present:—Pandit Kanhaiya Lal, A. J. C.

SRIPAL SINGH—Plaintiff—Appellant

versus

JAGDISH NARAYAN and others—Defendants—Respondents.

Expert evidence as to age, value of—Civil Procedure Code (Act V of 90-), O XXXII, r. 3—Guardian ad litem, *appointment of, provision as to, object of Court, duty of—Notices to minor and his guardian, whether necessary preliminaries to appointment of guardian* ad litem—*Failure to issue required notices, effect of—Guardian* ad litem, *appointment of, effect of—Irregularity or defect in procedure—Minor, whether bound by decree passed in suit—Decree, when can be avoided by minor—Guardian* ad litem, *powers of, extent of.*

The effect of medical testimony as to the age of a person is to render the other evidence adduced in the case as to his age medically probable or improbable. [p. 314, col. 2.]

The object of the provision contained in Order XXXII, rule 3 (4), Civil Procedure Code, is that the Court should be able to satisfy itself that the person described as a minor is really a minor and that the proposed guardian is a fit and proper person to represent him and to put in a proper defence and generally to act in the interests of the minor. [p. 31 , col. .]

Where a lawful guardian *ad litem* has been appointed, any defect or irregularity in the procedure leading up to such appointment cannot operate to render a decree passed in a suit in which the minor is represented by such a guardian invalid, unless the defect or irregularity has had the effect of prejudicing the interest of the minor or has affected the merits of the case [p. 315, col .]

Thus, where no notice was issued to the minor or to his mother, but a notice was issued to his proposed guardian who was also his brother and the manager of the joint family of which the minor was a member, and this proposed guardian was appointed his guardian *ad litem*, and the suit having been compromised a decree was passed in terms of the compromise:

Held, that unless there was anything to show that in spite of the appointment of the guardian *ad litem* the interests of the minor had not been duly protected or that the guardian *ad litem* had colluded with the plaintiff or had otherwise acted fraudulently or with gross negligence, the decree passed against the minor, in accordance with the compromise entered into by his guardian *ad litem* with the sanction of the Court, could not be set aside. [p. 315, col. 2.]

Ghanshyam Das v. *Musammat Hardei*, 32 Ind. Cas. 380: 2 O. L. J. 562; and *Bhagwan Dayal* v. *Param Sukh Das*, 28 Ind. Cas. 623; 37 A. 179 at p. 185; 13 A. L. J. 179, distinguished.

The powers of a person who has been appointed guardian *ad litem* are controlled by the provisions of the Code of Civil Procedure, and what he could have done as manager of the joint family, of which the minor is a member, irrespective of the suit, he cannot do when appointed as such guardian. [p. 316, col. 1.]

Appeal from the decree of the Additional Subordinate Judge, Lucknow, dated the 15th January 1919.

Babus *Bisheshwar Nath Srivastava* and *Rajeshwari Prasad*, for the Appellant.

Mr. *M. N. Ohak*, for Respondents Nos. 1 and 2.

Mr. *A. P. Sen*, for Respondents Nos. 4 to 8.

Mr. *Muhammad Wasim*, for Respondents Nos. 4 and 5.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for a declaration that the preliminary and final decrees for foreclosure obtained by the defendant, Radhe Lal, against the plaintiff and other persons were void and ineffectual as against the plaintiff.

The allegation of the plaintiff was that he was a minor on the date on which the said decrees were obtained and was not properly represented in the suit which resulted in those decrees, andt hat the said decrees had been obtained by fraud and collusion. There was a further allegation that the entire mortgage money had been satisfied from the usufruct of the mortgaged property before the suit for foreclosure was brought and that Surajpal Singh, who was appointed guardian *ad litem* of the plaintiff in that suit, had in any event acted with gross negligence in entering into a compromise with the then plaintiff and agreeing to the decretal of his claim. The defendants

denied the allegations made by the plaintiff.

The Court below found that the plaintiff had attained majority before three years prior to the suit and that if Article 44 or 95 of the Indian Limitation Act (IX of 1908) was applicable, the claim was barred by time. It further held that Article 120 of the Indian Limitation Act applied to a suit in which a decree was sought to be set aside on the ground that a minor was not properly represented. It then proceeded to discuss whether the present plaintiff was properly represented in the previous suit and, if not, whether the compromise entered into by his brother, Surajpal Singh, who had been appointed his guardian *ad litem*, was binding on him by reason of his having been the manager of the joint family of which the plaintiff was a member. The conclusion at which it arrived was that though the present plaintiff was not properly represented in that suit inasmuch as no notice of the proposal to appoint Surajpal Singh his guardian *ad litem* had been sent to him, the compromise entered into by Surajpal Singh, who was the manager of the joint family, was binding on the plaintiff. The other issues raised in the case were left undetermined.

The evidence adduced in the case does not bear out the finding of the learned Subordinate Judge that the plaintiff had attained majority three years prior to the suit. The plaintiff states that he was about 4 or 5 years old when his father died and that he attained majority in the year in which the present suit was filed. His mother, *Musammat* Maharaja, deposes that the plaintiff was born about a year prior to the mortgage effected by his father in favour of the father of the defendant No. 1, and that he would complete his 19th year in Magh next, *i. e.*, January or February 1919. She further states that her husband died 13 or 14 years ago. The mortgage aforefaid was made on the 15th October 1900. The bulk of its consideration was left for payment to the prior mortgagees.

Kallu Singh, who is married to the sister of the plaintiff, states that the plaintiff has been visiting and staying at his place off and on for the last ten years and that his age in his opinion was about 18 or 19 years. Col. Birdwood, Civil Surgeon, examined the plaintiff on the 9th April 1918, and judging by his teeth and general appearance came to the conclusion that his probable age was between 18 and 19 years and that at the outside he might be 21 or 22 years old. No evidence to the contrary was produced on behalf of the contesting defendants.

The learned Subordintae Judge refused to accept the evidence produced by the plaintiff on the ground that the plaintiff and Kallu Singh had no direct knowledge, while *Musammat* Maharaja had contradicted herself, firstly, by stating that the plaintiff was born a year before the mortgage and, secondly, by saying that the plaintiff was two or three years younger than the wife of Kallu Singh. There was evidently some confusion in the mind of *Musammat* Maharaja as to the different mortgages which her husband had executed. She stated that her husband did not tell her about any of those mortgages; and it is not improbable that when referring to the mortgage made by her husband, she had in view some one of the previous mortgages which were satisfied by borrowing from the father of the defendant No. 1. Her statement as to the age of her son, Chhatarpal Singh, does not positively fix the date of his birth. Any attempt to fix the age of the plaintiff with reference to the age of Chhatarpal Singh and that of his sister, who is the wife of Kallu Singh, the estimates of which might be put out by a year or two, might, therefore, lead to uncertain results. As observed by their Lordships of the Privy Council in *Banwari Lal* v. *Mahesh* (1), the effect of the medical testimony is to render the other evidence adduced in the case as to the age of a person medically probable or improbable. Here the statement of the plaintiff and his mother that he was about 19 years old is rendered medically probable by the evidence of Col. Birdwood, and in the absence of any rebutting evidence there can be no justification for holding that the plaintiff had attained majority three years prior to the institution of this suit.

Article 15 of the Indian Limitation Act (IX of 1908) applies to a suit to set

(1) 49 Ind. Cas. 540; 21 O. C. 225 at p. 232; 6 O. L. J. 169; 41 A. 63; 23 C. W. N. 577; (1919) M. W. N. 490; 45 I. A. 284 (P. C.).

aside a decree obtained by fraud and allows a period of three years from the date when the fraud becomes known to the party wronged. The plaintiff does not state when the fraud became known to him; but even if limitation be computed from the date when the final decree for foreclosure was obtained, the suit would be within time, as it was brought within three years of the plaintiff attaining majority.

With regard to the question of proper representation of a minor, it cannot be disputed that a notice to the minor is one of the necessary preliminaries to the appointment of a proposed guardian. Order XXXII, rule 3, clause (4), of the Code of Civil Procedure requires that no order of appointment shall be made except upon notice to the minor and to any guardian of the minor appointed or declared by any authority competent in that behalf or, where there is no such guardian, upon notice to the father or other natural guardian of the minor or to the person in whose care the minor is. In this case no notice was issued to the minor, or to the mother of the minor but a notice was issued to the proposed guardian who was also the manager of the joint family, of which the minor was member. The object of the provision is that the Court should be able to satisfy itself that the person described as a minor is really a minor and that the proposed guardian is a fit and proper person to represent him and to put in a proper defence and generally to act in the interests of the minor. Where a lawful guardian *ad litem* has been appointed, any defect or irregularity in the procedure leading up to such an appointment cannot, however, operate to render a decree passed in a suit in which the minor was represented by such a guardian invalid, unless the defect or irregularity has had the effect of prejudicing the interest of the minor or affected the merits of the case. Section 99 of the Code of Civil Procedure provides that no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. Order XXXII, rule 5, provides that every order made in a suit or on any application before the Court in or by which a minor is in any way concerned or affected without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged. But no question of discharge can arise where a minor defendant is represented by a guardian *ad litem* capable of being lawfully appointed and the irregularities are confined to the procedure antecedent to his appointment. The plaintiff was admittedly a minor. The person appointed his guardian *ad litem* was his brother and the manager of the joint family of which the minor was a member. The interest of the minor and the guardian *ad litem* with reference to the mortgage effected by their father was in no way differentiable and unless there is anything to show that in spite of the appointment of a guardian *ad litem* the interests of the minor were not duly protected or that the guardian *ad litem* colluded with the then plaintiff or had otherwise acted fraudulently or with gross negligence, the decree passed against the minor, in accordance with the compromise entered into by his guardian *ad litem* with the sanction of the Court, cannot be set aside.

As observed in *Halli Jha* v. *Lal Singh* (2), where no lawful guardian *ad litem* has been appointed to represent a minor, the effect is the same as if the minor had never been made a party to the suit. But as pointed out in *Munnu Lal* v. *Ghulam Abbas* (3) and *Rambrichh Ram* v. *Tarak Tewari* (4), where the appointment of a guardian has been merely irregular, it does not necessarily follow that the minor must be deemed to have been prejudiced. In *Musammat Bibi Walian* v. *Banke Behari Pershad Singh* (5) their Lordships of the Privy Council laid stress on the importance of following strictly the rules regulating the appointment of guardians *ad litem*; but observed at the same time that where in a suit the interests of the minors were effectively represented by their mother with the con-

(2) 27 Ind. Cas. 425; 21 C. L. J. 454.

(3) 6 Ind. Cas. 788; 32 A. 287; 13 O. C. 123; 11 C. L. J. 557; 1 Bom. L. R. 439; 14 C. W. N. 744; 8 M. L. T. 57; 37 I. A. 77; 20 M. L. J. 591 (P. C.)

(4) 33 Ind. Cas. 805; 14 A. L. J. 589.

(5) 30 I. A. 192; 7 C. W. N. 774; 30 C. 1021; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512.

sent of the Court, the absence of a formal order appointing her and a defect in the service of summons on the minors and their guardian not shown to have caused any prejudice to them, were mere irregularities, which would not be ground for reversing the proceedings either on appeal or in a separate suit for the purpose. In *Enuga Sundararama Reddi* v. *Rezwada Pattabhiramireddi* (6) it was similarly held that a mere omission to give notice to a minor party before the appointment of a guardian *ad litem* to represent him was not in itself sufficient to vitiate the proceedings. The decisions in *Ghanshyam Das* v. *Musammat Hardei* (7) and *Bhagwan Dayal* v. *Param Sukh Das* (8) do not apply, because in the former case the alleged minor was really major and in the latter a prejudice had resulted owing to the Court Amin having been appointed guardian *ad litem* of certain minors without any provision having been made to supply him with funds to enable him to defend the suit or to enquire whether any defense was available.

The question of prejudice is intimately connected with the question of fraud, collusion and gross negligence alleged by the plaintiff; and as the latter questions have not been tried, it will be premature to determine whether the proceedings which resulted in the decree for foreclosure can be upheld. It is argued that even if the minor was not properly represented, the compromise would still be binding, because the person appointed guardian *ad litem* was also the manager of the joint family of which the minor was a member; but as pointed out by their Lordships of the Privy Council in *Ganesha Row* v. *Tulja Ram Row* (9), the powers of a person who has been appointed guardian *ad litem* are controlled by the provisions of the Code of Civil Procedure, and what he would have done as manager of the joint family irrespective of the suit he cannot do when appointed as such guardian. To hold otherwise would be to defeat the object of the enactment.

(6) 42 Ind. Cas. 421; (1917) M. W. N. 495; 6 L. W. 272.

(7) 32 Ind. Cas. 380; 2 O. L. J. 562.

(8) 27 Ind. Cas. 623; 37 A. 479 at 485; 13 A. L. J. 179.

(9) 18 Ind. Cas. 518; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 15 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 182 (P. C.).

The appeal is, therefore, allowed and the suit remanded to the Court below with a direction to reinstate it under its original number and to dispose of it after determination of the other points involved in the case in the manner provided by law. The costs here and hitherto will abide the event.

Cause remanded.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 185 OF 1917.

June 9 and July 4, 1919.

Present :—Mr. Justice Mullick and Mr. Justice Adami.

Pandit BRIJ KRISHNA DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

Choudhury MURLI RAI AND OTHERS—PLAINTIFF—RESPONDENTS.

Court-fee, deficiency in, on plaint and appeal—Procedure—Suit for declaratory decree and consequential relief—Court-fee payable.

Where upon the proper valuation of a suit an Appellate Court finds that there is a deficit in the amount of Court-fees paid by the plaintiff on his plaint and memorandum of appeal, the correct procedure for the Court to adopt is to call upon the plaintiff to make good the deficiency and on his failing to do so, to enforce its order by the dismissal of his suit. In such a case the rejection of the plaint is inappropriate, because section 10 of the Court Fees Act enjoins a dismissal without option. [p. 19, col. 2; p. 320, col. 1.]

Where a plaintiff asks for a declaration and consequential relief, he should pay *ad valorem* fees in proportion to the loss from which he seeks to be relieved. [p. 320, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *P. K. Sen* and *Parmeswar Dayal*, for the Appellants.

Messrs. *Siva Nandan Rai* and *Ganesh Dutt Singh*, for the Respondents.

JUDGMENT.

MULLICK, J.—(*June* 9, 1919.)—The history of the transactions which led to the present suit is as follows:—

On the 24th of March 1909, Murli, Brij Mohan and others executed a mortgage deed in favour of Mohan Krishna Dar for Rs. 40,000. It was stipulated that a sum of

Rs. 15,000 out of this amount was to be deposited in Court to the credit of Abdul Ghani, who had a decree for that sum upon a simple mortgage executed by Murli and Brij Mohan. It was also stipulated that the balance of Rs. 25,000 was to be paid to Abdul Ghani out of Court in discharge of an usufructuary mortgage in respect of which a suit, *viz.*, No. 112 of 1908, was then pending in the Court of the Subordinate Judge of Arrah.

On the 26th March 1909 Mohan Krishna Dar deposited the sum of Rs. 15,04 in Court in payment of the claim of Abdul Ghani, inclusive of interest, upon the decree above referred to. It was subsequently discovered that Abdul Ghani's claim upon the usufructuary mortgage was not Rs. 25,000 but Rs. 71,000, and on the 16th September 1909 Mohan Krishna Dar served a notice upon the mortgagors asking them to pay into Court the difference between those two sums within one month. The mortgagors having failed to comply, Mohan Krishna on the 11th October 1909 brought the suit numbered 106 of 1909 to recover from the mortgagors the sum of Rs. 15,904. It is alleged that summonses in the suit were served on the 10th of November 1909, and the record shows that, on the 3rd December 1909, an *ex parte* decree was obtained by the plaintiffs. In execution of this money decree an attachment was effected on the 16th March 1910 of the mortgaged properties. On the 26th March 1910 notices were served under Order XXI, rule 66, of the Code of Civil Procedure. Sale proclamations were served on the 4th May 1910 and the sale was held on the 6th June following. Possession was delivered on the 2.th August and mutation was made in the Collector's registers on the 1st of September. There were then certain proceedings for the appraisement of crops under section 69 of the Bengal Tenancy Act, which are only material for the purpose of showing that Murli had knowledge of the decree. Murli, however, denied such knowledge and, on the 31st of May 1915, he and his minor son instituted Suit No. 40 of 1915, in the Court of the Subordinate Judge of Arrah, to set aside the decree on the ground that it was obtained by fraud.

The present appeal is preferred by the heirs of Mohan Krishna Dar, the defendant in that suit, against the decree of the Subordinate Judge setting aside the *ex parte* decree of the 3rd December 1909 and the sale of the 6th June 1910, and allowing the plaintiffs to redeem their interest in the property on payment of their proportionate share of the sum secured.

It is necessary to explain here how the redemption of a fractional part of the mortgaged properties came to be allowed. On the 2nd December 1912 Har Prosad and others, representing some of the mortgagors, brought Suit No. 168 of 1912 in the Court of the Subordinate Judge of Arrah to set aside the decree and the sale, so far as they affected their 4 annas share in the property; and, on the 10th December 1912 Suit No. 169 of 1912 was instituted by Inderdeo and others, representing a second batch of mortgagors, in respect of their 5 annas 4 pies share. Those two suits were decreed, and it is alleged that the plaintiffs therein redeemed their 9-annas 4-pies share in the property on the 14th of January 1915 upon payment of Rs. 11,666-10 0 to the mortgagees. There is, next, an allegation in the plaint in the present suit that the defendants have become proprietors of 2 annas, 8 pies in the properties by purchase. The plaintiffs accordingly pray to redeem the residue, which is their 4 annas share, upon payment of their proportionate share of the sum secured.

The Subordinate Judge decreed the suit on the 30th March 1917, notwithstanding the fact that on the 27th March 1917 the High Court had set aside the judgment and the decrees in Suits Nos. 168 and 169 of 1912, holding that the decrees and the sales were valid and dismissing the suits. Though this fact was brought to the notice of the subordinate Judge, and though it was contended before him that the decision of the High Court operated as *res judicata*, the learned Subordinate Judge was unable to give effect to the objection, and decreed the suit as already stated.

In the present appeal, a preliminary objection is taken by the plaintiffs that the appeal does not lie to this Court as the subject matter is below Rs. 5,000, and that the Court which had jurisdiction to entertain

tain the appeal was the Court of the District Judge of Arrah.

In order to deal with this point, it is necessary to examine the reliefs claimed in the plaint. The first prayer is that it may be held that the money decree of the 3rd December 1909 was obtained fraudulently; the second is that it may be held that the sale of the 6th June on the basis of the fraudulent decree was illegal, inoperative and null and void and the third is that the plaintiffs may be allowed to redeem, after setting off their claim for damages in regard to Mouza Ismailpur which is said, subsequent to the auction-purchase, to have been sold for arrears of Government revenue through the negligence of the auction-purchaser.

Now, it is quite clear that the suit comes under section 7, clause 4, of the Court Fees Act and, complying with the provisions of that section, the plaintiffs seem, in paragraph 9 of the plaint, to have valued their relief for Court fee purposes at Rs. 3,976, which sum represents their $\frac{1}{4}$th share in the sum of Rs. 15,904 for which the decree of the 3rd December was made. For the purpose of jurisdiction, however, the plaintiffs appear to have valued the suit at Rs. 15,904 only. Now, for the purpose of Court-fees the valuation put by the plaintiff on a suit under section 7, clause 4 (*c*), is not to be an arbitrary valuation. It is to accord with the value of the subject-matter and in case of dispute is to be determined by the Court. In the case before us an issue as to the valuation and Court-fee paid was raised, but it was decided by the learned Subordinate Judge in a most perfunctory manner, it being merely stated that there was no evidence to show that the valuation was insufficient. It was the duty of the learned Subordinate Judge to see that the Government revenue was adequately protected. That duty now falls upon us, and the parties having failed to adduce any evidence on the point, we are compelled to make the valuation upon the pleadings.

In this Court the principle has been accepted that where a plaintiff asks for a declaration and consequential relief, he is to pay *ad valorem* fees in proportion to the loss from which he asks to be relieved. Here if there had been no sale and the decree had merely stood, his loss would have been Rs. 15,904. It has been contended that his loss would have been only a quarter of this sum, but the decree, being a joint decree, it would seem that he is jointly and severally liable for the whole. But the sale having taken place, the plaintiff's loss is now not the amount of the decree but his interest in the property sold. That interest, in the event of a partition, will be $\frac{1}{4}$th and, therefore, the plaintiff's loss is $\frac{1}{4}$th of Rs. 2,20,000, which is alleged in paragraph 5 of the plaint to be the value of the entire properties, that is to say, Rs. 55,000.

As regards the prayer for redemption, it might be viewed either as a relief based upon a separate cause of action and as a distinct subject within the meaning of section 17 of the Court Fees Act or as a consequential relief. Adopting the latter view, we think the plaintiffs must pay *ad valorem* fees on Rs. 55,000 only, that is to say, Rs. 1,200.

The lower Court appears to have treated the case as one of redemption pure and simple, and it has been contended by the learned Vakil for the plaintiff-respondent before us that the first two prayers are only ancillary to the prayer for redemption. In my opinion this cannot be so, for, till the sale is reversed, the plaintiffs cannot redeem. It would not have been sufficient for them to bring a suit for redemption without making any mention of the decree and the sale, leaving it to the defendants to set up the decree as a bar to the suit. They could not, in a suit so framed, have been permitted to adduce evidence of fraud and get a declaration that the decree and the sale were inoperative. It might have been otherwise if the decree had been without jurisdiction, or if they had been defendants; but here it was of vital importance to them to set aside the decree and the sale by means of a declaratory decree. The result is that a sum of Rs. 975 is still due from the plaintiffs on account of deficit Court-fee.

For the purpose of jurisdiction, the case comes under section 8 of the Suits Valuation Act, and must be valued at Rs. 55,000. The appeal, therefore, lies to this Court.

BRIJ KRISHNA DAS v. MURLI RAI.

In regard to the Court-fee payable on the memorandum of appeal, it must be calculated upon the subject-matter of the appeal. The defendants-appellants seek to recover the plaintiffs' share and to defeat their right of redemption in all the Mouzas, except Ismailpur, the value of which, according to the Subordinate Judge, is Rs. 3,500. The subject matter of the appeal, therefore, is Rs. 55,000 less $\frac{1}{4}$th of Rs. 3,500, *i. e.*, Rs. 54,125. The Court-fee payable, therefore, is Rs. 1,200 and there is a deficit of Rs. 975.

The order, therefore, that we shall pass is that deficit Court fee to the extent of Rs. 975 must be paid by the appellants before the appeal can be entertained. They will have time till the 23rd June for complying with this order. On default, the memorandum of appeal will be rejected. If, and when, the requisite Court-fee upon the memorandum of appeal is paid, the plaintiffs will be called upon, under section 12 of the Court Fees Act, to pay the deficit of Rs. 975 upon their plaint on or before the 30th June. In the event of their failing to do so, their suit will be dismissed without costs and the appeal of the defendants will be decreed with costs throughout.

Upon both parties complying with the orders in the matter of the deficit fees recoverable from them, the appeal will be set down for hearing on the 7th July.

ADAMI, J.—I agree.

ORDER.—(*July* 4, 1919).—This case has been put up for hearing to-day because of an order made by us on the 9th June 1919, calling upon the appellants to deposit Rs. 975 as deficit due upon their memorandum of appeal.

We held that the suit was not one for redemption, that it fell under section 7, clause (4) (*c*) of the Court Fees Act, and that Court-fees should be paid upon the value of the relief claimed, which, in this case, was a sum of Rs. 54,125. The appellants have complied with that order and, therefore, so far as they are concerned, the appeal can proceed. But on the last date of hearing we found that the plaintiffs had not in the trial Court paid the full Court-fee, that a further sum of Rs. 975 was due upon their plaint and we directed them, under section 12 of the Court Fees Act, to make good that deficit on or before the 30th June. This they have failed to do. Mr. Ganesh Dutt Singh, on behalf of the plaintiffs, says that he has communicated with his client but has received no reply and consequently is not in a position to say whether or not the plaintiffs intend to comply with our order. But he has addressed an argument to us upon section 12 of the Act, the purport of which is that, under this section, we have no power either to call upon the plaintiffs to pay the money, nor, in the event of the plaintiffs' failure to comply with our order, to dismiss the suit by applying the provisions of section 10. The learned Vakil relies upon certain observations made by a learned Judge of the Allahabad High Court in the case of *Narain Singh* v. *Chaturbhuj Singh* (1), and contends that section 12 of the Act only applies to a case in which the plaintiff is the appellant. With great respect, if that is the meaning of the judgment, I venture to differ, and, so far as this Court is concerned, it seems to me that the matter is concluded by the decision in the case of *Rajdeo Narain Singh* v. *Ramdil Singh*, in Second Appeal No. 104 of 1919, in which a Division Bench held, that upon the plaintiff-respondent's failure to pay the deficit Court-fee, it was competent to the Appeal Court to call upon him to pay the deficit and, in the event of his being unable to pay, to enforce the order by the dismissal of his suit. I can find nothing in section 12 which would debar the Court from enforcing its order in this manner. The section clearly contemplates that section 10 is applicable, unless the circumstances of the case do not permit. It is contended that all that the Appeal Court can do is to hold the decree, which has been obtained by the defaulting party, in abeyance and to direct that it shall not be executed until such time as the order in respect of the deficit is complied with. It would seem that the Court can, if it so pleases, adopt this remedy in exercise of its inherent powers, but there is nothing in the law which says that this is the only remedy which it is open to

(1) 20 A. 362; A. W. N. (1898) 72; 3 Ind. Dec. (N. s.) 592.

the Court to apply. I cannot, therefore, accede to the argument, that the respondent is entitled to be heard in the appeal, that it is only if he loses that we can impose any penalty upon him, and that, in any event, the utmost that the Court can do is to stay the execution of his decree.

The learned Vakil also endeavoured to argue on the authority of *Sundar Mal Marwari* v. *J. C. Murray* (2) that section 12 does not at all apply to the case before us. In my opinion that case is of no assistance to him.

Finally it has been contended that even if we decide that the plaintiffs are liable to be called upon to pay the deficit, before they can be heard in the appeal, the proper order that we should make is not that the suit should be dismissed, but that the plaint should be rejected under Order VII, rule 11 of the Civil Procedure Code. In my opinion rule 11 of Order VII and section 10 of the Court Fees Act apply to different stages of a suit. The procedure of rule 11 of the former Act is not applicable to a case in which an Appeal Court acts under section 12 of the latter Act. In such a case the rejection of the plaint is an inappropriate remedy and the law enjoins a dismissal without option, though it may be that the result of the dismissal from the point of view of *res judicata* is the same as that of a rejection.

In these circumstances, the order made by us seems to be perfectly correct and the appeal has been rightly decreed with costs throughout.

Appeal decreed.

(2) 16 Ind. Cas. 963; 16 C. L. J. 375.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 84, 88, 89, 90, 91, 147 and 148 OF 1918.

December 11, 1919.

Present :—Mr. Lindsay, J. C.

DRIGPAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAKCHHED SINGH, DEAD, AND ON HIS DEATH SHEOAMBAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition proceedings—Presumption—Co-sharers not parties to proceedings, whether bound—Mortgagees, whether necessary parties to, and whether bound by, proceedings.

The presumption is that when a partition takes place, all the co-sharers in the village are made parties to the proceedings and, therefore, the proceedings must be taken to bind all the co-sharers and all persons who derive title under them. [p. 321, col 2.]

Mortgagees are not necessary parties to partition proceedings, but they are bound by the decision of the partition Court in so far as it affects the interests of the co-sharers who are their mortgagors. [p. 322, col. 1.]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 3th January 1918, reversing that of the Additional Munsif, Sultanpur, dated the 18th September 1915.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—These are seven appeals: all proceed upon common grounds and may be disposed of by one judgment.

The history of the litigation in these cases is fully set out in a judgment of a Bench of this Court reported as *Bisheshar Singh* v. *Brij Bhookhan Singh* (1). Shortly put what happened was as follows:—

Nakchhed and several others, plaintiffs, filed seven suits in ejectment against seven sets of defendants with respect to certain plots of land. In all the suits the case for the plaintiffs was that the lands in dispute had been allotted to the plaintiffs at a partition which had been carried out within 12 years from the date of the suit. It was represented that the defendants were refusing to deliver possession of these lands on the representation that they were holding the lands as mortgagees. Pleas were taken that the defendants were mortgagees of long standing. In some instances it was asserted that the mortgage deeds had been lost or destroyed and that the terms of the mortgage contract could not be definitely discovered. In a few of the cases it was further pleaded that the defendants were not under any obligation to disclose the conditions of their mortgages, because the plaintiffs were bound by entries in the partition record and were not in a position to deny that the defendants were

(1) 43 Ind. Cas. 300; 20 O. C. 336; 5 O. L. J. 18.

mortgagees. In those suits what happened was this. The Court of first instance, finding that the relation of mortgagor and mortgagee had not been proved, decreed the plaintiffs' claims. In the lower Appellate Court the decrees of the Court of first instance were reversed. It was held that for certain reasons the defendants had shown themselves to be mortgagees and that the plaintiffs could not sue in ejectment. Their only remedy was to bring suits for redemption. When these cases came up in second appeal to this Court, it was considered advisable to refer them to a Bench for the purpose of laying down certain principles of decision applicable to cases of this nature. The law was accordingly laid down in the reported judgment to which I have just referred, and the result was that the decrees of the Subordinate Judge having been reversed, the cases were sent back to him for disposal in appeal in accordance with the law laid down in the reported judgment. The Subordinate Judge has now decided against all these defendants that the evidence adduced by them does not establish the existence of the mortgage relation and that the plaintiffs in all cases are entitled to eject them. He has remanded the suits to the Court of first instance for a finding upon the question of damages. Now the defendants come up here in second appeal and seek to have the orders of the lower Appellate Court reversed.

I have read the judgment of the Subordinate Judge which deals with all these seven cases, and I have no doubt whatever that the Subordinate Judge has correctly apprehended and applied all the principles of decision which were laid down in the judgment of the Bench. He has considered each case separately and has demonstrated that in none of the cases have the defendants been able to produce any definite proof of the mortgages upon which they rely. The evidence consisted for the most part of vague entries in the revenue papers of the village extending, it is true, over a long period of time; but there is absolutely no material upon which the Courts below could possibly have found whether or not these mortgages set up by the defendants were subsisting mortgages. I am satisfied that the evidence has been properly examined and dealt with by the Court below. It has, however, been argued here that in matter of law the decision of the Court below is erroneous. In order to understand the point which has been raised by Mr. Sen on behalf of these appellants it is necessary to say that at the partition, which was held within 12 years before the present suits were brought, a record was made in the partition proceedings to show that certain plots assigned to the shares of certain co-sharers were held in mortgage either by other co-sharers or by persons who were not co-sharers in the village. In the first place, it is contended that persons who were not parties to the partition record are not bound by any of the results of partition. With regard to this argument it is only necessary to state that the presumption is that when partition took place all the co-sharers in the village were made parties and every one, therefore, of the co-proprietors must be taken to be bound by the proceedings. It is further to be observed that a mortgagee cannot put forward the contention that he is not bound by the partition proceedings. He certainly is bound on the ground that any title he holds is derived from co-sharers who were parties. The proceedings bind all parties to them and all persons who derive title under those parties. In the present case, therefore, none of these persons, who call themselves mortgagees, can be heard to say that the partition proceedings are no evidence as against them of the title of the plaintiffs in these suits. The persons who set up these mortgages all admit that they are either original mortgagees from co-sharers in the village or sub-mortgagees. In some cases the original mortgages were made in favour of persons already co-sharers. In one instance, namely, the instance of Debi Dayal whose appeal here is No. 90 of 1918, the mortgage was to a stranger. But the case which Debi Dayal put up was that he was a mortgagee of a co-sharer in the village and so, whether or not Debi Dayal was a party to the partition proceedings, he is not in a position to deny the title which these plaintiffs have acquired by the partition proceedings. Practically the whole of the argument before me has been confined to this point; an attempt has been made to

show that certain of these defendants, who were not parties to the partition proceedings, cannot be bound and that, as against them, the plaintiffs have not proved their title. As has been mentioned before, the title upon which the plaintiffs rely is a title which they got in the course of partition. For the reasons which I have given I am unable to entertain this argument. Mortgagees are not necessary parties to partition proceedings and they are bound by the decision of the partition Court in so far as it affects the interests of the proprietors who are their mortgagors. I am satisfied, therefore, that in all these cases the plaintiffs were able to show a title by partition and the evidence, which was led to prove that title, namely, the record of the partition proceedings, was evidence admissible against all the defendants, whether they had been parties to the proceedings or not. The plaintiffs in virtue of the rights acquired by them at the time of partition are entitled to possession unless the defendants can show a better claim to possession; and here we have the finding of the learned Subordinate Judge, with which I agree, that none of these defendants has been able to put forward any definite proof of a mortgage subsisting at the date on which these suits were brought; consequently none of the defendants has been able to establish any claim to possession which would be a bar to the recovery of possession by the plaintiffs.

The result is that I find that the judgment of the lower Appellate Court is correct and these seven appeals fail and are accordingly dismissed with costs.

Appeals dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 128 OF 1919.

March 30, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

Babu DEONANDAN PRASAD SINGH—JUDGMENT DEBTOR—OBJECTOR—APPELLANT

versus

JANKI SINGH AND OTHERS—DECREE-HOLDERS—OPPOSITE-PARTY—RESPONDENTS.

Specific performance of contract of sale, suit for—Possession, whether can be decreed—Appeal to Privy Council—Death of respondent—Appeal heard in ignorance—Decree, whether can be ignored.

In a suit for specific performance of a contract for sale of land, it is open to the plaintiff to join with his prayer for specific performance a claim for delivery of possession, unless the contract expressly disentitles him to such relief. [p. 323, cols. 1 & 2.]

Where, pending the hearing of an appeal before the Privy Council, one of the respondents dies and his legal representatives are not brought upon the record and the appeal is heard in ignorance of the fact of death, the decree pronounced by the Privy Council cannot be ignored by the Courts in India. [p. 324, col. 2.]

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 28th April 1919.

Messrs. *S. M. Mullick* and *S. N. Bose*, for the Appellants.

Messrs. *S. N. Palit*, *S. K. Mitter*, and *N. N. Sen*, for the Respondents.

JUDGMENT.

MULLICK, J.—This litigation arises out of the sale of an estate which was held under Act XI of 1859 in consequence of the default of the proprietors of the twelve-annas share to pay the Government revenue due from that share.

It appears that a separate account has been opened for the 4-annas share and that the residuary 12-annas share stands in the names of plaintiffs Nos. 1 to 20; plaintiffs Nos. 7 to 16 and Nos. 17 to 20 are respectively owners of 9 annas and 3 annas therein; plaintiffs Nos. 1 to 6 claim to be assignees as to portions of the above 3 annas share, while the defendant Deo Nandan Prosad Singh holds an usufructuary mortgage over the same and was the auction-purchaser at the sale.

The plaintiffs brought the suit in the Court of the Subordinate Judge to set aside the auction-sale, on the ground that the defendant No. 1 had fraudulently withheld

payment of the Government demand, and they claimed that the defendant should convey the property to the plaintiffs and give possession with mesne profits. An alternative claim for damages was also made, but it was withdrawn with liberty to bring a fresh suit thereon.

The Subordinate Judge dismissed the suit with costs.

On appeal to the High Court it was decreed that the sale was invalid and that upon the plaintiffs paying into Court the purchase money with interest from the date of the sale, the defendant should through his guardian convey the property to the plaintiffs by a proper deed of sale.

On appeal to the Privy Council this decree was modified and their Lordships were of opinion that the declaration in the decree, that the sale and purchase were invalid, was misconceived as a description of the legal position, and that in its place should be substituted a declaration that the property purchased must be held for the benefit of the plaintiffs and the 1st defendant, according to their several interests, and that subject to the re-payment of Rs. 425 with interest there should be a direction for a conveyance as decreed by the High Court on payment of that amount on or before a date to be fixed by the Subordinate Judge. With this variation the decree of the High Court was affirmed in all respects.

The plaintiffs then applied on the 7th of September 1918 for the execution of the above decree. The judgment debtor, defendant No. 1, filed an objection on the 21st November 1918. On the 28th April 1919 the Subordinate Judge of Monghyr dismissed the objection and held that execution must proceed. The present appeal is directed against this order of dismissal.

The first point urged before us is that there can be no delivery of possession in this execution proceeding.

It is contended that their Lordships of the Privy Council only directed the execution of a conveyance and that as the decree is silent as to delivery of possession, the plaintiffs must bring a separate suit on the completed contract.

Now it is admitted that in a suit for specific performance of a contract for sale of land, it is open to the plaintiff to join with his prayer for specific performance a claim for delivery of possession, unless the contract expressly disentitles him to such relief. A contrary view has sometimes been taken, but I think it is now settled that a cause of action for delivery of possession may arise both upon the contract and the completed conveyance. [See *Ranjit Sinha* v. *Kalidasi Debi* (1) and *Madan Mohan Singh* v. *Gaja Prosad Singh* (2).] Forms Nos. 47 and 48 given in Appendix A in the First Schedule to the Civil Procedure Code also support this view.

Ordinarily the plaintiff would be entitled to ask for both reliefs and a subsequent suit for delivery of possession would, I think, be barred under the provisions of Order II, rule 2, Civil Procedure Code, which in its application to cases of contract merely asserts the principle that the Court will not direct the performance of a part of the contract where the whole can be enforced. As an exception to this rule, the Court will decree a claim for a conveyance only in cases where it embodies the substantial part of the agreement and where the Court can direct its execution without regard to the question whether or not its provisions can be specifically enforced.

Where the right to possession springs out of the contract for sale, delivery of possession would, in my opinion, be included in relief by specific performance. Generally the right arises coincidently with the right to the execution of the conveyance, and if their Lordships of the Madras High Court in *Krishnammal* v. *Manandiar Sundararaja Aiyar* (3) intended to lay down a contrary view I would respectfully venture to differ.

The plaintiffs before us did in fact ask that the sale should be set aside and delivery of possession given after the execution of a conveyance, and in my opinion their Lordships of the Calcutta High Court as well as their Lordships of the Judicial Committee intended that the relief as to possession, being ancillary, should be included in the relief as to execution of the necessary document. Therefore, although

(1) 5 Ind. Cas. 205; 37 C. 57; 14 C. W. N. 527.
(2) 11 Ind. Cas. 228; 14 C. L. J. 159.
(3) 22 Ind. Cas. 912; 38 M. 698; 15 M. L. T. 103; (1914) M. W. N. 200; 1 L. W. 147.

their Lordships of the Judicial Committee have not expressly made an order for delivery of possession, that relief follows immediately from the order for the execution of the conveyance.

It has been contended by the learned Vakil for the appellant that other equities may arise and it has been hinted that a decree for delivery of joint possession is in the nature of a declaratory decree and cannot be executed. Such a view has sometimes been taken, but the weight of authority, in my opinion, shows that delivery of joint possession can be made among co proprietors.

Then it is said that the 3 annas share is under usufructuary mortgage and that for this reason and for the reason that assignments have been freely made by the recorded co-sharers, a decree for possession could not be worked out in the execution department. The law, however, merely requires that the vendor shall make to the vendee such delivery of possession as the nature of the property admits of, and in this case I see no difficulty in giving to the plaintiffs that possession which they had at the time of the sale. There is no reason why the plaintiffs should be relegated to a separate suit for obtaining a relief which can without difficulty be given in the execution department, and I cannot conceive that it is the intention of their Lordships of the Judicial Committee that litigation should be multiplied for this purpose.

It is contended that if a suit for possession lies upon the executed conveyance, then delivery of possession should not be made in execution. I do not think section 47, Civil Procedure Code, is any bar. That section says that if the decree gives a certain relief, a separate suit for obtaining that relief will not lie during the pendency of execution proceedings founded on that decree. In the view that I take of the meaning of the decree, delivery of possession can and should be made.

I think, therefore, that the first objection must fail and upon the officer of the Court executing the document on behalf of the judgment-debtor, if he refuses to execute it, a right to possession vests in the decree-holder which can be enforced by the execution Court.

The next point urged on behalf of the appellant is that the decree of their Lordships of the Privy Council is a nullity, inasmuch as the heirs of one of the respondents who had died before the decree were not brought upon the record. It is contended that so far as the interest of the deceased plaintiff respondent is concerned, the suit has abated and as the cause of action has not survived to the remaining plaintiffs-respondents, they cannot execute the decree.

Now apart from the question of fact as to whether or not Eklal, the deceased respondent, had died before their Lordships of the Privy Council heard the appeal, I am unable to accede to the proposition that any Court in India can regard the order of the Sovereign as a nullity. It has been held in *Flood* v. *Egan* (4) that where, pending the hearing of the appeal, the respondent died and the Judicial Committee heard the appeal in ignorance of the death, and the appellant was ordered to pay costs, the Court below should refuse to ignore a decree of the Sovereign in Council. The provisions of Will. IV, C. 41, section 23, seem to furnish express statutory authority for this view. Indeed it would be a curious result if the defendant-appellant should now be permitted to take advantage of his own negligence or wilful omission. It was his duty to substitute parties in the Privy Council and it is certain that if he had succeeded in his appeal, he would have strenuously resisted the plea that the decree was a nullity. I think, therefore, that the contention, that the only decree which it was possible to the Subordinate Judge to execute was the decree of the High Court, is untenable and must fail.

But there is a more sustantial ground upon which the appellant's contention must fail. The learned Subordinate Judge has found that Eklal did not die in 1916, as has been alleged by the appellant, and that he was alive at the time that their Lordships heard the appeal. One witness, a *karpardaz*, has given evidence on behalf of the appellant that Eklal died in 1916. On the other hand the respondents have produced one of their co-sharers named Janki Singh, who says that Eklal died in 1917.

(4) (1869) 20 N. S. W. R. 337.

The learned Subordinate Judge, having taken the oral evidence of both sides into consideration, has come to the conclusion that the judgment debtor has failed to discharge the onus that lay upon him. The appellant also produced a report from an officer of the Collector's office at Monghyr, stating that in a certain death register kept in the Collectorate for the year 1919 the name of Eklal is shown as having died on the 29th March of that year. The report was signed on the 3rd January 1919 and the register in question was destroyed on the 15th March of that year. The original register was, therefore, not available to the respondents in the Court of the Subordinate Judge on the 26th April, when the hearing of the execution case began. It is clearly impossible to place any reliance upon a report of this kind. The respondents had no opportunity of calling for the original register or even obtaining copies of the relevant entries therein with a view to eliciting what was the nature of the register, who was the person who gave the information of the death of Eklal and what was his official status.

It is very pertinently observed by the learned Subordinate Judge that in the execution petition filed by the judgment-debtor on the 21st November 1918 no particulars were given showing that the judgment-debtor would contend that Eklal died on the 29th March 1916, and that the date of his death was not disclosed till the 18th of March 1919, that is to say, 3 days after the destruction of the register. The appellants have also filed two reports from the office of the Collector, Exhibits 2 and 2A, to the effect that in the death register for 1917 there is no entry of Eklal's death. The learned Subordinate Judge observes that Eklal may have died in a village other than the village to which the register relates.

We agree with the learned Subordinate Judge that in this state of the evidence, both documentary and oral, it would be impossible to hold that the onus cast upon the appellant has been discharged.

These are the only two points which have been argued before us and on both the appellant must fail. The appeal is, therefore, dismissed with costs.

SULTAN AHMED, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

EXECUTION CASE No. 4 OF 1919.

April 11, 1919.

Present:—Mr. Justice Rankin.

PURUSOTTUM DAS NARAIN DAS—APPLICANT

versus

LOUIS DREYFUS & CO.—RESPONDENT.

Arbitration—Notice to parties, whether essential—Arbitrator, proceeding ex parte, *duty of—Award against firm, validity of—Award, how to be enforced.*

When arbitrators assume the burden of their duty, their first duty is to see that the parties have had notice, and sufficient notice, to enable them to appear before the tribunal and put their case. If they do not appear before them, it is the duty of the arbitrators to make sure that they have no sort of excuse for not appearing. When the arbitrators have failed to discharge this duty, their award must be set aside. [p. 328, col. 1.]

An award of arbitrators is not bad because it is made against a firm. Under the Arbitration Act an award is not a decree, but it is to be enforced as though it were a decree. The provisions which relate to the execution of a decree against a firm apply in the case of an award which has been filed, the award having been made against the firm. [p. 326, col. 2.]

Rule calling upon the respondents to show cause why a certain award should not be taken off the file or set aside.

Mr. *K. P. Basu* (for Mr. *Langford James*), for Louis Dreyfus and Co.

M. *S. C. Bose* (for Mr. *N. N. Sircar*) in support of the Rule.

JUDGMENT.—This is an application by the seller under certain contracts to have an award taken off the file, as being bad and not valid against the firm. There is one question on the contract which I cannot now decide, because it requires investigation by means of oral evidence, and that is the question whether on the contract which was originally entered into the words which now appear on the top of the exhibit before me ("Calcutta" will be read instead of "Karachi") were really there; whether they have been interpolated afterwards for the purpose of making it appear that the contract was different from what it really was. I have to consider whether this award is invalid apart from the determination one way or another of that question; and three points have been taken before me independently of that more troublesome point. The *first* point is that the award is bad because it is against a firm,

The *second* point is that the award is bad because the arbitrators did not give any notice to the applicants of the fact that they were to determine the matter, and the *third* point is that this is not a case where a suit over the subject-matter of this award could have been brought in this Court and that, therefore, Act IX of 1899 by sub-section (2) does not apply.

On the first point, that the award is bad because it is against the firm, I am of opinion that that objection will not hold. It is quite true that in *Hurdwary Mull* v. *Ahmed Musaji Saleji* (1) there is an opinion of my learned brother Mr. Justice Fletcher to the effect that "this Court cannot make a decree against a firm when it is ignorant as to what persons constitute the firm. This being so, I am of opinion that not only did the arbitrators act improperly in not taking evidence on this issue, but also that the award is bad on the face of it." In my opinion there is no substance in reason for this objection. As I have, during the argument, pointed out, when an action is brought against a firm, the persons who appear as partners must appear in their individual names; so long as one person appears, the action will go on against the firm in the firm's name, and it will be left to proceedings after the decree to ascertain whether other persons are really partners, either by means of an issue being directed or otherwise. At the time the Court passess a decree aginst a firm in the firms's name, there is no constat as to how many partners there are of the firm or who these partners are, and, therefore, the major premise, as it seems to me, on which Mr. Justice Fletcher proceeded, "the Court cannot make a decree against a firm when it is ignorant as to what persons constitute the firm," is I think very much too wide. It is said that in view of the fact that the procedure for suing a firm in the firm's name was only introduced into this country in 1908, I must not read the Indian Arbitration Act of 1899 together with the new provisions in 1908. For the present purpose I do not agree. It is quite true, and I am glad to hear that it is known, that in strictness of law there is no such thing as a firm or partnership. Partnership is a relationship between persons and the law in England, and the law that has been incorporated into this country, recognises these persons as joint proprietors of a business, but does not recognise a partnership as being an entity at all; it is a mere guise or cloak or name by which the individual persons, joint owners, are concealed or pointed out. There is no such thing as a partnership; but the law now does allow for persons who own businesses in co-partnership being sued for convenience by a designation which is the designation commercially employed, and the machinery for doing that has been elaborated in England, and is now in force here. It is perfectly well known in India, just as it has been known for many years in England, that a large proportion of awards in commercial cases are made in favour of or against the firm. Business cannot be carried on unless commercial men who have constituted themselves into firms can be allowed to deal with firms, and I shall be doing something that I should be extremely sorry to do, causing much inconvenience and trouble, giving much opportunity for fraud and collusion, if I give my assent to the argument which has been put before me. Under the Indian Arbitration Act the award is not a decree, but it is to be enforced as though it were a decree and a decree of this Court. I certainly hold—and I have held in Chambers before to day—that the provisions which relate to the execution of a decree against a firm apply in the case of an award which has been filed, the award having been made against the firm. In my opinion, the *dictum* of Mr. Justice Fletcher proceeded upon a wide principle which is inaccurate. If there is one thing more firmly established than another in law it is the maxim "*Id certum est quod certum reddi potest*"—that is certain which is capable of being made certain, capable of being ascertained with a little trouble. In this case the machinery is provided by which you can for all the purposes of execution ascertain who are the partners in the firm, and I am not going to deprive the commercial community of the benefit of the system of arbitration and award by reason of a technical objection which, I think, is unfounded in principle and has got no commercial substance. So much for the point.

The next point that is taken is the question whether this Court has any jurisdiction

(1) 1 Ind. Cas. 871; 13 C. W. N. 468.

to entertain an award upon this contract. Section 2 of Act IX of 1899 was pointed out, and that clearly enough lays down the test. The test is, would the subject-matter as taken to arbitration here be properly made the subject matter of a suit in this Presidency Town? Now, I look to this contract, and it appears to me that although there is to be an advance against railway receipt at Patna, speaking in terms of the contract, and speaking in the ordinary meaning of the English language, in terms of substance, this is a contract for delivery, not at Patna at all, but at a place which is called in the original contract Karachi, and which according to the evidence which is in dispute and which I have already mentioned, would be Calcutta. On that view if Mr. Basu's client be right, upon further investigation of that fact I should be prepared to hold that this Court had jurisdiction. Therefore, at present and without going into the question of what the contract was, whether the words have been interpolated or not, I cannot set aside this award on that ground.

Now I have come to the last of the three grounds that have been taken against this award, and that is that the arbitrators did not give notice to the sellers. Now I very much regret indeed that I think this point is fatal. What happened was that the buyers nominated their arbitrator; they nominated Mr. Nicashi of Messrs. Petrocochino Brothers to act for them by a letter of the 19th November 1918, and they asked "Please let us have the name of your arbitrator within seven days or we shall, without further notice, proceed with the arbitration *ex parte*." Now, under the contract what they were entitled to do was this. They were entitled, if a party failed to nominate an arbitrator within seven days from the date of request, to nominate both arbitrators. That was the measure of their right. They were entitled to nominate both of them, and in fact they did nominate both arbitrators, and so far everything was absolutely correct. But it is a principle which I have already had occasion to, lay down in these cases that when arbitrators assume the burden of their duty, their first duty is to see that the parties have had notice and sufficient notice, to enable them to appear before the tribunal and put their case. That being their duty, I have to examine first of all whether the arbitrators carried their duty out, and secondly, whether there was enough in the conduct of the sellers to entitle the arbitrators to say that the duty no longer existed. What happened was this. The arbitrators gave no notice of their being about to go into this matter at all. The buyers had asked the sellers to nominate their arbitrator. The sellers wrote back to the buyers in their letter of the 25th November 1918: "We are surprised to see that you want to refer the matter to the arbitration of one living in Calcutta. You must note that the dealings were effected in Patna and we have no concern with Calcutta and that unless arbitrators living in Patna be chosen, we cannot consent to any such proceeding. We have further to add that your agent or broker never fully explained the contract to us, nor gave us a copy of the terms thereof. However, as you want on the strength of the said contract to refer the matter to arbitrators, we would request you to send us a copy of the said contract at any early date. Under the circumstances unless you furnish us with a copy of the contract and we consent to the reference to arbitration your action, if any, taken *ex parte* will be at your risk and costs and cannot be legally binding on us."

Now, in my opinion, that was not such a letter as made it right or safe for the arbitrators to proceed without giving the sellers any notice that they were going to try the case. This letter states the objection to a Calcutta arbitration, it is true; but it goes on to say: "We have not got a copy of the contract. No doubt as you have acted under the contract, there may be something in it that is against us. We want to see it; but unless we consent to the reference to arbitration what you do will be at your own risk." It is not a final irrevocable, conclusive refusal to have any thing to do with this arbitration. It is an objection; what it says is that when we see the contract to know our rights, there is a chance that we may consent to the reference. That is the fair meaning of the letter. To my mind although it may be quite true, where a man refuses utterly and in all events to have any thing to do with an arbitration, that nobody is obliged to give any further notice because it will be useless, I do not think that this letter was sufficient to justify the party or the arbitrators in going on without any further notice

whatsoever. As I have said recently, arbitrators, when they begin to take upon themselves the burden of their duty, must remember that it is laid upon them to see—not upon anybody else, but upon them as tribunal—that the parties have notice to appear before them; if they do not appear before them, to make sure that they have no sort of excuse for not appearing. I very much regret that I have to set aside this award, but I think the arbitrators of the buyers have so conducted themselves as to infringe this important principle. That being so, the award must be set aside, and I must set it aside with costs.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 111 OF 1918.

February 11, 1920.

Present:—Mr. Lindsay, J. C.

BANKE LAL AND OTHERS—DEFENDANTS NOS. 4 TO 6—APPELLANTS

versus

SWAMI DAYAL AND ANOTHER—PLAINTIFFS NATHTHA AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 27, 31 (2)—Admission by guardian of time barred debt, whether act of prudence—Order sanctioning transfer by guardian, contents of—Necessity for and advantage of transfer not recited in order, effect of Evidence Act (I of 1872), s 67 Document not required by law to be attested—Execution, proof of.

The provisions of section 31 (2) of the Guardians and Wards Act are mandatory and not merely directory, and an order made by a District Judge granting sanction to the guardian to transfer his ward's property, which fails to recite the necessity for or the advantage of the transfer, is not a legal order which can be pleaded as sufficient sanction for the transfer by the guardian. [p. 329, col. 2; p. 330, col. 1.]

Gopal v. *Musammat Mahtaba*, 2 Ind. Cas. 237; 12 O. C. 78, followed.

Rameshwar Singh Bahadur v. *Dhanpat Singh*, 5 Ind Cas 834: 11 C. L. J. 197, considered.

It is not an act of ordinary prudence on the part of a guardian within the meaning of section 27 of the Guardians and Wards Act, to admit that his ward is liable for a debt which cannot be legally recovered owing to the lapse of time. [p. 333, col. 1.]

In the case of a document not required by law to be attested, it is absolutely necessary under section 67 of the Evidence Act that some evidence should be given to show that the executant executed the document, *i. e.*, that he signed it or put his mark on it. [p. 333, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 2nd August 1918.

The Hon'ble Syed *Wazir Hasan*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—The suit out of which this appeal has arisen was brought for the purpose of obtaining a declaration that a certain sale of property, effected under a deed dated the 19th of May 1914, was not binding on the plaintiffs. The original plaintiff in the case was one Swami Dayal, who at the time this sale was made was a minor. At the time the suit was brought one Murli was impleaded as a defendant, but subsequently he was allowed to join in the suit as a plaintiff. It is not disputed that the property affected by the sale-deed in question was the property of both these persons. Murli was still a minor at the time the suit was brought.

When this sale was made, the minors were under the control of a guardian appointed by the Civil Court—one Naththa, who was impleaded as a defendant. It was alleged in the plaint that Naththa had improperly sold this property to two persons, Ram Autar and Sheo Baran. It appears that after the purchase by these last named persons they transferred the property by sale to two other persons, namely, Bhesher and Mahraj Singh. The plaintiff alleged that one Banke Lal, who was also impleaded as a defendant, was interested in this latter transfer.

In the fourth paragraph of the plaint it was stated that Naththa, the guardian, was a man of weak intellect and in the fifth paragraph it was urged that the purchasers, Ram Autar and Sheo Baran, had brought influence to bear on the guardian for the purpose of bringing off this sale on the 10th of May 1914. The property, it is said, was at the time of the sale held by one Balgobind who was a mortgagee with possession. In the sixth paragraph of the plaint it was stated that certain false items had been entered in the sale-deed as being

portions of the consideration. The eighth paragraph of the plaint set out that the sale was collusive, without legal necessity and injurious to the interests of the minors. In the ninth paragraph it was said that no permission for the sale had been obtained from the Court of the District Judge, and it was further pleaded that the Court was not put in possession of all the facts in order to enable it to determine whether the sale was for necessity or not. Lastly the allegation was that the second set of purchasers had bought the property with knowledge of all the above facts.

The main defence was that the sale had been held with the permission of the District Judge and that consequently the suit was not maintainable. The Subordinate Judge held that no valid permission for the sale had been given by the learned Judge. He, therefore, entered upon an inquiry for the purpose of ascertaining which of the items set out in the sale-deed were binding on the plaintiffs. In the event he found that the plaintiffs were bound to the extent of Rs. 2,281-14-0. He, therefore, decreed the claim of the plaintiffs subject to a payment by them of Rs. 231-14-0 to the defendants Nos. 4 to 6, the ultimate purchasers of the property. In case of default the suit was to stand dismissed with costs.

The first question to be dealt with in appeal is whether there was a valid permission for the sale given by the District Judge so as to bar the entertainment of the suit. The law relating to the powers of a guardian in the matter of disposal of his ward's property is laid down in sections 29 of the Guardians and Wards Act (VIII of 1890). Under that section no guardian appointed by the Court is allowed to transfer by mortgage, sale, gift, or exchange or otherwise without the previous permission of the Court. Section 30 declares that a disposal of immoveable property by a guardian in contravention of the terms of section 29 is voidable at the instance of any other person affected thereby. Section 31 provides that permission to alienate the property shall not be granted by the Court except in case of necessity or for evident advantage to the ward. Sub-section 2 of this section directs that the order of the Court granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the Court may see fit to attach to the permission. It is further required that the order shall be recorded, dated and signed by the Judge of the Court with his own hand or when from any cause he is prevented from recording the order with his own hand, it must be taken down in writing from his dictation and be dated and signed by him.

It is common ground that no order framed in strict compliance with the requirement of sub-section 2 of section 31 was drawn up by the District Judge of Sitapur prior to the sale now complained of. The entire file of the guardianship case has been put in evidence and it is certain that no such order was prepared. The learned Judge of the Court below in dealing with this question of law relied upon a decision of a Judge of this Court reported as *Gopal* v. *Musammat Mahtaba* (1). In that case it was laid down by Mr. Greeven that the provisions of sub section 2 of section 31 of the Guardians and Wards Act are mandatory and not merely directory, and he expressed the opinion that an order which failed to recite the necessity for or the advantage of the transfer was not a legal order which could be pleaded as sufficient sanction for a sale by the guardian. If that ruling is to be applied to the facts of the present case, the judgment of the learned Judge of the Court below is correct and the defendants were not entitled to plead that there had been a sale under a valid permission given by the Court. There has been a great deal of argument here, as there seems to have been in the Court below, on this matter. The learned Judge who tried the case was referred to a number of authorities regarding the interpretation of section 31, sub section 2. The case which is most in point is a decision of the Calcutta High Court reported as *Rameshwar Singh Bahadur* v. *Dhanpat Singh* (2), where it was held that when an order permitting a sale was endorsed on the back of an application in

(1) 2 Ind. Cas. 237; 12 O. C. 73.
(2) 5 Ind. Cas. 334; 11 C. L. J. 197.

which the necessity or advantage was referred to, it might be presumed that in granting the application containing those statements the Judge adopted them and that in such a case there would be a substantial compliance with the provisions of section 31, clause 2. It seems to me that I ought in this case to follow the ruling of our own Court and agree with the Court below that in this instance there was no valid sanction for the sale. To me it seems that Mr Greeven's interpretation of section 31, sub-section 2, is a sound one, and in view of the peremptory language in which the sub-section is couched, I am not prepared to say that he has put an unduly narrow construction upon its provisions. In this view it is hardly necessary for me to say anything more on this point. But as it has been argued that there was a substantial compliance with the spirit of the law and that the Judge did really make an investigation for the purpose of satisfying himself regarding the necessity for this sale, I think it right to say that having examined all the proceedings as they are set out in the file of the guardianship case, I am not satisfied that there was any proper inquiry. It appears from the record in the guardirnship case that one Raghubar was originally appointed as the guardian of the persons and property of these minors. After his death the other guardian Naththa was appointed in the year 1913. While Raghubar was alive, he made an application to the learned Judge for permission to sell a portion of the property of the minors in order to discharge certain debts. The Judge ordered the Munsif of Biswan to enquire into the matter and to report whether the property was encumbered and whether it would be expedient to sell a portion of it. The Munsif reported that the whole property, namely, a 16-pies share was worth about Rs. 6,000 and that 5 pies of it might be sold for the purpose of discharging the debts. In his report the Munsif stated that the principal creditor, a mortgagee, had put forward claims on certain bonds which were not admitted by the then guardians Raghubar. He stated that no investigation as to the genuineness of those documents could be held in the course of his proceedings. The learned Judge accepted the recommendation of the Munsif and gave permission for the sale of a 5-pies share. This permission, however, was never availed of by Raghubar till the time of his death. When Naththa was appointed, he put in a petition on the 26th of November 1913. In this petition he stated that there were encumbrance on the minors' property in favour of one Balgobind Dass, who, he said, held the whole of the minors' property in his possession under a mortgage with the exception of 25 *bighas* of *sir* land. Naththa represented to the Judge that Balgobind Dass was pressing for his money and there was no money available to pay off the debt. He proposed to the Court that a 9-pies share of the property might be sold to satisfy the claim of Balgobind Dass, thus saving a 7-pies share for the minor. In that petition he stated that the principal sum due to the mortgagee was Rs. 950, and that the interest came to Rs. 1,000 in addition. On this the learned Judge passed an order as follows:—

"This has been sanctioned already. See the order of the 8th August 1913. Let a draft deed be put up for approval."

It may be observed here that the order of the Judge was quite erroneous. There had been no previous sanction for a sale of a nine-pies share of the minors' property and further there was no order of the 8th of August 1913. The previous order passed on the Munsif's report was dated the 3rd August 1911.

On the 27th of February 1914 Naththa put in another petition before the District Judge. In this he declared that a sum of Rs. 7,432 was owing to the *mahajans*. He said that the only way to satisfy this debt would be by selling a portion of the property. He proposed that a 12-pies share should be sold for the purpose of discharging the debt. The remaining 4 pies share, it was represented, would bring in an income of Rs. 75 per annum which would be sufficient for the minors. Leave was, therefore, asked to sell a twelve pies share to the mortgagee Balgobind Dass and to another man Sant Bakhsh, who appears to have been an agent of Balgobind Dass. A statement of the debts was attached to this petition, from which it appears that Rs. 7,275 were owing to Balgobind Dass; Rs. 100 to the petitioner himself and a sum of Rs. 75 to one Ram Ratan. On this the Judge passed an order as follows:—

"Sanctioned. Let a draft be filed"

On the 5th of March 1914 a draft was filed, whereupon the Judge ordered a report to

be called for from his office as to whether the draft was in accordance with the report of the Munsif of Biswan and whether the total amount of the debts was correctly shown. A report was prepared on the same date, drawing attention to the report which had been furnished by the Munsif in 1911 and pointing out that the Munsif had reported that only Rs. 3,000 was due to Mohan Dass, who was the predecessor-in-title of Balgobind Dass. After examining this report the District Judge ordered that the petitioner should attend on the 17th of March with all the documents and with the minors. Then on the 24th of March he recorded a further order saying that the documents had been produced by the guardian and by Sant Bakhsh, the agent of the mortgagee. He ordered that the documents should be examined in the office. An office report was accordingly made on the 25th of March 1914, in which it was stated that 12 deeds had been produced—six of them registered and six unregistered. There were also a *rukka* and copies of five decrees. The principal moneys came to Rs. 3,270 odd. It was reported that the *rukka* had become time-barred. It was stated with respect to two of the decrees that they had been discharged by the execution of a bond for Rs. 400 in favour of Ram Autar. It was further reported that there was a claim for arrears of rent amounting to Rs. 520 odd. After an examination of the various items the office reported that the total sum for which it was proposed to sell the property was a sum of Rs. 7,000. The office asked for orders regarding the interest claimed by Balgobind Dass. On this the Judge passed an order that the guardian was to make up a proper account and to show what was really due for principal and interest. The guardian was directed to attend at the Court and to furnish the information to the office. The Judge directed that time barred debts would not be recognised. On the 26th of March 1914 there was a further report by the office saying that a sum of R. 4,016 6-0 was claimed as principal and a sum of Rs. 3,117-7-6 on account of interest. The total came to Rs. 7,133-13-6. It was stated in the report that the whole property was in possession of the mortgagee Balgobind Dass. The Judge thereupon sanctioned the draft sale-deed, which had been put in after making certain additions to it. The draft proposed that the property should be sold to Balgobind Dass himself for a sum of Rs. 7,000. As a matter of fact the sale which took place in May 1914 was not to Balgobind at all but, as already mentioned, to Sheo Baran and Ram Autar. I do not see how it could reasonably be contended that in these proceedings the learned Judge really made any valid investigation regarding the extent to which these claims were good. It is indeed an extraordinary thing that his suspicions were not roused after comparing the first petition, which had been filed by the guardian, with the second petition filed on the 27th of February 1914. In the first petition the only debt mentioned was one of Rs. 1,950 in favour of Balgobind Dass. In the second petition filed only three months later the debt due to Balgobind Dass was shown as Rs. 7,275.

I need not, I think, discuss this matter any further. I am unable to accept the argument that there was a substantial compliance with the requirements of the law for the purpose of ascertaining that these debts were really debts due from the minors' estate and that the proposed sale was for the minors' advantage. The finding of the learned Judge must, therefore, be accepted.

I have now to deal with the various items which the Court below has found not to be chargeable to the account of the plaintiffs.

The sale deed sets out a consideration of Rs. 7,000 made up as follows:—

(1) Rs. 6,175 left with the purchasers for redemption;

(2) Rs. 400 payable to Ram Autar (one of the purchasers under a bond);

(3) Rs. 200 payable to the other purchaser Sheo Baran;

(4) Rs. 75 cost of the stamps, and

(5) Rs. 150 received by the vendor Nathu at the time of registration.

To begin with the smaller items, I take first the sum of Rs. 400 alleged to have been due to Ram Autar. The bond is Exhibit A 41. As regards this the Subordinate Judge finds that there is absolutely no evidence on

record to show that Ram Autar advanced this money to the guardian Naththa for the purpose of satisfying two decrees. It was recited in the bond that the money had been lent for this purpose. The only evidence to which I have been referred is a statement of Sheo Baran, one of the original purchasers. All he could say was that Naththa borrowed Rs. 400 from Ram Autar on a bond. He admitted this bond was not written in his presence. He says that he saw it when it was returned by Ram Autar to Naththa at the time the sale-deed was executed. There is not a scrap of evidence to show that this money was applied by the guardian for the purpose of satisfying any decree binding upon the minors. The Judge was, therefore, quite right in disallowing this item.

The next item, one of Rs. 200, was alleged to be due to Sheo Baran himself. Sheo Baran's story was that this sum had been advanced on an oral contract to the first guardian Raghubar a few days before his death. All he could say was that Raghubar had informed him that the money was being taken for certain purposes of the minors. Rs. 150 of this sum represents principal and Rs. 50 interest. As the Judge of the Court below observes, there is no convincing evidence to show that this money was applied for the minors' benefit.

Next there is the item of Rs. 150 cash advanced to the guardian Naththa at the time of the sale. Naththa's story was that Rs. 100 of this was due to himself from the minors and that a sum of Rs. 50 had been spent for their benefit. No evidence whatever was forthcoming on this point, except the statement of Naththa himself which in the circumstances cannot be accepted as sufficient proof.

I come to the large item of Rs. 6,175. This sum is composed of a number of items said to have been due upon various documents. Six deeds of mortgage, Exhibits A3, A4 A5, A6, A7 and A8, were put forward in this connection. The Court below allowed the full sums claimed in respect of the two documents, Exhibits A3 and A4. With regard to the remaining four documents the learned Judge has allowed only the principal sums. It appears that these documents of mortgage provided for the redemption of properties mortgaged to prior mortgagees and it was agreed that so long as the subsequent mortgagee, that is, Balgobind Dass, remained out of possession, he was to be entitled to interest. The Subordinate Judge found that no evidence had been given as to the date on which the subsequent mortgagee had obtained possession of the mortgaged properties and consequently he was unable to say for what period the interest was to run. He was of opinion that it lay upon the subsequent mortgagee to prove the date upon which he came into possession in order to enable the Court to decide the question. It has been argued here that it lay upon the plaintiffs to prove that the mortgagee was in possession prior to the date of the sale in 1914 and that he was not entitled to claim interest up to that date. This argument cannot be accepted. There seems to be no doubt whatever that Balgobind Dass was in possession at the date of the sale and the matter being one peculiarly within the knowledge of the mortgagee himself, the burden of proving on what date he got possession lay upon him. The Court below, in my opinion, took a perfectly correct view and the order refusing interest on these four mortgages cannot be interfered with.

Next there were two items, D. W. No. 3 and D. W. No 4 Each of these was a bond debt. Both have been disallowed on the ground that it was not proved that they had been executed by the minors' father. With regard to the document D. W. No. 4 there is no longer any dispute. The learned Counsel for the appellants says he cannot contest the finding of the Court below. The decision regarding the other bond (D. W. No. 3) is attacked. The facts relating to this matter are as follows:—The document was produced and was proved to have been witnessed by a man named Baldeo. Evidence was forthcoming for the purpose of showing that the signature of Baldeo on the document was in fact in his writing. There was, however, no evidence to prove that the mark purporting to be the mark of the executant Hargobind was in the latter's writing. It cannot, I think, be argued that because it is proved that the signature of the witness Baldeo was in his writing that it must, therefore, be taken

to be proved that the mark was made by Hargobind. This document was not a a document required by law to be attested and the ordinary rule regarding proof of execution as laid down in section 67 of the Evidence Act applies. It was absolutely necessary that some evidence should be given to show that the mark of the executant was in fact made by him. The decision of the Court below is, in my opinion, correct.

Next it was claimed that moneys owing under four decrees A46, A47, A48 and A49 were included in the large item of Rs. 6,175. The Court below allowed the claim regarding A46 and A47. As regards the other two decrees the claims were rejectsd. It was proved that these two decrees had been passed more than three years before the date of the execution of the sale, and as the learned Subordinate Judge observes, there was nothing to show that these decrees were alive and capable of execution at the time when the sale-deed was drawn up. In the absence of evidence to this effect the presumption is that they were time-barred. It has been argued before me that even if these decretal debts were time-barred, they could form consideration of this sale. I am unable to agree with this contention. The guardian of a minor's property is under section 27 of the Guardians and Wards Act bound to deal with the property carefully as a man of ordinary prudence would deal with it, if it were his own. I do not consider that it would be an act of ordinary prudence to admit that his wards were liable for a debt which could not be legally recovered owing to lapse of time. I think the learned Judge took a correct view of the matter.

Next a sum of Rs. 1,168 was claimed in respect of four bonds. Neither the originals of these bonds were produced nor certified copies. It seems from other evidence that these documents were all unregistered. The only proof of the existence of these bonds is contained in Exhibit A50, a certified copy of the list of debts which Naththa the guardian put in before the District Judge. That would certainly be no evidence against the plaintiffs of the execution of these bonds by their father or by any one who was in a position to bind them. Naththa, the guardian, was examined regarding these bonds and all he could say was that he had no personal knowledge of them. Then again the learned Judge of the Court below thought that even if the bonds existed they were time-barred. In any event it is clear that no adequate evidence was offered upon which it was possible to find that these bonds were binding on the minors.

Lastly it seems that some claim was made in respect of payments made under seven receipts. These payments are said to have been made by Sheo Baran, but after an examination of the evidence I agree with the argument of the learned Counsel for the respondent here that these payments do not represent independent payments. The receipts were only vouchers for the purpose of showing that Sheo Baran had paid off the various sums which he was liable to pay under the sale-deed, that is to say, sums which were left with him to be paid off to satisfy other claims. In his examination he deposes to this effect. He says that he produced these receipts in a pre-emption suit for the purpose of proving payment of the purchase-money. It was not possible, therefore, that the Court below should allow any credit to the defendants in respect of these sums. I am satisfied on the evidence that the sums which the learned Judge of the Court below has allowed credit for were the only sums which were proved to be payable by the minors and I uphold his judgment in this respect. As regards the claim for Rs. 75 on account of stamp, he has allowed Rs. 25 which I think is sufficient.

Lastly it was argued that as the appellants here were subsequent purchasers for value, they were not affected by any defect in the order for permission given by the Judge. As regards this argument all that it is necessary to say is that section 30 of the Guardians and Wards Act provides that a disposal of immoveable property by a guardian in contravention of the provisions of section 29 is voidable at the instance of any other person affected thereby. Having already found that the permission given by the Judge was not a legal permission, it must be held that the sale was voidable. This being the case, the original purchasers Ram Autar and Sheo Baran must

be deemed to have acquired only a defeasible title and they could give no better than this to the subsequent purchasers, Banke, Bisheshar and Mahraj Singh. It cannot, therefore, be argued by the appellants that they were in any better position than the original purchasers, Sheo Baran and Ram Autar. The result of all this is that I find that the decision of the Court below is perfectly correct.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 925 OF 1917.

June, 19, 1919.

Present:—Mr. Justice Fletcher and Mr. Justice Cuming.

UMESH CHANDRA DUTT AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BIBHUTI BHUSHAN PAL CHOWDHURY—DECREE-HOLDER—RESPONDENT.

Appeal—Costs, question of—Judgment not involving question of principle.

An appeal which raises a question of costs only and in which no question of principle is involved is not competent. [p. 334, col. 2; p. 335, col. 1.]

Appeal against the decree of the District Judge, Nadia, dated the 8th December 1916, modifying that of the Subordinate Judge, Nadia, dated the 22nd December 1915.

Babus *Bipin Bihari Gosh* (*Jr.*) and *Dwijendra Nath Mukerji*, for the Appellants.

Babu *Brojalal Chakrabarti*, *Gurudas Singha* and *Khagendra Bhooshan Ray*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the defendants judgment-debtors against the decision of the learned District Judge of Nadia, dated the 8th December 1916, modifying the decision of the Subordinate Judge of the same place. The facts out of which the present appeal arises are as follows:—The plaintiffs brought a suit for recovery of possession of certain land and for mesne profits. They succeeded in that suit. The case then went before a Commissioner for ascertainment of mesne profits and demarcation of the land of which possession was to be recovered. Before the Commissioner, the parties arrived at an agreement, and under the terms of that agreement, the matters were adjusted between the parties and the question of costs was dealt with in this way in clauses 3 and 4: "Regarding the costs of this execution case, the Court costs incurred in taking possession and in ascertaining the amount of *wasilat*, which will be decided by the Court to be legally due to the decree-holders will be obtained by the decree-holders, from the judgment debtors"; and "besides the above, the decree-holders will get from the judgment-debtors an additional sum of Rs. 50 as costs." The case then went before the Subordinate Judge and he allowed certain sums as costs payable under the terms of the arrangement arrived at between the parties. The plaintiffs, being dissatisfied with those amounts, appealed to the Court of the District Judge, and the District Judge has allowed further and other sums than those allowed by the Subordinate Judge. Now, if it is assumed in the present case that this is a decree or an appealable order, then an appeal would involve a question of costs only. If it is a non-appealable order, it is quite clear that there cannot be an appeal. Now, what is the question of principle involved in this case? There is nothing except that one Judge thinks that the plaintiffs should be awarded more than what the first Court allowed. There is no question as to any difficult construction of the terms of the agreement arrived at between the parties or any similar question. Similarly, there is no question as to what amount must be allowed to the plaintiffs under the terms of the arrangement. It is quite clear that, in a case like this, the appeal raising the question of costs only, where no question of principle

was involved, was not competent and could not be heard and decided by the learned District Judge. In my opinion, we ought to set aside the judgment and order of the learned District Judge and restore the judgment and order of the Subordinate Judge. The defendants must have their costs in this Court and in the lower Appellate Court.

CUMING, J.—I agree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 43 OF 1919.

April 9, 1920.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

THE BENARES HINDU UNIVERSITY THROUGH BABU JWALA PRASAD—PLAINTIFF—APPELLANT

versus

SRI KISHEN DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Probote—Corporation aggregate, probate, whether can be granted to—Benares Hindu University, whether capable of obtaining probate—Benares Hindu University Act (XVI of 1915), s. 20.

A Court is competent to grant probate to a corporation aggregate as executor, although the enactment creating the corporation does not distinctly provide authority for it to be an executor, where the granting of the probate is not only in no way repugnant to its functions, but is merely a prelude to the obtaining of benefits under the Will which it is permitted to accept both generally and under the provision of the enactment creating it. [p. 336, cols. 1 & 2.]

The Benares Hindu University is not incapable of obtaining probate of a Will as an executor. [p. 336, col. 1.]

Appeal against the order of the District Judge, Lucknow, dated the 29th August 1919.

The Hon'ble Pandit *Gokaran Nath Misra*, Pandits *Jagmohan Nath Ohak* and *Harkaran Nath Misra*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, Mr. *A. P. Sen*, Babus *Bisheswar Nath Srivastava*, *Hari Kishen Dhaon* and *Gulab Chand Srimal*, for the Respondents.

JUDGMENT.—This appeal raises points of interest. A certain Sah Bindraban Das is said to have made a Will on the 11th November 1913. He died on the 13th June 1919. Under the terms of this Will he appointed as executor the Hindu University Society—a society registered under Act XXI of 1860—or in event of this society having been absorbed in the Benares Hindu University, he appointed the Benares Hindu University as executor. At the time that the Will was made, the Hindu University Society was in existence and the Benares Hindu University was not in existence but steps were then being taken to create the latter body and hand over to it the functions of the society. An Act was subsequently passed (Act XVI of 1915) which effected that purpose. It was a matter of common knowledge in 1913 that many influential persons were endeavouring to obtain legislative sanction for the creation of the new University and the testator was clearly aware that such was the case. On the testator's death the Benares Hindu University applied for probate of the Will before the District Judge of Lucknow. The nephew of the deceased and the brother's wife of the deceased opposed the application. The learned District Judge has dismissed the application on a preliminary point. He found that the Benares Hindu University had no power under its constitution to be a trustee or an executor. The University appeals against this decision.

The Probate Act, having effect, (Act V of 1881), does not treat at any length of the question as to who is capable of being an executor. Beyond stating in section 8 that probate cannot be granted to any person who is a minor or of unsound mind, the Act is silent on the subject. The point must be decided according to the principles laid down in England in so

far as they are not repugnant to the testamentary law of India. We have first to consider what is the legal personality possessed by the Benares Hindu University. The answer to that question presents no difficulty. The Benares Hindu University is a corporation aggregate, the creature of Act XVI of 1915. It is generally accepted in England in the present day that a corporation aggregate can be an executor.

"Doubts have been entertained whether a corporation aggregate can be executor; principally because they cannot prove a Will or at least cannot take the oath for the due execution of the office. But there are authorities in favour of the capability and it is said to be now settled, that on their being so named, they may appoint persons, styled Syndics, to receive administration with the Will annexed, who are sworn like other administrators." (Williams on Executors, tenth Edition, Volume I, pages 153 and 159).

In India there would never have been any force in the now obsolete objection in England against corporations aggregate being executors because they cannot take an oath, as the taking of an oath is not required from executors in India. The learned Counsel for the respondents, while accepting this view of the law, supports the decision of the learned District Judge on the following argument. He draws our attention to the provisions of Act XVI of 1915, particularly to the provisions of section 3 (3). The Benares Hindu Unviversity was incorporated, as the Act says, for the purpose of making provision for imparting education, furthering original research and giving instruction in Hindu theology and religion. His case is that, unless the Act distinctly provides authority for the Benares Hindu University to be an executor or a trustee, the Court is debarred from granting probate to the University as executor. We cannot accept this argument. There would be much to be said for the proposition that the Court could not grant the University authority to do acts which were repugnant to its functions. But here the granting of probate is in no way repugnant to the functions of the University and is merely a prelude to the obtaining of benefits under the Will which the University is permitted to accept both generally and under the provisions of section 20 of Act XVI of 1915. We know of no authority in English or Indian Law which would prohibit the University from accepting such an executorship. A Bench of the Calcutta High Court decided under somewhat similar Acts affecting the constitution of the Calcutta University that it was open to the University to accept a testamentary disposition beneficial to their purposes subject to the grantor's conditions, *Jittindra Nath Palit* v. *Lokendra Nath Palit* (1). Thus such authority as there is supports our view.

We accordingly set aside the order of the learnad District Judge. He decided the question on a preliminary point that the Benares Hindu University *qua* Benares Hindu University was incapable of obtaining probate in any circumstances. We reverse his decision on that point and remand the case to him for retrial and decision on the merits. Costs here and hitherto will follow the result.

Cause remanded.

(1) 34 Ind. Cas. 657; 22 C. L. J. 593.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 40 OF 1919
IN INSOLVENCY CASE No. 39 OF 1919.

June 2, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

BHURAMULL BANKA—INSOLVENT —APPELLANT

versus

THE OFFICIAL ASSIGNEE OF BENGAL—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 33—Official Assignee, order by, directing insolvent to attend, whether should be in writing—Failure to comply with order—Contempt of Court—Application for committal for contempt, affidavit in support of, service of—Procedure—Irregularity, effect of.

It is not necessary that an order of the Official Assignee directing an insolvent to attend at his office, in pursuance of section 33 (2) (*c*) of the Presidency Towns Insolvency Act, should be in writing: a verbal order is valid, and casts upon the insolvent the duty to comply therewith. Where in pursuance of a verbal order the insolvent fails to perform the duty imposed upon him, he is guilty of a contempt of Court. [p. 338, col. 2.]

There is no express provision requiring the affidavit in support of an application to commit an insolvent for contempt of Court to be served at the same time as the notice of the application. [p. 339, col. 1.]

An irregularity in the proceedings of an Official Assignee, which is not in any way prejudicial to the insolvent, or does not occasion any failure of justice, does not invalidate the proceedings. [p. 339, col. 2 p. 340, col. 1.]

In future if the Official Assignee intends to apply for a committal order for contempt of Court, he will be well advised to put his order into writing and have it served on the person intended to be proceeded against, with a notice that if the order is not complied with proceedings for contempt will be taken Further it is eminently desirable from all points of view that the procedure laid down by the rules should be strictly complied with. [p. 339, col. 2.]

Appeal from the order of Mr. Justice Rankin, sitting as Commissioner in insolvency.

Messrs. *N. Sircar* and *S. R. Das*, for the Insolvent.

Mr. *Lingford James*, for the Respondent.

JUDGMENT.

SANDERSON, C. J.—This is an appeal by the insolvent against an order of committal made by Rankin, J.

On the hearing of the appeal, the merits of the matter were not discussed by the learned Counsel for the insolvent and no attempt was made to justify his conduct.

It appears that the appellant was adjudicated insolvent on the 21st March 1919 at the instance of a creditor, and shortly before that, *viz.*, on the 26th February 1919, a suit in which the insolvent's grandmother was the plaintiff and the insolvent was defendant was filed, and in that suit by consent of the parties the Official Receiver was appointed on the 10th March 1919 receiver of the book-debts, outstandings, cash, money, properties and assets of the insolvent's firm.

Notice of an application for an order of committal dated the 5th May 1919 was served on the insolvent on the 6th May. The notice was as follows:—

"Take notice that on Tuesday the 13th day of May 1919 at 11 o'clock in the forenoon or so soon thereafter as the matter may be heard an application will be made before the learned Commissioner in insolvency for an order that you be committed for contempt under section 24 (3) and section 33 (2) (*c*) and (*e*) and (4) on the following grounds:—

"1. That the order of adjudication passed against you on the 21st March 1919 was served on you on the 5th April 1919, and that you have failed to file your schedule.

"2. That you were ordered by the Official Assignee personally on the 9th day of April 1919 to attend his office from day to day in order to make a list of the books belonging to your estate which had been removed to the Official Assignee's office. You have neither attended his office nor have you made a list of the books.

"3. That you were directed by the Official Assignee on the same date to make enquiries and report to him as to the whereabouts of your current books. You have taken no notice whatsoever of such directions.

"4. That you were directed by the Official Assignee to enquire and report as to the books, papers, belonging to your estate taken possession of by the Official Receiver appointed in the suit of Radha Bibee. You have failed to do so."

On the 13th May the insolvent applied for an adjournment, which was granted by the learned Judge, and the application was heard on the 16th.

The learned Judge came to the conclusion that the insolvent was deliberately trying to play off the Official Receiver against the Official Assignee and that in the insolvency he had done nothing, or as near as possible to nothing, for a period of a month, that he had deliberately done this with the idea that the Court would take no notice of it, if he gave sufficient trouble.

As I have already stated, there has been no attempt made to question the learned Judge's finding which, on the materials before us, was, in my judgment, amply justified.

It was, therefore, a case in which, as far as the merits are concerned, an order for committal was properly made.

The appellant's learned Counsel, however, raised several technical points, none of which were taken in the Court of first instance or referred to in the grounds of appeal. But having regard to the nature of the case, we allowed these points to be argued.

It was argued that the leaned Judge had not committed the insolvent on the first ground and that the insolvent should not have been committed on grounds Nos. 2, 3 and 4 of the application.

The first reason alleged was that the orders of the Official Assignee were verbal and as such were not sufficient basis for committal. It was argued that if the insolvent did not attend, in pursuance of the order made by the Official Assignee on the 9th April referred to in ground No. 2 of the notice, the Official Assignee should have applied to the Court for an order for the insolvent's attendance, that the Court's order should have been in writing, that it should have been served personally on the insolvent, that it should have contained a notice that unless he complied with it he would be committed for contempt, and that the insolvent could not be committed unles the above procedure had been carried out.

In my judgment, this question must depend upon the terms of section 33 of the Presidency Towns Insolvency Act, 1909. Sub-section (2) of that section provides that "the insolvent shall...(*c*) wait at such times and places on the Official Assignee or special manager...(*e*) generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be required by the Official Assignee or special manager or may be prescribed or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the Official Assignee or special manager, or any creditor or person interested."

Sub-section (4) is as follows :—

"If the insolvent wilfully fails to perform the duties imposed upon him by this section, or to deliver up possession to the Official Assignee of any part of his property, which is divisible amongst his creditors under this Act and which is for the time being in his possession or under his control he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court and may be punished accordingly."

There is nothing in the section to show that an order of the Official Assignee to attend his office in pursuance of section 33 (2) (*c*) must be in writing. Consequently, the order given verbally on the 9th April was a valid order and there was then a duty upon the insolvent to comply with the order. This section further provides in sub-section (4) that if the insolvent wilfully fails to perform the duties imposed upon him by the section, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court and may be punished accordingly. So that in this case when the insolvent failed to attend at the Official Assignee's office in accordance with the order of the Official Assignee, he failed to perform a duty imposed upon him by the section and he was guilty of a contempt of Court. The contempt was complete and he was liable to be punished accordingly.

Consequently, in my judgment, having regard to the terms of the section, there was no need for the Official Assignee to pursue the procedure indicated above, which the learned Counsel for the appellant urged, was necessary, before proceedings for contempt could be properly taken.

The next point urged was that there was no time specified in grounds Nos. 3 and 4. I do not think it necessary to consider this at any length; the learned Judge has found that the insolvent did practically nothing for a month : further, this point does not touch ground No. 2 of the application

and that ground alone, having regard to the facts of this case and the finding that the insolvent was deliberately trying to play off the Official Receiver against the Official Assignee with the idea that if he gave sufficient trouble, the Court would take no notice of it, would be sufficient to justify the order for committal.

It was next argued that the affidavit filed on behalf of the Official Assignee should have been filed together with or before the notice of application, and should have been served on the insolvent at the same time as the notice of application : and reference was made to the Insolvency Rules Nos. 36, 37 and the preceding rules 17 to 20. The notice of application was served on the insolvent on the 6th May ; on the 9th May the Official Assignee sent copies of the affidavits which he intended to use in support of his application for contempt. On the 10th May the notice of application and the affidavits were filed by the Official Assignee. On the 13th May the matter was before the learned Judge; at the insolvent's request the application was adjourned until the 15th. At the hearing of the application on the 16th the insolvent relied upon an affidavit put in by him, which he had affirmed on the 15th, and in which he replied to the allegations contained in the affidavit filed on behalf of the Official Assignee.

There is no express provision that the affidavit in support of the application should be served at the same time as the notice of application, but assuming that there was any irregularity in the procedure, the learned Counsel for the Official Assignee relied upon rule 200 of the Insolvency Rules and the decision in *Rendell* v. *Grundy* (1).

In this case the insolvent was served with the notice on the 6th May, one week before the day originally fixed for the hearing : the notice set out the grounds of the application. On the 9th copies of the affidavits intended to be used were sent by the Official Assignee.

The insolvent affirmed his affidavit on the 15th and the case was heard on the 16th.

(1) (1895) 1 Q. B. 16; 64 L. J. Q. B. 135; 14 R. 19; 71 L. T. 564; 43 W. R. 50.

The insolvent had everything, to which he was entitled, and he has not been prejudiced in any way and in my judgment on the facts of this case the non-compliance with the rules, if any, does not invalidate the proceedings.

The learned Counsel for the insolvent argued that the application was in the nature of a criminal proceeding and, therefore, that there could be no question of waiver : in my judgment, on the facts of this case, it was not necessary for the Official Assignee to rely on the doctrine of waiver.

For these reasons, in my judgment, this appeal must be dismissed.

In this case there was no doubt as to the verbal orders, which were made by the Official Assignee. We think, however, that in future, if the Official Assignee intends to apply for a committal order for contempt of Court, he will be well advised to put his order into writing and have it served on the person intended to be proceeded against, with a notice that if the order is not complied with, proceedings for contempt will be taken. Further, it is eminently desirable, from all points of view, that the procedure laid down by the rules should be strictly complied with.

The Official Assignee will get his costs out of the assets—the costs will be as between Attorney and client.

WOODROFFE, J.—The contention that a written order of the Court was necessary, which order had to be served on the appellant, in practice amounts to this that if the orders of the Official Assignee are repeatedly disobeyed and then an order is made by the Court which is obeyed, no punishment by way of contempt can follow under the Act upon the repeated disobedience, though according to the Act the offence is complete immediately the Official Assignee's directions are disobeyed. It would be possible in this way to delay, and to some extent to defeat, the insolvency proceedings. In my opinion, no order in writing was requisite either from the Official Assignee or from the Court, though as regards the former it may be, as the learned Chief Justice has pointed out, desirable for the Official Assignee to put his directions into writing. The other alleged irregularities of procedure are [illegible]

my opinion, not made out: but if they were, they have not in fact occasioned any failure of justice. The merits are not the subject of discussion before us, the question before us merely being whether the technical grounds have been established which would justify this Court in holding that the appellant should not be committed for acts which call for the proceedings which have been taken against him.

I agree, therefore, that the appeal fails and should be dismissed.

Appeal dismissed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 172 OF 1916.

September 16, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

BALKRISHNA NARAYAN SAWANT—PLAINTIFF—APPELLANT

versus

JANKIBAI SITARAM SANZGIRI AND OTHERS—DEFENDANT—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c)—Suits Valuation Act (VII of 1887), s. 8—Suit for declaration and injunction—Valuation for purposes of Court-fees and jurisdiction.

A plaintiff in a suit for a declaration and for an injunction by way of consequential relief has the right to put his own valuation on the claim for purposes of Court-fees under section 7, clause (*iv*) (*c*) of the Court Fees Act, and under section 8 of the Suits Valuation Act, the same value must determine the value for the purpose of jurisdiction. [p. 341, col. 1.]

In a suit for a declaration and for an injunction by way of consequential relief the plaintiff valued the claim at Rs. 135 for purposes of Court-fees and at Rs. 16,000 for purposes of jurisdiction. The suit was heard by a First Class Subordinate Judge under his special jurisdiction and was dismissed. Plaintiff filed an appeal in the High Court. On the appeal coming on for hearing, the plaintiff-appellant raised a preliminary point that the value of the claim for purposes of jurisdiction must be taken to be Rs. 135 in accordance with the provision of section 8 of the Suits Valuation Act and that the appeal accordingly lay to the District Judge and not to the High Court:

Held, that under the circumstances of this case, it must be held that the valuation was incorrectly stated for Court-fees and correctly stated for purposes of jurisdiction and that the appeal, therefore, lay to the High Court. [p. 342, cols. 1 & 2; p. 343, col. 2.]

First appeal from the decision of the First Class Subordinate Judge at Ratnagiri, in Civil Suit No. 319 of 1913.

Messrs. *G. S. Rao* and *A. G. Desai*, for the Appellant.

Messrs. *Jayakar* and *G. S. Mulgaonkar*, for Respondent Nos. 1 and 2.

Messrs. *P. B. Shingne* and *T. N. Walavalkar*, for Respondent No. 3.

Mr. *V. S. Sanzgiri*, for Respondents Nos. 4 and 5.

JUDGMENT.

SHAH, J.—In this appeal, a preliminary point has been raised on behalf of the appellant that the appeal lies to the District Court, and not to this Court, and that the memorandum of appeal should be returned to him now to be presented to the District Court.

It will be convenient to state the facts bearing on this point. One Sitaram left his native place for Benares in 1902: he has not been heard of since and is presumed to be dead. There were disputes as to his property in the hands of third persons: the claimants were his widow, Jankibai, his brother, Narayan, and his nephew, Balkrishna (Narayan's son). The widow claimed as an heir, the brother, by survivorship on the footing that he and Sitaram were joint, and the nephew under the Will of Sitaram. Jankibai filed a suit in 1913 on the original side of the High Court against the stake-holders, to which other claimants were added as parties later on. This suit was ultimately transferred to the Court of the First Class Subordinate Judge at Ratnagiri to be tried along with two other suits, which were filed in that Court by the brother and the nephew respectively. The brother filed Suit No. 319 of 1913 against the widow and the stake-holders for a declaration that he was jointly interested in the property of Sitaram and for an injunction restraining defendants Nos. 1 and 2 (the widow and her brother) from receiving, and defendants Nos. 3, 4 and 5 (the stake holders) from handing over to them, the property of Sitaram. Other minor reliefs claimed by him are not material. He valued the claim for the declaration and the injunction at Rs. 135 (Rs. 130 for declaration

and Rs. 5 for injunction) for the purpose of Court-fees. He stated that the value of the subject-matter for the purpose of jurisdiction was about Rs. 16,000. This suit was filed under the special jurisdiction of the First Class Subordinate Judge of Ratnagiri, and not under his ordinary jurisdiction. The other suit was filed by Balkrishna against the widow and other defendants. That also was a suit for a declaration and an injunction, the valuation for the purpose of Court-fees being Rs. 135, and the value of the subject-matter of the suit for the purpose of jurisdiction being over Rs. 5,000. This also was a suit filed under the special—and not the ordinary—jurisdiction of the First Class Subordinate Judge. These two suits and the widow's suit transferred to that Court were tried and decided together. Several appeals have been filed from the different decrees to this Court. Narayan, whose suit was dismissed, has filed the present appeal, which, it is now contended, lies to the District Court. In Balkrishna's suit the widow has appealed to this Court on the merits, and Balkrishna has appealed as to costs. We are not concerned with the appeals in the widow's suit as regards this preliminary point.

It is significant that Narayan alone raises the point of jurisdiction in his appeal. The point, if good, equally affects the two appeals arising out of Balkrishna's suit. The appellants in those two appeals do not raise this point. On the contrary the widow contends that the appeals are properly filed in this Court. I shall deal with the preliminary point in this appeal in which it has been raised: for if it fails here, it must fail as regards the appeals arising out of Balkrishna's suit.

There can be no doubt that it is open to the plaintiff to put his own valuation on the claim for the purpose of Court-fees under section 7, clause (*iv*) (*c*), and that in the present case he purported to value it at Rs. 135. It is also clear that under section 8 of the Suits Valuation Act, 1887, the same value must determine the value for the purpose of jurisdiction. The decisions of this Court are to the same effect: and the course of the decisions on this point has been approved by the Privy Council recently in *Sunderbai* v. *Collector of Belgaum* (1). An attempt has been made on behalf of the widow to show that the present case is governed by the decision in *Rachappa Subrao* v. *Shidappa Venkatrao* (2). But I think that the injunction relates to the whole property, in respect of which the declaration is sought, and is a proper consequential relief. The suit, therefore, falls under clause (*iv*) (*c*) of section 7 of the Court Fees Act. I do not see how the present case can be treated on the same footing as the case of *Rachappa Subrao* v. *Shidappa Venkatrao* (2).

If the matter rested there, it would follow that the appeal would lie to the District Court and we would be bound to give effect to the contention that the appeal lies to the District Court, even though that conclusion would involve a further delay for no useful purpose in the disposal of these appeals.

The facts of the case are somewhat peculiar, and, on the particular facts of the case, I think the plaintiff should not be allowed to contend that the true value for the purpose of Court fees is Rs. 135. It is clear from the plaint that he filed the suit in the Court of the First Class Subordinate Judge with a definite allegation that the suit was filed under the special jurisdiction of the Court as the value of the subject-matter for that purpose was about Rs. 16,000. The value for the purpose of Court-fees was stated to be Rs. 135. If the lower Court had considered the question of Court fees and jurisdiction, as it should have, after the plaint was filed, the inconsistency between the two statements would have been realised and the plaintiff would have been at once called upon either to amend the value for the purpose of Court-fees so as to bring the case within the special jurisdiction of the Court, or to take back the plaint to be presented to the Court of the Second Class Subordinate Judge at Malvan, which would have jurisdiction to entertain the suit on the basis of the value for Court-fees being Rs. 135. That was not done. The defend-

(1) 52 Ind. Cas. 897; 46 I. A. 15; 21 Bom. L. R. 1148; 23 C. W. N. 753; (1919) M. W. N. 254; 43 B. 376 (P. C.).

(2) 50 Ind Cas. 280; 46 I. A. 24; 21 Bom. L. R. 489; 17 A. L. J. 418; 25 M L. T. 298; 36 M. L. J. 437; 29 C. L. J. 452; 43 B. 507; 10 L. W. 274; 24 C. W. N. 33; 1 U. P. L. R. (P. C.) 83 (P. C.).

ants raised no objection as to the deficiency of Court-fees or want of jurisdiction. The result was that the suit of 1913 was tried by the First Class Subordinate Judge and decided by him in 1916, on the footing that it was a suit within his special jurisdiction as contemplated by section 25 of the Bombay Civil Courts Act (XIV of 1869). The plaintiff took advantage of the trial of the suit by a Court of higher jurisdiction; and he followed it up with an appeal to this Court in 1916 on the same basis. All these appeals are now ready for hearing; and for the first time it is urged on behalf of the plaintiff that the value of Court-fees as mentioned in the plaint is the true value for the purpose of jurisdiction also. The point now urged suggests not only want of jurisdiction in this Court to entertain the appeal, but also want of jurisdiction in the trial Court. Not only the plaintiff Narayan but other parties to this litigation and the lower Court have acted upon the allegation in the plaint that the true value of the subject-matter of the suit is over Rs. 5,000. It is inconsistent with the value of the claim for the purpose of Court-fees being only Rs. 135. The inconsistency might have been removed if it had been noticed in time by the plaintiff amending the value of his claim for the purpose of Court fees or that for the purpose of jurisdiction. Under the circumstances I think that the plaintiff can be fairly taken, and ought to be taken, to have really valued his claim for the purpose of Court-fees not at Rs. 135 as he has apparently done, but at a sum exceeding Rs. 5,000, as he has himself acted and induced others to act on that basis. He cannot be allowed to use either of these inconsistent valuations in different Courts according to his convenience. At this stage he can be properly held to have valued his claim for Court-fees and jurisdiction at Rs. 16,000 or at some figure exceeding Rs. 5,000. It may be that he has not paid sufficient Court fees from this point of view: but we are not now concerned with the question of sufficiency of Court fees either for the plaint or for the memorandum of appeal. We are concerned with the question of jurisdiction. On the special facts of this case I am of opinion that the plaintiff must be taken to have filed the suit properly in the Court below under its special jurisdiction, and to have filed the appeal properly in this Court. The appeal must, therefore, be heard on the merits. It follows that Appeals Nos. 177 and 218 of 1916 have been properly filed in this Court and must be heard on the merits.

I have reached this conclusion on the special facts of this case, and desire to make it clear that I do not mean to depart in the slightest degree from the recognised rule, to which I am bound to give effect, that the plaintiff has the right to value his claim for the purpose of Court-fees in a suit for a declaration and for an injunction by way of consequential relief, and that the value for the purpose of jurisdiction is the same. In this particular case I hold that the plaintiff must be taken to have really valued the claim for the purpose of Court fees at about Rs. 16,000, though in terms he purports to put a different and lower value.

First Appeal No. 172 is not pressed on the merits, and, is, therefore, dismissed.

Respondent No. 1 to get her costs from the appellant, the other respondents to bear their own costs.

We see no reason to disturb the order made by the trial Court as to costs of the stake-holders.

We dismiss the cross-objections of respondent No. 3 with costs.

HAYWARD, J.—I concur with the conclusions and have only a few words to add to the reasons of my learned brother.

Narayan, the father, and Balkrishna, the son, both brought suits for declarations and injunctions against the widow of the last holder for property worth Rs. 15,000 in the hands of stake-holders. These suits were filed the same day and were Suits Nos. 319 and 321 of 1913 in the Court of the First Class Subordinate Judge of Ratnagiri. They appear to have assessed their claims for declarations at Rs. 130 and injunctions at Rs. 5 and thereon to have paid Rs. 10 6-0 as Court-fees. But at the same time they stated definitely that the value of the property was some Rs. 15,000 and that the suits were, therefore, not within the jurisdiction of the Second Class Subordinate Court of Malvan, but were within that of the First Class Subordinate Court of Ratnagiri. It

is difficult to follow the precise method by which they arrived at Rs. 10 6 0 as the appropriate Court-fees. If they had treated the claims for declarations separately, it would not have been necessary to have given them any value. If, however, they had valued them and did so at Rs. 130 for the purposes of *ad valorem* fees, then the appropriate fees would have been Rs. 9-12-0, while the *ad valorem* fees for claims for injunctions valued at Rs. 5 would have been annas 6, making a total of Rs. 10-2-0 as the appropriate Court-fees. If on the other hand, they had, treated, as they ought logically to have done, the claims as claims for declarations with injunctions valued at total sums of Rs. 135, then Rs. 10-8-0 would have been the appropriate *ad valorem* Court-fees. But they neither paid Rs. 10-2-0 nor Rs. 10-8-0. They fixed on the intermediate sums of Rs. 10-6-0 and they paid those sums without specific explanations as the Court-fees, so that even on their own showing they did not pay the right Court-fees in accordance with section 7, clause 4, and Schedule II, Article 17, clause 3 of the Court Fees Act, 1870.

They then proceeded apparently to make a further mistake and to overlook the provision that the valuation for Court-fees must be deemed the same as the valuation for jurisdiction under section 8 of the Suits Valuation Act, 1887. For they valued their suits at Rs. 15,000 for the purposes of jurisdiction: and upon that valuation they deliberately brought their suits not in the Court of the Second Class Subordinate Judge of Malvan, but, as no doubt suited them better, in the Court of the First Class Subordinate Judge of Ratnagiri. They must have been aware at the time they selected the trial Court that an appeal from the former would lie to the District Court of Ratnagiri and an appeal from the latter would lie to this High Court. It is clear that they did realize this and that they had deliberately filed their suits accordingly, because Narayan, the father, proceeded to file Appeal No. 172 of 1916 in this High Court, and no objection was taken by Balkrishna, the son, to the widow filing her Appeal No. 177 of 1916 also in this High Court. It is only now some three years later that they have denied practically the jurisdiction both of the trial Court and the appellate jurisdiction of this High Court. It seems to me that in these circumstances the only possible course is to hold that they were wrong in their statements as to the valuations for Court-fees, which in any case were incorrect according to the amounts actually paid as Court-fees and which were directly opposed to the actual valuation of the property in the suits, upon which valuation they had deliberately brought their suits in the superior Court of the First Class Subordinate Judge of Ratnagiri and had brought their appeals or suffered the appeals to be brought in this High Court. The proper course, therefore, in my opinion, must be to hold that the valuation in both the suits was incorrectly stated for Court fees and correctly stated for the purposes of jurisdiction both of the trial Court and of this High Court.

It seems to me further, to hold otherwise would lead to a most unfortunate result. Owing to the technical course which would have to be followed in order eventually to bring these appeals for final decision in this High Court, there would ensue a further serious delay which might extend to years before the widow would succeed, if she be entitled to succeed, in establishing her rights to this large sum of money in this High Court. To allow such a result would, in my opinion, be encouraging an abuse of the proceedings both of the First Class Subordinate Court of Ratnagiri and of this High Court, and it is, in my opinion, our incumbent duty to prevent any such abuse under the powers inherent in us under section 151 of the Civil Procedure Code.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 196 OF 1916 AND 19 OF 1919.

March 17, 1920.

Present :—Mr. Justice Das and Mr. Justice Adami.

IN F. A. No. 196 OF 1916

Babu BRAHMANAND SINGH AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS

versus

DUND BAHADUR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN F. A. No. 19 OF 1919

JIVAN RAUT AND OTHERS—APPELLANTS

versus

NIRSU SINGH AND OTHERS—RESPONDENTS.

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4 (1)—Gradual accession, what is—"Gained," meaning of—Common Law of England, applicability of, to India—Possession and dispossession—Land in condition unfit for actual enjoyment.

The word "gained" in clause (1) of section 4 of the Bengal Alluvion and Diluvion Regulation does not mean land washed away and afterwards identified as having reformed on its old site. [p 346, col .]

A case under clause (1) of section 4 of the Bengal Alluvion and Diluvion Regulation is not made out where the land in dispute is shown to have reformed on its old identifiable site. [p. 346, col. 1.]

The rules of the Common Law of England have no application to the Mofassil towns of India, except as rules of justice, equity and good conscience. [p. 346, col. 1.]

Where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that the state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. [p. 347, col 1]

Appeals from a decision of the Subordinate Judge, Durbhanga.

Messrs. *C C. Das*, *G. D. Singh* and *Jal Gobind Prasad Singh*, for the Appellants.

Messrs. *Fakhruddin* and *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

DAS, J.—On the main question that has been urged before us, the appeal is concluded by the decision of this Court in the case of *Lachmi Narayan Lal* v. *Maharaja Kesho Prasad Singh* (1).

The plaintiffs claim the land in dispute as land reformed on its old site. They say that the land in dispute formed part of their Mauza Mahindwara at the time of the preparation of the Revenue Survey map and as such was assessed to Government revenue as part of their Mouza Mahindwara, and that, in the year 1318, the river Chota Bagwati swallowed up the land in dispute but has now restored it again on the other side of the river. To adopt the words of Lord Justice James in the case of *Lopez* v. *Muddun Mohun Thakoor* (2), the plaintiffs say: "This was my property. The river, which swallowed it, has again yielded it up and I claim my property, which, having been buried and lost to sight, has again re-appeared."

The learned Subordinate Judge has found that the land, having reformed on its old site, belongs to the plaintiffs. This finding has not been challenged before us, but Mr. C. C. Dass on behalf of the appellants very strongly and forcibly contends that the land having gradually accreted to his Mauza must in law belong to him.

Precisely the same argument was put forward in *Lopez's case* (2). With reference to that argument, Lord Justice James said as follows: "It is to be observed, however, that that clause," referring to the fourth clause of the Regulation, "refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication. The plaintiff here says: 'I had the property. It was my property before it was covered by the Ganges. It remained my property after it was submerged by the Ganges. There was nothing in that state of things that took it from me and gave it to the Government. When it emerged there was nothing that took it from me and gave it to any other person,' and in answer to such a claim it would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion or by what other term may be used, would be required in order to enable the owner of one

(1) 52 Ind Cas. 127; 5 P. L. J. 1; 1 P. L. T. 193; (1920) Pat. 102.

(2) 13 M. I. A. 437; 14 W. R. P. C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

property to take property which had been legally vested in another." Stopping here for a moment, the passage cited seems to me to be a definite pronouncement on the question whether there is any room for a gain by accretion, when the land is clearly identifiable as land belonging to another owner as a reformation *in situ*. Lord Justice James proceeded to say as follows: "In truth, when the whole words are looked at, not merely of that clause, but of the whole Regulation, it is quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable out of that which was in a state of nature neither valuable nor usable."

Mr. Das contends that there is no justification for this view on a plain reading of the Regulation itself. If there is not, still we would have to adopt, with all humility, the construction which the Judicial Committee has placed on the Regulation. But, in my view, it can bear no other construction. According to the Regulation accretion is land gained from the recess of a river or of the sea. It is difficult to understand how land confiscated from another proprietor can be said to be land gained from the recess of the river. But it is said that there is a decision of this Court in which the construction put upon the Regulation by Lord Justice James has not been accepted. In the case of *Puri Dass* v. *Kanhu Behera* (3) Mullick, J., is reported to have said: "The only thing that he can show us is the case of *Lopez* v. *Muddun Mohun Thakoor* (1) and he relies upon certain observations of their Lordships of the Privy Council as a foundation for the proposition that their Lordships intended to make a distinction between a river which is private property and a river of which the bed belongs to the Crown. In my opinion the judgment of their Lordships does not in clear terms make any such distinction. The section itself is perfectly intelligible without any such distinction, and I see no reason why any words of limitation should be inserted into it when no such limitation is necessary on the face of the enactment itself. On the contrary if the contention of the learned Vakil for the appellants is to be accepted, and rivers which are the property of the Crown are the only rivers to which the Regulation refers, then it is difficult to see what necessity there was for importing clause 4 into the Regulation. That clause makes special reference to island *chars*, thrown up in small and shallow rivers. There would have been no necessity whatsoever for legislating for this class of rivers, if by hypothesis the whole Regulation was intended to be inapplicable to it." With great respect, I am wholly unable to take this view. It was the defendant's contention in *Lopez's case* (2) that the recession of the river caused a gradual accession to his land, and an increment by annexation to his estate, notwithstanding that the land had been reformed on the ascertainable and ascertained site of the plaintiff's Mauza. To this contention, Lord Justice James replied that there are no words in the Regulation which imply the confiscation or destruction of any private person's property whatever and that it is "quite obvious that what the then legislative authority was dealing with, was the gain which an individual proprietor might make in the way from that which was part of the public territory, the public domain not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State." In my view, it is impossible to misunderstand the clear and unequivocal words employed by Lord Justice James, and I do not think that it is open to this Court or to any Court to construe the Regulation differently. The same view was taken by Sir Barnes Peacock in the case of *Ramanath Thakoor* v. *Chundernarain Chowdhry* (4), and identically the same view has been taken in certainly three subsequent cases that I have been able to trace, cases reported as *Mohini Mohun Dass*

(3) 38 Ind. Cas. 135; 1 P.L.J. 636.

(4) 1 Marsh. 136; 1 Ind. Jur. (o. s.) 44.

v. *Juggobundoo Bose* (5), *Dwarkanath Roy Chowdhry* v. *Dinobundho Singh* (6) and *Jugdish Chunder Biswas* v. *Chowdhry Zuhoor-ul Huq* (7)] In my view, the word "gained" in clause 1, section 4 of the Regulation, does not mean land washed away and afterwards identified as having reformed on its old site. But although this is my view, I cannot differ from the view taken in the decision of this Court without referring the question to the decision of the Full Bench. It is unnecessary in this case to rest my decision on the meaning of the word "gained." It is sufficient to say that a case under clause 1 of section 4 of the Regulation is not made out when the land in dispute is shown to have reformed on its old identifiable site.

It was, however, argued by Mr. Das that the rule enunciated by Lord Justice James was based on the Common Law as it was then understood, and as the Common Law, as now understood, embodies a different principle, the old principle should no longer guide us. It may be conceded that it has been definitely laid down in England that gradual accretion of land from water belongs to the owner of the land gradually added to, and that the qualification suggested by Britton, namely, that the rule should not apply "if certain boundaries are found," has been finally rejected. But it may be remembered that the Common Law of England has no application to the Mofassil towns of India except as rules of justice, equity and good conscience. Now on what principle is the Common Law of England based? It is based upon the impossibility of determining year by year, to whom an inch or a foot or a yard belongs. In other words, the rule laid down in England is a rule of necessity. But, in India, the conditions are different. As was pointed out by Lord Sumner in the case of *Srinath Roy* v. *Dinabandhu Sen* (8), what would be almost miraculous in the case of English rivers is normal and commonplace in the case of Indian rivers. For instance, an addition of over 600 acres in the course of a single flood season could not be described as slow and gradual according to the standard of additions by alluvion in English rivers, but there is nothing abnormal in such a phenomenon in Indian rivers. It seems to me, therefore, that the rule of English Common Law, based on conditions which are entirely different, should not be extended to the Mofassil towns of India. But, if it is at all extended, it must be extended for the first time by the Judicial Committee, and, until that is done, we must be guided by the decision of the Judicial Committee in *Lopez's case* (2).

The identical point was, however, decided by this Court in the case of *Lachmi Narayan Lal* v. *Maharaja Kesho Prasad Singh* (1). That decision is binding on us and in accordance therewith, I must hold that the plaintiffs having shown the land as a reformation on its old site, they are entitled to succeed in the action, unless their claim is barred by limitation.

It is just as well to record my finding on the question whether the land in dispute can be said to have accreted to the defendants' Mouza within the meaning of clause 1, section 4 of the Regulation. The defendants, in my view, have adduced no evidence on this point. It is necessary to remember in this connection that the defendants have deliberately withheld the measurement *khasras* which are admittedly in existence, and which would throw a great deal of light on the question. We are entitled to draw the presumption that the measurement *khasras*, if produced, would support the case of the plaintiffs and not that of the defendants. The defendants rely on two leases, one granted on 15th July 1901 in respect of 15 *bighas* of accreted lands, and the other granted on 31st October 1905 in respect of 20 *bighas* inclusive of 15 *bighas* covered by the lease of 15th July 1901. The argument is that if 15 *bighas* accreted by the 15th July 1901, and 5 *bighas* accreted between that date and 31st October 1905, the accretion must have been gradual. On referring to Exhibit E2, the lease of 31st October 1905, it will appear that 15 *bighas* covered by the lease of the 15th July 1901 were formed on the old bed of the river. It is clear, therefore, that the lease of 15th July 1901 was not in respect of any portion of the disputed land. If the lease of 15th July 1901 goes out, then the only other document with which we are concerned is the

(5) 9 W. R. 312.
(6) 15 W. R. 461.
(7) 24 W. R. 317.
(8) 25 Ind. Cas. 467; 42 C. 489; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 41 I. A. 221 (P. C.).

lease of 31st October 1905, which shows that the defendants settled 5 *bighas* of Bharan lands with some of the tenants. There is nothing to show that the remaining portion of the disputed land did not come out of the river at the same time. I hold, therefore, that the defendants have failed to show that they have a title to the land in dispute by gradual accretion.

I now come to the question of limitation. I agree with the learned Vakil that it lies on the plaintiffs to prove possession and dispossession within twelve years of suit, but it must be remembered that possession is not the same thing as actual user. The "true rule" was stated by Wilson, J., in the following words: "That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in section 114 of the Evidence Act." See *Mahomed Ali Khan* v. *Khoja Abdul Gunny* (9).

The cadastral survey map published in 1897 shows that the plaintiffs were in possession of the land in dispute in that year. The defendants' case is that the land began to go under water after 1897. It may, therefore, properly be presumed that the plaintiffs' possession over the land in dispute remained so long as the land was under water and continued until the contrary is shown. The only document that bears on the point is Exhibit E 2, the lease of 31st October 1905. That is the only document which shows the contrary, but the lease was within twelve years of the suit and cannot, therefore, defeat the plaintiffs' claim. On the other hand, Exhibits 10 A, 11 A, 10 B, 11 B, 10 C, 11 C show that the plaintiffs were recovering decrees for rent in respect of portions of the disputed land in 1910. I hold, therefore, that the suit is within time and is not barred by limitation.

(9) 9 C. 744 F. B.; 12 C. L. R. 257; 4 Ind. Dec. (N. s) 1145.

It was further argued on behalf of the appellants that defendants Nos. 8, 9 and 12, having been inducted into the land by a *de facto* owner, cannot be ejected from the land in dispute. I am not in sympathy with this argument. I cannot look upon the defendants, the owners of Mauza Sreedib, as *de facto* owners of the lands in dispute. It was also argued that as the defendant 3rd party, who owns a 15 *ganda* share in the Mauza, has not joined the plaintiffs in bringing the suit, the plaintiffs cannot recover a decree for joint possession. The point is entirely without merit. That objection must come from the defendant 3rd party and not from the contesting defendants.

I am of opinion that the decision of the Subordinate Judge is right and must be affirmed. There are, however, two errors in the decree which must be corrected. In Suit No. 99 of 19 4 out of which First Appeal No. 19 of 1919 arises, the plaintiff claimed to recover joint possession of 49 *bighas* 9 *kuttas* 12 *dhurs*. The Commissioner found 44 *bighas* to be the land in dispute. In Suit No. 100 of 1914 out of which First Appeal No. 196 of 1916 arises the plaintiffs claimed to recover joint possession of 73 *bighas* 2 *kuttas* 2 *dhurs*. The Commissioner found 61 *bighas* 3 *kuttas* to be the land in dispute. It has not been shown that the Commissioner's report is wrong. The plaintiffs, therefore, are entitled to a decree according to the Commissioner's report. On the question of mesne profits too there is an error. The Court made a distinction between tenanted lands and lands in direct possession of the Maliks. So far as tenanted lands are concerned, the Court gave the plaintiffs a decree for mesne profits at the rate of Rs. 4 per *bigha*. So far as Zarait lands are concerned, the Court adopted another principle. The decree as drawn up makes no distinction between the two. This is wrong. The Commissioner's report shows the area held by the tenants and the area in the *khas* possession of the Maliks. The decree must be modified accordingly in accordance with the Commissioner's report. Subject to this modification, the appeals fail and are dismissed with costs.

ADAMI, J.—I agree.

Appeals dismissed; Decree modified.

GOKUL PRASAD *v.* SITLA PRASAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 14 AND 30 OF 1919.
November 14, 1919.
Present:—Mr. Stuart, J. C.

GOKUL PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS IN BOTH

versus

SITLA PRASAD AND ANOTHER—PLAINTIFFS RESPONDENTS IN BOTH.

Mortgage—Mortgagee, right of, to take possession on default—Waiver—Penal clauses—Suit by mortgagee to recover possession—Consideration, payment of, whether can be gone into—Redemption, whether can be permitted.

A mortgage-deed was to the following effect. The principal and interest was to be paid within a fixed period. If default was made in payment of any portion of the interest, the balance was to be converted from simple interest to compound interest at the same rate. If the total amount due on the deed was not paid by the time fixed, the mortgagee was at liberty either to bring the mortgaged property to sale and recover the amount due from the sale-proceeds or, in the alternative, to enter into possession of the property and remain in possession until such time as the mortgage was redeemed or in perpetuity if the mortgage was not redeemed. Default was made in the payment of principal and interest and it was found that the mortgagee had accepted certain deeds of further charge in respect of some of the unpaid arrears of interest:

Held, (1) that the acceptance of the deeds of further charge by the mortgagee did not amount to a waiver of his remedy as to taking possession of the mortgaged property; [p. 349, col. 1.]

(2) that the mortgage deed contained no penal clause and that the condition permitting possession was a good condition. [p. 349, col. 2.]

The question as to whether the full consideration for a mortgage was paid can be gone into only when a suit for its redemption is filed and not in a suit by the mortgagee for possession of the mortgaged property. Nor can the mortgagor be allowed to redeem the mortgage in such a suit. [p. 349, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 28th February 1917.

Babu *Ishwari Prasad*, for the Appellants in both appeals.

Babu *Bisheshwar Nath Srivastava*, for the Respondents in Appeal No. 14 of 1919.

Babu *Bisheshwar Nath Srivastava* and Syed *Zahur Ahmad*, for the Respondents in Appeal No. 30 of 1919.

JUDGMENT.—These two appeals can be decided by the same judgment. The facts are as follows:—

Manzur Ahmad executed a deed of mortgage on the 15th January 1907 and a second deed of mortgage on the 22nd June 1907. Separate properties were mortgaged by these two deeds. The property mortgaged by both the deeds was brought to sale in execution of a simple money decree and purchased by Gokul Prasad in 1916. Manzur Ahmad has ceased to have any interest in the mortgaged property. Both properties are now in possession of Gokul Prasad, who is in the position of the mortgagor. The mortgagees sued for possession of the properties mortgaged and have obtained decrees. Gokul Prasad and the representative of a prior mortgagee have appealed in Appeal No. 30 against the decree passed on the mortgage of 15th January 1907, and Gokul Prasad alone has appealed in Appeal No. 14 against the decree passed in respect of the property mortgaged by the mortgage deed of 22nd June 1907. I have examined the deeds. They are both to the same effect which is as follows:—Manzur Ahmad agreed in the first deed to pay the principal and interest within four years. He agreed in the 2nd deed to pay the principal and interest within three years. In event of his failing to pay any portion of the interest the balance was to be converted from simple interest to compound interest at the same rate. In event of his not paying up the total amount due on the deed of 15th January 1907 within four years and the total amount on the deed of 22nd June 1907 within three years, the mortgagees were at liberty either to bring the mortgaged properties to sale and recover the amount due from the sale-proceeds or, in the alternative, to enter into possession of the mortgaged properties and remain in possession until such time as the mortgages were redeemed or in perpetuity if the mortgages were not redeemed. They have sought and obtained the last named remedy in the Court below. The appeals raise the following points:—

The *first* is that no suits for possession lay because the mortgagees had deliberately elected to waive their claim for possession and accepted in lieu certain deeds of further charge in respect of the unpaid arrears of interest. It is perfectly true that the suits for possession were not filed when the defaults took place, but the suits for possession were filed well within limitation, the limitation being governed by the provisions of Article

138 of the First Schedule of Act IX of 1903, and it is further to be noted that although the mortgagees took deeds of further charge in respect of certain unpaid instalments of interest, there are arrears of interest which are not covered by these deeds of further charge and the deeds of further charge naturally have had no effect upon the principal. In these circumstances it is difficult to see how the question of waiver or estoppel can be raised and I decide the point against the appellants. I am of opinion that the mortgagees have neither by act or omission deprived themselves of the right to obtain possession of the mortgaged property.

The *next* point raised is that no suit for possession should have been brought until specific notice had been given to Gokul Prasad of the desire of the mortgagees to obtain possession. The argument is here based upon a *dictum* in a case from the Punjab, *Banu Mal* v. *Pars Ram* (1). The *dictum* in question goes no further than to lay down that in the particular circumstances of the appeal a mortgagee who has waived the right to claim possession of the mortgaged land must, if he desires to avail himself of that right upon a future default, give the mortgagor reasonable notice of his intention. I should not go so far as to say that in this case there had been any waiver. So it is unnecessary to discuss whether the view taken in the Punjab Chief Court is a view which should or should not be followed because there being no waiver, the case has no application. Similarly I find that the decision of the Bombay High Court in *Chagan Chunilal* v. *Suka Barku* (2), which has also been relied on by the learned Counsel for the appellants, has no application to the facts of this case. I cannot consider that the suits should fail because the mortgagees gave no notice to the mortgagor of their desire to obtain possession of the property.

That *third* point raised is that Manzur Ahmad was a habitual drunkard, a reckless borrower, and a man of extravagant habits and that the onus was on the plaintiffs-respondents to prove that he was paid the full consideration of the mortgage deeds. Manzur Ahmed appears to have been somewhat intemperate, but the description of him given in the grounds of appeal is hardly fair to him. He was not such a weak or foolish character as the appeals make out. But in any circumstances there can be no doubt as to the fact that the deeds were executed for good consideration. The point does not arise here whether the full consideration was or was not paid. The question as to whether the full consideration was paid can be gone into when a suit for redemption is filed and should not be prejudged now. It is sufficient to say that the deeds in question were for consideration and were good deeds. It is unnecessary to say anything more.

The *next* point taken is that the mortgages are vitiated as containing a penal clause. I do not agree here. I cannot find that the mortgages contain any penal clause and I find that the condition permitting possession is a good condition.

The *last* point taken, which has been very strongly pressed, is that the appellants should be allowed to redeem the mortgages in the present suits. That cannot be permitted. They must first give possession. After they have done so they will, of course, be at liberty to file suits for redemption.

For the above reasons I dismiss these appeals with costs.

Appeals dismissed.

(1) 48 Ind. Cas. 656; 35 P. W. R. 1918; 30 P. R. 1918; 47 P. L. R. 1918.

(2) 12 Ind. Cas. 384; 35 B. 511; 13 Bom. L. R. 891.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 175 OF 1917.

September 19, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

RAMCHANDRA VITHAL BHAT—PLAINTIFF—APPELLANT

versus

GAJANAN NARAYAN DESHMUKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 66, O. II, r. 2, O. XXI, rr. 69, 96—Mortgage decree—Execution of decree—Purchase by benamidar for decree-holder, validity of—Benamidar, suit by, to recover possession, maintainability of—Mortgagee, whether necessary party—Leave to bid not obtained by mortgagee, effect of—Suits against different per-

in respect of distinct properties at different times, maintainability of.

Where in execution of a mortgage decree the property is purchased by a *benamidar* for the mortgagee, the former is entitled to sue in his own name to recover the property vested in him as a *benamidar*, and the original mortgagee for whom he is alleged to have purchased the property at the Court sale is not a necessary party to the suit. [p. 351, col. 1.]

Such a suit is not barred by the provisions of section 47 of the Civil Procedure Code, inasmuch as the plaintiff-purchaser is not the decree-holder himself but a third person. For purposes of procedure the auction-purchaser, even though a *benamidar* for the decree-holder, is a third party. [p. 352, col. 1.]

Where in such a case it appears that the mortgagee did not obtain any leave to bid for or purchase the property, the omission would not render the purchase by the *benamidar* void. The purchase is merely liable to be set aside at the instance of the judgment-debtor in proceedings properly framed for that purpose and until so set aside, holds good. [p. 351, col 2.]

An auction-purchaser brought a suit to recover possession of certain property included in his purchase and obtained a decree. Subsequently he brought another suit against a different set of defendants to recover possession of certain other property which was also included in his purchase:

Held, that the suit was not barred by the provisions of Order II, rule 2, of the Civil Procedure Code. [p. 352, col. 2.]

Appeal from the decision of the District Judge, Thana, in Appeal No. 150 of 1915, confirming the decree passed by the Acting Subordinate Judge at Roha, in Civil Suit No. 360 of 1914.

Messrs. *Jayakar* and *P. V. Kane*, for the Appellant.

Messrs. *G. S. Rao* and *W. B. Pradhan*, for the Respondents.

JUDGMENT.

SHAH, J.—It will be convenient to set forth the facts which have given rise to this second appeal.

One Narayan and his other brothers mortgaged a two-anna share in the Khoti Takshim to one Vinayak Tilak with all the Khasgi lands and other rights appertaining to the Takshim. The mortgagee filed Suit No. 194 of 1902 on his mortgage and obtained a decree. In pursuance of that decree the property mortgaged was sold by the Court and the present plaintiff purchased it at the Court sale on the 16th June 1908 for Rs. 1,200. The sale was confirmed in July 1908. The auction-purchaser applied to have possession of the property and he recovered possession in December 1903 of the Takshim. It was stated, however, at the time by him that certain properties to which the sale certificate related were in the actual possession of the defendants and that he had not received possession of those properties. Those properties were not specified; but generally speaking, the main property described in the sale certificate, *viz*, the Khoti Takshim, was taken possession of under section 319 of the Code of Civil Procedure which was then in force. The present plaintiff filed Suit No. 118 of 1910 against some of the defendants to the mortgage suit for possession of certain Survey Numbers which were in the possession of those defendants. To that suit the present defendants Nos. 2 and 3 were joined as parties, but they had nothing to do with the lands then in suit. In that suit it was found that the plaintiff was not a Benamidar for the original mortgagee and decree-holder, and that the lands then in suit were covered by the sale certificate. Accordingly a decree was passed in his favour for possession of the lands, and that was upheld by both the Appellate Courts in appeals preferred by the defendants in that case who were in possession of the lands then in suit. The plaintiff filed the present suit in 1914 against defendants Nos. 2 and 3, alleging that the 1st defendant who was the tenant of defendants Nos. 2 and 3 was really in occupation of the land in suit at the date when he recovered possession in 1903 under the sale certificate and that subsequently he had transferred possession wrongfully to defendants Nos. 2 and 3. Defendant No. 1 did not claim any interest in the property, and defendants Nos. 2 and 3 contended that the land in suit was not included in the sale certificate, that it was a Khoti Kulargi land, that the plaintiff was a Benamidar for the original decree-holder and that the suit was barred under Order II, rule 2, by the previous Suit No. 118 of 1910. The trial Court came to the conclusion that the plaintiff was not a Benamidar and that he was entitled to recover possession of the lands in suit, as the terms of the sale certificate were sufficient to convey the lands to the plaintiff. The objection based on rule 2 of Order II of the Code of Civil Procedure was overruled, with the result that a decree was passed in favour of the plaintiff. The defendants Nos. 2 and 3

appealed to the District Court. That Court came to the conclusion that the plaintiff was a Benamidar for the original decree holder, that the latter was a necessary party to the suit, and that the present suit was not maintainable. The learned District Judge accordingly dismissed the plaintiff's suit with costs throughout. The plaintiff has appealed to this Court.

The appeal has been argued before us on the footing that the plaintiff is a Benamidar for the original mortgagee and the decree-holder, as found by the lower Appellate Court. It is also now common ground between the parties that the land in suit, though not expressly mentioned in the sale certificate, is included therein, and that the purchaser has a title under the sale certificate to the land in suit as he has to the two-anna Takshim.

The first question that arises in this appeal is whether the lower Appellate Court is right in holding that the original mortgagee was a necessary party to the suit and that in his absence the plaintiff could not maintain the suit. It is clear, in my opinion, that the original mortgagee, for whom the plaintiff is supposed to have purchased the property at the Court sale, is not a necessary party and that the plaintiff, though a Benamidar, can sue in his own name to recover the property vested in him as a Benamidar.

The judgment in *Gur Narayan* v. *Sheo Lal Singh* (1) is a clear authority in favour of this view. Their Lordships observe at page 9* of the report that "so long, therefore, as a Benami transaction does not contravene the provisions of the law, the Courts are bound to give it effect. As already observed, the Benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the Benamidar in respect of the property, although the beneficial owner is no party to it. The bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the Benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him." This was a case of a private Benami purchaser. But, in my opinion, it makes no difference that in the present case the plaintiff is a purchaser at a Court sale. In the case of *Ravji Appaji* v. *Mahadev Bapuji* (2) Mr. Justice Ranade, after reviewing the various reported cases, summed up as follows:—"This review of the authorities shows clearly that appellant No. 1 as *benami* purchaser had full right to bring the suit. If the true owner holds back, a decree against the Benamidar owner would bind him as *res judicata*. The present suit was, therefore, properly instituted. The addition of appellant No. 2's name made no difference in the character of the suit." This was said with reference to a case in which the plaintiff was a purchaser at a Court sale.

It is urged, however, on behalf of the respondents that this rule holds good so long as the Benami transaction does not contravene the provisions of the law and that in the present case the provisions of section 294 of the Code of 1882 have been contravened, in so far as the decree-holder did not obtain any leave to bid for or purchase the property. It seems to me that the omission on the part of the mortgagee to obtain such a leave does not render the purchase by the Benamidar invalid or unlawful. It is clear that so far as the apparent title of the Benamidar is concerned, the sale, when it has been confirmed, has the effect of vesting the property in the purchaser and that under section 66 of the present Code of Civil Procedure and the corresponding provisions of the Code of 1882 even the real owner cannot maintain a suit against the Court purchaser. Further, section 294 of the Code of 1882 and the corresponding provisions in the present Code show that the omission on the part of the decree holder to obtain the necessary leave has not the effect of rendering the Benami purchase void; but such a purchase is liable to be set aside. It is an admitted fact in this case that none of the defendants in the mortgage suit

(1) 49 Ind. Cas. 1; 46 I. A. 1 at p. 9; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.); 1 46 C. 566; 12 Bur. L. T. 122.

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(2) 22 B. 672 at p. 679; 11 Ind. Dec. (N. s.) 1020.

applied under section 294, paragraph 3, to have the sale set aside. The application for setting aside a sale under that paragraph could have been made within the period prescribed by the law of limitation. No such application was made, and having regard to the fact that the original mortgagors were all brothers and that some of the defendants, who were parties to the suit of 1910, had specifically raised the point that the plaintiff was a Benamidar for the original decree holder, it cannot be said that the defendants were really ignorant of any fact which could have prevented them from making a proper application for setting aside the sale. There is no allegation in the present case that the defendants were ignorant of the real nature of the purchase by the plaintiff during all the time preceding the present suit. The sale certificate, therefore, must be taken as a valid certificate giving the plaintiff a title to the land in suit which he is entitled to enforce.

It is further urged that though the present defendants Nos. 2 and 3 may not be in a position to have this sale set aside by a proper application under paragraph 3 of section 294 or under the corresponding provisions in the present Code on account of the bar of limitation, it is open to them to plead by way of defence that the title of the plaintiff is vitiated by fraud. In support of this contention reliance is placed upon *Rangnath Sakharam* v. *Govind Narasinv* (3) and *Minalal Shadiram* v. *Kharsetji Jivaji* (4). It is not necessary in this case to express any opinion as to whether such a plea could be raised by way of defence, though any suit based on that ground would be time barred. Assuming in favour of the defendants that such a defence is open to them, it seems to me that on the merits that defence must fail. In the first place, no such plea of fraud was raised in the written statement; and the only fraud suggested in the argument before us is that the property which was roughly valued at Rs. 1,500 fetched only Rs. 1,200 at the Court sale. In my opinion this is no fraud whatever. In the first place there is nothing to show that the property was really worth Rs. 1,500: it only shows that in execution proceedings the Court had estimated the value at that figure, and the difference between the estimated value and the price actually realized is not so great as to indicate any kind of fraud on the part of the decree-holder or any other person. In connection with this point the learned Pleader for the respondents relied upon the case of *Thathu Naick* v. *Kondu Reddi* (5). The facts of that case were quite different, and I do not see how that case could be treated as an authority in favour of the view that in the present case the fact of the property having fetched Rs. 300 less than its estimated value amounts to fraud.

It is urged in support of the decree of the lower Appellate Court on behalf of the respondents that the present suit is barred under rule 2 of Order II. The contention is that the plaintiff should have included in the suit of 1910 his claim for the possession of all the properties to which he acquired a title under the sale certificate and that if he failed to do so, his present suit would be barred. It is urged that the plaintiff having omitted to sue in respect of the property now in suit in 1910, he cannot now sue in respect thereof. The question is whether the cause of action in the present suit is the same as that in the previous suit. Several cases have been cited in the argument in connection with this point; but I do not consider it necessary to refer to these cases. The point, it seems to me, must be decided with reference to the facts of this case. It is clear that the cause of action in the present suit cannot be treated as the same as that in the previous suit. The plaintiff no doubt acquired a title to several properties under a general description of the Khoti Khasgi lands under one and the same sale certificate. But his cause of action in respect of the lands in the possession of different persons cannot be treated as the same. It was open to him to have sued the several defendants in possession of the different lands including the present defendants in the suit of 1910; but I do not think that the plaintiff was bound to do so. The property in this suit is different. The parties in possession sued now are different, and the cause of action alleged is also different. For the purposes of this point, however, I assume that the cause of action is

(3) 28 B. 639; 6 Bom. L. R. 592.
(4) 30 B. 395; 8 Bom. L. R. 296.

(5) 1 Ind. Cas. 221; 32 M. 242; 5 M. L. T. 248.

simply that the defendants have withheld possession from him although he is entitled thereto under the sale certificate, and to leave out of consideration the special allegations which the plaintiff has made. With regard to these special allegations as to the land being in the possession of defendant No. 1 and the possession having been subsequently transferred by defendant No. 1 to defendants Nos. 2 and 3, the trial Court found in favour of the plaintiff and the Appellate Court does not seem to me to have recorded any specific finding on that point. In the view I take of the case, I consider this allegation to be immaterial and it is not necessary to have any finding on that question. Assuming that there was no intervention of defendant No. 1 and the position of defendants Nos. 2 and 3 was throughout as I have stated it, I think that the cause of action would not be the same as that in the suit of 1910 in which different properties were involved and different defendants were in possession of the properties in that suit. The evidence in the present case may be similar, but it cannot be said to be identical. Besides the plea raised by the defendants that the land in suit is Kulargi land shows that the evidence in this suit must be different. Taking the meaning of the expression 'cause of action' most favourable to the defendants' contention, I am satisfied that the cause of action in the present case is not the same as that in the suit of 1910 and that rule 2 of Order II presents no bar to the maintainability of the present suit.

It remains only to notice the point which has been made by the lower Appellate Court but which has not been pressed before us. The learned Judge has held, relying on *Sadashiv* v. *Narayan* (6), that the proper remedy of the plaintiff is not a suit but an application in execution under section 47 of the Code of Civil Procedure. That was, however, a case in which the decree-holder himself was the purchaser. The view taken in that case has not been applied to a case in which the decree holder himself is not the purchaser but where a third person has purchased Benami for him. For the purposes of procedure the auction-purchaser, even though a Benamidar for the decree-holder, is a third party. The ruling in *Sadashiv* v. *Narayan* (6) really can apply to a case where the decree-holder himself is the purchaser at the Court sale. The present suit is a suit by an auction-purchaser, who is not the decree-holder for the purposes of procedure and who is, therefore, entitled to sue to recover possession of the property which he has purchased.

In my opinion, therefore, this appeal should be allowed, the decree of the lower Appellate Court reversed and that of the trial Court restored with costs here and in the lower Appellate Court on defendants Nos. 2 and 3.

HAYWARD, J.—I concur. I have no doubt that the Benamidar was entitled to sue. The certificate of sale was good title until set aside in regular proceedings. The general proposition of law has clearly been wrongly stated by the lower Appellate Court. It would be sufficient to refer to the Privy Council case of *Gur Narayan* v. *Sheo Lal Singh* (1). But it has been argued that the Benamidar had no permission to bid at the sale and that it was, therefore, a nullity.

But no steps were taken to avoid the sale as they might have been in execution on that account, nor was it alleged in the written statement that there was any fraud. It was not even alleged in the first Appeal Court. It has, as a final resource, been alleged here, but it has, in my opinion, not been established. It would appear to me, therefore, no good reason for treating the sale as a nullity, whether or no it was open to the defence to raise the plea of fraud in view of the provisions of Article 166 of the Schedule of the Indian Limitation Act.

It has been somewhat difficult to follow the line of reasoning in the remainder of the judgment of the first Appeal Court. The learned Judge devoted a material part of his judgment to the proposition, not raised as an issue, that the real remedy for recovering possession was by execution and not by way of suit, and he held that there was no real possession recovered in execution and apparently (the point was not clearly stated) that there was no remedy left by suit. But he did not explain precisely why even in default of recovery of possession in execution there should not have been a regular suit to recover possession upon the

(6) 11 Ind Cas. 987; 35 B. 452; 13 Bom. L. R. 661.

title-deed, that is to say, the certificate of sale of the Court.

The learned Judge held, on the other hand, on the issue raised that there was no bar to the suit under Order II, rule 2. of the First Schedule of the Civil Procedure Code. But he has not given, so far as it would appear from the judgment, any reasons for that conclusion. It would appear to me, however, to have been correct. For he has found as a fact that the previous suit was to recover possession of different properties from different defendants. If that were so, it was, in my opinion, clear that recourse could not be had to Order II, rule 2, of the First Schedule of the Civil Procedure Code. My detailed reasons for holding this need not be further stated as they have already been given in the case of *Sonu Khushal Khadake* v. *Bohinibai Krishna* (7).

It seems to me, therefore, that we ought to restore the decree of the trial Court and reverse that of the first Appeal Court.

Appeal allowed.

(7) 33 Ind. Cas. 950; 40 B. 351 at p. 357; 18 Bom. L. R. 545.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 454 OF 1918.

January 12, 1920.

Present:—Mr. Lindsay, J. C.

Lala GANESH PRASAD—PLAINTIFF—APPELLANT

versus

BISHWA NATH—DEFENDANT—RESPONDENT.

Construction of document—Shankalap, *grant by way of*—*Grantor reserving no right to herself*—*Property to be held* bila lagan *with heritable and transferable rights*—*Under-proprietary rights.*

Where a deed of grant declared that the grant was made by way of *shankalap*, that after the date of the deed the grantor was to have no sort of right or claim to the granted property, and that the grantee was to hold it for ever *bila lagani* with heritable and transferable rights:

Held, that the deed conferred under-proprietary rights on the grantee. [p. 356, col. 2; p. 357, col. 1.]

Appeal from the decree of the District Judge, Lucknow, dated the 14th September 1918, upholding that of the Subordinate Judge, Unao, dated the 12th March 1918.

Mr. *H. K. Ghosh* for Mr. *A. P. Sen* and *Chaudhri Ram Bharose Lal*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The plaintiff, who is the appellant here, brought a suit in the Court of the Subordinate Judge of Unao for the purpose of obtaining a declaration that the defendant Bishwa Nath had no proprietary or under proprietary right in an area of 110 *bighas* 10 *biswas* situated in Mauza Niwarna Taraf Budhu.

It appears that this village belonged at one time to Babu Ram Sahae, who died on the 26th of July 1890 leaving a widow *Musammat* Krishna Dei. This lady got possession of the village and remained in possession up till the time of her death in December 1897. While she was still alive, two suits were brought against her by Bisheshwar Prasad and Ram Charan for a declaration that they were the nearest reversioners to Babu Ram Sahae and that they would be entitled to succeed on the death of the widow. These suits were decreed. After the death of Krishna Dei in December 1897 one *Musammat* Ram Dei, who was the widow of an elder brother of Ram Sahae, took possession of Ram Sahae's estate including this village Niwarna. Suits in ejectment were then brought by Bisheshwar Prasad and Ram Charan, who eventually succeeded in obtaining possession of the property. Bisheshwar Prasad and Ram Charan died and were succeeded by their sons Ganesh Prasad and Jamuna Prasad. These two men effected a partition of the property, in the course of which the village of Niwarna fell to the share of Ganesh Prasad, who is the plaintiff in the present suit.

It is proved that the defendant Bishwa Nath has been in possession of the area in dispute for a very long time. His case was that the lands had been granted to his father Gurdin Lal partly by Ram Sahae and partly by the widow Krishna Dei. In support of this plea he produced a document (Exhibit A 1), being a deed of gift executed on the 10th of September 1891 by *Musammat* Krishna Dei. In this document

the lady, after reciting that her husband had made a gift by way of *shankalap* to Gardin Lal of three separate areas, namely, 48 *bighas* of *sir matahti*, 22 *bighas* 6 *biswas* grove land, and 14 *bighas* 9 *biswas* of *muafi* lands, went on to declare that she also was giving him a *shankalap* grant of 26 *bighas* of land "*bila lagani*" In this document she recorded that she was confirming both the *shankalap* grants. In the last clause of the document it was declared that the lady had drawn up the deed as a *shankalap-nama*. There appears to be no doubt that mutation was effected in favour of Gardin Lal on the strength of this document and it is proved that ever since Gardin, and after him the present defendant, has been in possession of the lands in dispute. In the year 1913 the present plaintiff brought a suit in the Revenue Court for resumption of the area now in question The case for the plaintiff was that the lands were held rent-free and were liable to resumption under Chapter VIIA of the Oudh Rent Act. The defendant Bishwa Nath resisted the claim and set up proprietary rights. The Revenue Court directed the plaintiff to the Civil Court for the purpose of obtaining a declaration that the defendant had neither proprietary nor under proprietary rights. In this way the present suit for declaration came to be filed on the 19th of June 1917. Shortly put, the case for the plaintiff is that the defendant is nothing more than a tenant holding land rent free. Various pleas were raised by way of defence and among others the plea of ownership. The case for the defendant was that he was the owner of the property in dispute.

The learned Judge of the Court below has come to the conclusion that whatever view may be taken of the origin of the title of the defendant to these lands, he has by adverse possession acquired a title as full owner. As a result of this finding the plaintiff's claim was dismissed *in toto*. The learned Judge was also of opinion that the suit was barred by limitation.

The finding of the learned District Judge on the question of adverse possesion has been attacked here in appeal, and the first matter to be considered is whether the judgment is correct in this respect. If it is not, then the plaintiff was not liable to have his suit dismissed in its entirety, unless indeed it can be shown that it was barred by the rule of limitation.

I have already mentioned that there can be no dispute that the lands to which this suit relates have been in the possession of the defendant and his father since at least the year 1892. It is also to be borne in mind that the widow Krishna Dei died in the year 1897 and that as against the present plaintiff adverse possession could only begin to run from the date of the lady's death. It is proved by a reference to the village papers that the name of the defendant has been continuously recorded for a very long period as a "*shankalapdar bila lagan.*" The first entry to this effect appears in the *khewat* of the year 1303 Fasli, corresponding to 1895-1896. Copies of the *khewats* of the years 1892 to 1894 were produced in the Court below, which show that the name of the defendant's father was not recorded in those years. From 1303 Fasli onwards, however, there is a continuous record of the name of the defendant's father or the defendant himself, and the peculiar thing to be noticed is that the entry is made in what is called Register No. 3, that is to say, the register of proprietary interests. It is this fact which is mainly relied upon by the defendant for the purpose of showing that he has full proprietary title to the lands in dispute. As against this the plaintiff has appealed to a document (Exhibit 15), which is a copy of an application made by the defendant to the Revenue Court on the 23rd of July 1906 for the purpose of having mutation effected in his favour after his father's death. In column 7 of that application it was necessary for the defendant to state the name of the owner of the *mahal* in case there was any interest which had to be recorded in the registers prepared under clauses (*b*) and (*c*) of section 32 of the Land Revenue Act. These registers relate to under-proprietary tenures. The defendant admittedly filled in this column and recorded that Jamuna Prasad and Ganesh Prasad Talukdars were the owners of the *mahal*. According to

the plaintiff's case this was an admission of his proprietary title to the property in dispute, and consequently the defendant is not in a position to say that he was holding himself out as the proprietor of the area in question. It is, however, to be observed that notwithstanding the form in which this application for mutation was made, the defendant's name was entered in the proprietary *khewat* (Register No. 3). The learned Judge of the Court below has taken into consideration all these circumstances and also taken into consideration the language of the deed of gift which was executed in favour of Gurdin Lal by the widow Krishna Dei and he has come to the conclusion, therefore, that there was a transfer of full proprietary interest made to Gurdin Lal and that ever since he has been claiming full proprietary rights in the property. I may say at once that I agree with the finding of the learned Judge that the defendant has been in possession adversely to the plaintiff. But after a careful consideration of all the evidence I am not prepared to agree with him that the defendant or his predecessor was setting up a full proprietary title to this area of $110\frac{1}{2}$ *bighas*. It cannot, I think, be doubted that at the time when Krishna Dei died and the plaintiff became entitled to possession, the defendant's father was in possession and his name was recorded in the revenue registers. I agree with the learned Judge that the plaintiff must be taken to have had notice of the defendant's possession and also of the nature of the possession, regard being had to the entries in the revenue papers. The real matter in issue is what was the nature of the defendant's possession. The plaintiff claims that he is not bound by the deed of gift which was executed in favour of Gurdin Lal by the widow Krishna Dei. That, however, is not the point. Although the deed may not be binding upon the plaintiff, nevertheless it is apparent that the defendant's possession had its origin in this deed and it is, therefore, permissible to refer to the language of the document for the purpose of determining what was the nature of the possession which was conferred by the deed. I have already referred briefly to the contents of this document (Exhibit A1). Gurdin Lal, the defendant's father, was a Brahman and a priest in the family of Ram Sahae and the deed of gift executed by the widow sets out that he had been a faithful servant of herself and her husband. In the deed she clearly sets out that the grant had been made by her husband on account of Gurdin Lal's services as the family priest, and she describes the nature of the gift made by her husband by saying that it was a grant in *shankalap*. Similarly, when she comes to describe the grant which she was making herself, she describes it as a *shankalap* grant. *Prima facie*, therefore, this document purports to confer upon Gurdin Lal the interest of a *shankalapdar*. *Shankalap* tenure is well-known in Oudh and its nature and incidents are set out in Sykes' Compendium of Taluqdari Law. The tenure is there described as a well-known under-proprietary tenure, and I have never before heard the proposition advanced that a grant in *shankalap* was a grant of a full proprietary estate. The learned Counsel for the respondent admits that he cannot refer me to any authority or decision to the effect that a *shankalap* grant confers full proprietary rights. He argues, however, that the word "*shankalap*" ought not to be interpreted in its strictly technical sense in construing this deed (Exhibit A1) executed by Krishna Dei. According to his interpretation and to the interpretation of the learned Judge, the grant was a grant of a full proprietary interest because the lady declared that after the date of the deed she was to have no sort of right or claim to the property. The transferee was to hold it for ever with heritable and transferable rights. Language of this description, however, is just as appropriate to the case of a grant of an under-proprietary tenure as it is to the case of a grant of proprietary rights; and I do not think that merely because the lady reserves to herself no rights in the property after the making of the grant, it necessarily follows that it must be construed as a transfer of the full title to the property. Effect must be given, so far as is possible, to every word in the document, and I cannot ignore the use of the word "*shankalap*" and the recital of the lady to the effect that the gifts made by her husband and herself to the Brahman Gurdin Lal were

made by way of reward for his faithful services as the family priest. Again the use of the words "*bila lagani*" in the document is a matter of some importance. The learned Judge of the Court below thought that the word "*lagan*" referred to the Government revenue and he cited a judgment of this Court in which the word "*lagan*" had been similarly interpreted; but in the case to which he is referring the words were "*lagan sarkari*" which obviously could mean nothing else than the Government revenue. To my mind the use of these words "*bila lagani*" is significant. If the intention was to grant the entire proprietary right in the property, there would have been no necessity for using these words, for transfer of full proprietary rights would necessarily imply that no rent was to be demanded of the transferee.

With regard to the entries in the revenue papers, I have already pointed out that the names of the defendant and his father have been continuously recorded in proprietary *khewat*. At the same time the language of the entry does not necessarily justify the position now taken up by the defendant, to the effect that he and his father have all along been asserting full proprietary rights. In the *khewat* entry for 1303 Fasli, Gurdin Lal was shown as holding 110 *bighas* and 10 *biswas* "*bazarie shankalap*," and the entry has continued in this form down to the present time. Further as I have pointed out, there is the document Exhibit 15, a copy of the application for mutation made by the defendant after his father's death. The entry in column No. 7 of that document speaks for itself and is to my mind proof that the defendant was conscious of the fact that he was the owner of an under-proprietary interest and of nothing more. If his case was that he was the full owner of the property, then there was no necessity for his making any entry in column No. 7. It has been suggested here that the entry was made by mistake, but this suggestion cannot be entertained. The defendant did not go into the witness-box to explain how he came to make this entry and I am not, therefore, prepared to assume in his favour that the entry was a mistake. In short all the documentary evidence before me points to the conclusion that the defendant and his father before him were in adverse possession of the property in suit under a claim to hold as *shankalapdars*, and that being so, the proper conclusion seems to me to be that the title which has thus been acquired by adverse possession is an under-proprietary title. I may also remark here that the defendant has produced no evidence to show that he has ever paid the Government revenue in respect of the property in suit. The presumption must be that the revenue has been paid by the plaintiff *talukdar*. For these reasons I hold that the defendant has shown himself to be an under proprietor only.

In this view the order of the learned Judge dismissing the claim *in toto* cannot be supported. If the defendant has acquired an under proprietary title by adverse possession, the proprietary title of the plaintiff still remains; and as regards limitation, the suit for declaration must be deemed to be within time in so far as it relates to the question of proprietary title. In the year 1913 when the plaintiff filed his case in the Revenue Court under Chapter VIIA of the Oudh Rent Act, the defendant put forward a claim to proprietary rights and consequently a cause of action for a declaration regarding the proprietary right of the plaintiff accrued to him within six years from the date of the suit. The appeal must, therefore, be allowed in part and the decree of the Court below must be modified. The plaintiff will be given a decree that the defendant has no proprietary right in the property in suit. I leave the parties to bear their own costs.

Appeal partly allowed.

RAMANATHAN CHETTIAR v. MUTHIAH CHETTY.

MADRAS HIGH COURT.

CIVIL APPEAL No. 97 OF 1917.

December 3, 1919.

Present:—Sir Abdur Rahim, KT., Offg. Chief Justice, and Justice Sir William Ayling, KT.

M. P. M. R. M. N. RAMANATHAN CHETTIAR—PLAINTIFF—APPELLANT

versus

K. R. S. V. MUTHIAH CHETTY AND OTHERS—DEFENDANTS AND LEGAL REPRESENTATIVES OF DEFENDANT No. 2—RESPONDENTS.

Accounts, suit for, by minor against agent appointed by guardian, maintainability of—Arbitrators, settlement by, when liable to be re-opened—Fraud, proof of.

An agent appointed by the guardian of a minor is not liable to account to the minor for his acts as an agent on the principle applicable to trustees or persons intermeddling with the trust estate. The rule laid down with respect to trustees *de son tort* cannot be extended to persons in the position of agents of the guardian of a minor. [p. 359, col. 2.]

A settlement made by arbitrators cannot be re-opened except on the ground of fraud. [p. 360, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge at Sivaganga, in Ordinary Suit No. 98 of 1914.

FACTS appear from the judgment.

The Hon'ble Mr. *S. Srinivasa Ayangar*, Advocate General (with him Mr. *T. V. Muthukrishna Iyer*), for the Appellant.—The suit lies on behalf of the minors. The 1st and 2nd defendants, agents appointed by the guardians of the minor plaintiffs, are in the position of trustees *de son tort*. Having meddled with the minor's estates, they are in a position of accountability to the minors. See *Barnes* v. *Addy* (1), *Mara* v. *Browne* (2) and *Barney, In re, Barney* v. *Barney* (3).

In the present case defendants Nos. 1 and 2 are in possession of the minors' estate, and the liability to account attaches.

Messrs. *K. V. Krishnaswami Iyer* and *C. A. Seshagiri Sastri*, for the Respondents.—There is no analogy between the case of trustees and that of agents appointed by guardians. No authority has been shown by the other side for the position that such agents are in the position of trustees *de son tort* and it would be dangerous to make undue extensions of that doctrine. In *Chidambaram Chetti* v. *Pichappa Chetty* (4) it was laid down that an agent appointed by an administrator cannot be proceeded against by the person entitled to the estate on the contract of agency. The principle applies to agents appointed by the guardians of minors. The agent is liable only to his principal. The appointors of these agents have not been impleaded in this case and any decree that might be passed would not reach them.

(1) (1874) 9 Ch. App. 244; 43 L. J. Ch. 513; 30 L. T. 4; 22 W. R. 505

(2) (1886) 1 Ch. D. 199; 65 L. J. Ch. 225; 73 L. T. 639; 44 W. R. 330.

(3) (1892) 2 Ch. D. 265; 61 L. J. Ch. 555; 67 L. T. 28; 40 W. R. 637.

(4) 30 M. 243; 2 M. L. T. 326.

JUDGMENT.

ABDUR RAHIM, OFFG. C. J.—There were two brothers belonging to the Nattukottai Chetty community, namely, Narayana Chettiar and Muthiah Chettiar. The plaintiff is the son of the former and defendants Nos. 4 to 6 are sons of the latter. The two brothers carried on money-lending business in the name of M. P. M. R. M. They had business in various places. Narayana Chettiar died fifteen years ago, and Muthiah Chettiar died about 10 years previous to the suit. At the time of the latter's death, plaintiff and defendants Nos. 4 to 6 were all minors and the family was undivided. The 1st defendant in the suit is maternal uncle of defendants Nos. 4 to 6. He was appointed as agent by the mother of these defendants to manage and look after their share in the family property and the business. The 2nd defendant, who is the maternal uncle of the plaintiff, was similarly appointed by the plaintiff's mother. The suit was instituted by the plaintiff, who attained majority in 1911, for a decree directing defendants Nos. 1 and 2 to render an account to him of their management of the affairs of the family of the plaintiff and the defendants during his minority and for other reliefs.

The first question that arises is, whether the suit is maintainable. It is to be noted that the mothers of plaintiff and defendants Nos. 4 to 6, who appointed defendants Nos. 1 and 2 as agents, have not been made parties. It is contended by the learned Advocate General on behalf of the appellant (plaintiff) that defendants Nos. 1 and 2 must be treated as trustees *de son tort* and as such liable to account to the plaintiff.

His argument is that the guardians of the plaintiff and defendants Nos. 4 to 6 occupied the position of trustees and defendants Nos. 1 and 2, having intermeddled with the estate of the minor and having received the properties of the minor, are liable to account to him. He has cited a number of rulings, but it is sufficient to point out that all those rulings relate to the liability either of trustees or of persons accountable as trustees for intermeddling or for being connected with breaches of trust of the trust property. The leading authority on the point is the case of *Barnes* v. *Addy* (1). The other cases cited by the Advocate-General, *Mara* v. *Browne* (2) and *Barney, In re, Barney* v. *Barney* (3), simply follow the principle laid down in that case at page 251. There Lord Selborne states the principle in these words:—"Those who create a trust clothe the trustee with a legal power and control over the trust property imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort* or actually participating in any fraudulent conduct of the trustees to the injury of the *cestui que trust*. But, on the other hand, strangers are not to be made constructive trustees, merely because they act as the agents of the trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which he must bear in mind in dealing with the facts of this case. * * * But, on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees." And Lord Justice James added: "I have long thought, and more than once expressed my opinion from this seat, that this Court has, in some cases, gone to the very verge of justice in making good to *cestui que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest but who have been, in some more or less degree, injudicious. I do not think it is for the good of *cestui que trust* or the good of the world that those cases should be extended."

The learned Advocate-General admitted that there is no authority for the proposition that an agent appointed by the guardian of a minor is liable to account to the minor as if he was a trustee *de son tort* because he received property belonging to the minor. On the other hand, there is a ruling of this Court which seems to be opposed to such a proposition, *Chidambaram Chetti* v. *Fichappa Chetty* (4). There it was held that an agent appointed by the administrator of an estate as such cannot be proceeded against on such contract of agency by the person entitled to the estate, and it makes no difference that the administrator obtained the grant as the attorney of the mother and guardian of the person entitled.

The learned Advocate General, however, drew our attention to a passage in the judgment to the effect that no claim was made against the defendant on the ground of his possession of property belonging to the plaintiff, and he argued that where such an agent is in possession of the property, the law makes a difference. But we do not think that, in the absence of any clear authority, it would be safe to hold that an agent appointed by the guardian of the minor is liable to account to the minor for his acts as an agent on the principle applicable to trustees or persons intermeddling with the trust estate. If there were any force in the contention of the appellant, one might reasonably expect that there would have been some authority forthcoming in support of it. It would be unsafe to extend the rule laid down with respect to trustees *de son tort* to the persons in the position of agents of the guardian of the minor. Under the ordinary law an agent is liable to the principal. The state of accounts between an agent and a principal and the liabilities of the agent to the principal would be on a very different

footing from the account which a trustee or a person intermeddling with the trust estate has to render to the *cestui que trust*. Besides, as mentioned above, in this case the mothers, who appointed defendants Nos. 1 and 2 as agents, have not been made parties and any decree in this case would not exempt the agents from their liability to their principals. The conclusion of the learned Subordinate Judge on this point is right.

The 2nd point relates to a sum of Rs. 14,000 and odd which the plaintiff paid to the 1st defendant on behalf of defendants Nos. 4 to 6. The Subordinate Judge has found that this was settled by arbitration and the question cannot be re opened. On the other hand, the case of the plaintiff is that it is a matter of stated and settled accounts and if he is able to show errors in the account, he is entitled to re open the question. Exhibit III makes it clear that the settlement was made by arbitrators or mediators. Such a settlement is not liable to be re-opened, except on the ground of fraud which is not alleged in this case.

The third point arises under the 2nd issue. Plaintiff claims to recover from the 1st defendant a certain book of account called Oorkanakku. The Subordinate Judge upon the evidence found that the 1st defendant was not in possession of the account. Besides that, it is doubtful, if the plaintiff is not entitled to ask the 1st defendant to render an account to him, that he can ask him to hand over any account.

The appeal fails on all the points and must be dismissed with costs.

AYLING, J.—I agree.

M. C. P.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 94 OF 1919.

February 4, 1920.

Present:—Sir Henry Drake-Brockman, KT., J. C., and Mr. Kotval, A. J. C.

BALDEOPRASAD—APPELLANT

versus

R. S. Seth GHASIRAM—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 (iv) (c), Sch. II, Art 17 (3)—Suit to set aside decree on ground of fraud, nature of—Court-fee payable.

A suit to set aside a decree on the ground of fraud falls under sub-clause (*c* of clause (*iv*) of section 7 of the Court Fees Act and *ad valorem* Court-fees must be paid on the value set on the claim for purposes of jurisdiction. [p. 361, col. 1.]

Appeal against the decree of the Additional District Judge, Narsinghpur, dated the 8th December 1919.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *D. T. Mangalmurti*, for the Respondent.

JUDGMENT.—This is an appeal from an order rejecting a plaint under clause (*c*), rule 11, Order VII, 1st Schedule, Civil Procedure Code.

The relief claimed in paragraph 15 of the plaint is "that the decree absolute obtained by defendant No. 1 on 25th April 1916 be set aside on the ground of fraud and declared null and void against the plaintiff."

The plaint is written upon a ten-rupees stamp paper. The defendants raised a preliminary objection to the sufficiency of the stamp. The lower Court held that the suit was governed by clause (*iv*) (*c*), section 7 of the Court Fees Act, and directed *ad valorem* Court fee to be paid on the value set upon the claim by the plaintiff for purposes of jurisdiction. The plaintiff failed to supply the requisite stamp and the plaint was in consequence rejected.

It is urged that the suit is governed by clause (3), Article 17, Schedule II, Court Fees Act, which refers to a plaint in a suit "to obtain a declaratory decree where no consequential relief is prayed." The question for decision is whether the decree sought to be obtained is purely a declaratory one or whether consequential relief is also asked or involved in the suit.

The cases relied on by the appellant are *Karam Khan* v. *Daryai Singh* (1), *Shrimant Sagajirao* v. *Smith* (2) and *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (3). In *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (3) and *Shrimant Sagajirao* v. *Smith* (2) there was not as a matter of fact any prayer for setting aside the decree. The head-note

(1) 5 A. 331; A. W. N. (1883) 55; 3 Ind. Dec. (N. S.) 317.

(2) 20 B. 736; 10 Ind. Dec. (N. S.) 1061.

(3) 30 C. 788.

in the latter case appears to be incorrect. It appears from the judgment at page 741 that the only prayer was that the decree may be declared null and void. At page 742 it is observed:—

"The suit is analogous to one under section 39 of the Specific Relief Act (I of 1877) merely to have the decree adjudged void; leaving it to the Subordinate Judge to do what he likes with his decree if he so adjudges it void."

In the present case the decree is sought to be set aside so that nothing will be left to be done by the Court passing it. In *Karam Khan* v. *Daryai Singh* (1) a suit for the cancellation of a mortgage deed was held to be in the nature of a simple declaratory suit. This case has been dissented from in *Samiya Mavali* v. *Minammal* (4) and *Parvatibai* v. *Vishvanath* (5). In the case last mentioned a prayer for an order to have a sale-deed cancelled was held to be a prayer for a relief as distinguished from a mere declaration which is not a relief. In the present case both a declaration and a relief are sought: declaration that the decree is null and void and relief that the decree be set aside. In *Deokali Koer* v. *Kedar Nath* (6) it was held that a suit to set aside a decree is not a suit for a declaration within the meaning of section 42 of the Specific Relief Act for which alone a Court-fee of Rs. 10 is sufficient. In *Arunachalam Chetty* v. *Rangasawmy Pillai* (7) it was held by a Full Bench that a suit for a declaration that a decree passed against the plaintiff is not binding on him is, although it asks for a mere declaration, nonetheless a suit for a declaratory decree with consequential relief within the meaning of clause (*iv*) (*c*) of section 7, Court Fees Act.

We are of opinion that a prayer to set aside a decree is not of a declaratory nature and that the present suit is one for both a declaration and consequential relief and is governed by clause (*iv*) (*c*) of section 7, Court Fees Act. *Ad valorem* Court-fees should, therefore, have been paid. The plaint was rightly rejected. This appeal is dismissed with costs. Pleader's fee Rs. 30.

Appeal dismissed.

(4) 23 M. 490; 10 M. L. J. 240; 8 Ind Dec. (N. S.) 744

(5) 29 B. 207; 6 Bom L R. 1125.

(6) 15 Ind Cas 427; 39 C 704; 16 C. W. N. 838.

(7) 28 Ind. Cas 79; 38 M. 922; 28 M. L. J. 118; 17 M. L T 154; (915) M. W. N. 118.

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 18 OF 1917.

August 25, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

RUKMINIBAI KRISHNARAO TAMBVEKAR—APPELLANT

versus

LAXMIBAI NARAYAN TAMBVEKAR AND OTHERS—RESPONDENTS.

*Hindu Law—Gift—*Agrahar *gift, nature of—Condition restricting residence, whether enforceable—Public policy.*

A religious gift (*agrahar*) to a Brahmin for his maintenance is a private and an absolute gift according to law, and is entirely distinguishable from a religious endowment in favour of a deity of a public character, and where such a gift imposes a condition restricting the residence of the donee, and there is no rule of Hindu Law necessitating the enforcement of such condition, the condition is opposed to public policy and has no legal effect [p. 363, col. 2; p. 364, col. 2; p. 365, col. 2; p. 366, cols. 1 & 2.]

Appeal from an order passed by the Assistant Judge at Satara, in Appeal No. 3 0 of 1914, reversing the decree passed by, and remanding the suit to, the Joint Subordinate Judge at Karad, in Civil Suit No. 139 of 1912.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *D. R. Satwardhan*, for Respondent No. 1.

Mr. *Nilkanth Atmaram*, for Respondents Nos. 2 and 3.

Mr. *J. R. Gharpure*, for Respondent No. 6.

JUDGMENT.

SHAH, J.—The plaintiff in this case sued the defendants to recover a certain sum said to have been wrongfully withheld by defendant No. 10 and for a perpetual injunction against the defendants, restraining defendant No. 10 from receiving the dues and defendants Nos. 1 to 9 from paying the dues to her in respect of the property in suit. The relief was claimed on the footing that the plaintiff was entitled to the Inam rights in the property in suit under a conveyance in his favour, dated the 18th of September 1911, by one Ramkrishna, who traced his title to the said rights under a deed of gift in favour of his father, dated the 13th of October 1880. This deed of gift was passed by the members of the Tambvekar family. The gift was described as a 'religious Agrahar Inam.' The land and the

house described in the deed were given by way of gift to the donee in these terms: "So you, your sons and grandsons and succeedig generations should enjoy the said land and house and ground, etc., according to the deed of gift, dated the 5th of the Sudha half of Shravan in the Shake year 1801, and should live in peace at the holy place of Markandeya, otherwise known as Monje Malkhed." The earlier informal deed of the Shake year 1801 (A. D. 1879) is not forthcoming. It is found by both the lower Courts that the conditions of the gift were the same as the conditions laid down in the document of the year 1799 A. D. executed by the members of the Tambvekar family in favour of several Brahmins in respect of different lands described in detail in that document.

The trial Court found that according to the conditions of the gift the donee was bound to live in the village and that the donee got a "limited interest, limited to specific purpose and liable to be defeated on Ambekar (the donee) leaving the village of Malkhed and going to reside elsewhere." It was found as a fact that Ambekar had left the village at the time when he conveyed the property in suit to the plaintiff, and that the plaintiff acquired no title as his vendor had no subsisting title at the time of the conveyance. The trial Court accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the District Court, and the learned Assistant Judge, who heard the appeal, found that the donee was bound to fulfil the condition as to residence in the village, and that "Ambekar had to leave the village temporarily in search of maintenance on account of the hostile attitude of the Inamdars, that his absence from the village under those circumstances is insufficient to prove a positive breach of the conditions of the gift, that he was competent to nominate his successor according to the terms of the gift and that in making the transfer in plaintiff's favour, he (Ambekar) has substantially complied with the conditions imposed by the original donor." On the basis of this finding the lower Appellate Court reversed the decree of the trial Court and remanded the suit for a fresh decision.

The defendant No. 10 has appealed to this Court from the said order, and it is urged on her behalf in support of the appeal that the finding of the lower Appellate Court that there was a substantial compliance with the condition attached to the gift as to residence in the said village should not be accepted by this Court on the ground, first, that the point was not made in the trial Court, and, secondly, that it is in effect based on no evidence but is largely conjectural. On the other hand on behalf of the plaintiff it is urged not only that this finding should be accepted as binding in this appeal, but that the finding of the lower Courts that the condition as to residence is good in law and enforceable is erroneous.

The finding of the lower Appellate Court as to substantial compliance with the condition laid down in the deed of gift as to residence, assuming that such a condition is otherwise valid, seems to me to be open to the objections urged against the finding on behalf of the appellant; and if the decision of this appeal depended in any way on that finding, I could not have accepted it without a further inquiry.

The principal question of law, which has been argued and which requires a careful consideration, is the question whether the condition as to residence is valid. In order to appreciate the contentions on either side with reference to this condition, it will be convenient to set forth the important passages from the deed of gift of the year 1799, because it is now common ground that the conditions of the gift in favour of Ambekar in 1880 were the same as the conditions laid down in the earlier deed of gift in favour of several Brahmins. It is recited in this deed that originally the village of Malkhed was given in gift to the Tambvekar family by Gopalji Bhonsle in the year 1772 on the occasion of a solar eclipse. In the year 1799 the members of the Tambvekar family made a gift to several Brahmins, and we find the following recitals in that deed:—

"At that time our Vadil desired to build houses and give them to Brahmins in the name of God as Agrahar (gift). Therefore, houses were built at that place and you all Brahmins were installed and gifts of land were given to you to help you in your maintenance. Since then some changes have occurred on account of the manage-

ment. In consequence of the same this writing is given to you for Vahivat."

Then after describing the names of the donees and the extent of the land given to each one of them and after referring to certain letters which were originally received by the Tambvekars and given over to the donees, it provides as follows:—

"In all fourteen letters were obtained by the Vadil in his name. I have given to you, all the Brahmins, these and this deed of gift passed by me and have established you; you and your descendants, *i. e.*, sons and grandsons, etc, should enjoy the said lands and reside in the respective dwelling houses and perform the six-fold religious duties, *viz.*, performance of the Sandhya worship at twilights and in the afternoon and take care of the Agrahar and live in peace....None of these persons (donees) should abandon his house and go to another place and enjoy his Vritti given to him in connection with the Agrahar from that place. In case any one of them wished to leave the said village and live elsewhere, he should substitute in his place a Brahmin equally learned and who has a large family and who is approved by all, and should hand over to him the house and the Vritti and pass to him a writing in his name and approved by all. We have given to you these houses and Vrittis of our free will and pleasure. You should, therefore, enjoy the same and remain in peace. If any one of you has to go out, (you can go) after having got nothing to do (with the Agrahar). If instead of acting in this manner any one through obstinacy live at another place and desire to enjoy the income of the Vritti in connection with the Agrahar relying upon his own strength or upon the strength of other persons, his conduct shall be considered an act of irreligiousness and the whole body of Brahmins residing at the Agrahar should appoint another Brahim who is learned and is a man of large family and hand over to him the house and the Vritti (of the man who may go) and pass to him a writing in the name of all the Brahmins and establish him. This Danpatra (*i. e.*, deed of gift) is given having been approved by all. Nobody should cause any obstruction to this act of charity."

And then follow a number of verses pointing out to the successors of the donors the merit of preserving the gift and of not disturbing it in any way. It is an earnest appeal to the descendants of the donors to see that their act of charity was upheld by their successors. It is needless to quote any of these verses cited in the document pointing out the merit of allowing the gift to continue.

It is urged on behalf of the appellant that the condition as to residence in the village attaching to the gift has been explicitly mentioned in the document, that the gift must be taken to be subject to that condition and that the donees and their successors are bound to fulfil it. Both the lower Courts so far have decided in favour of the appellant's contention. On a careful consideration of the arguments urged on both sides with reference to this point, which is important and difficult, and the terms of the document, I have come to the conclusion that this Agrahar gift is a private gift to the donees and absolute gift according to law, and that the further provision as regards the residence in the same village is only a recommendation and an appeal to the religious conscience of the donees and their descendants, and that as a condition it is not valid and enforceable in law. The words of the gift are "you and your descendants, *i.e.*, sons and grandsons, should enjoy the said land and reside in the respective dwelling houses," the corresponding words in Marathi being *Tuhmi wa tumche puttarpautradi wanshparamprenen apalya ghari rahun sadrahu jaminicha upbhog gheun.* These words by themselves would indicate an absolute gift. It is doubtless described as an Agrahar gift. The dictionary meaning of the word 'Agrahar' in Sanskrit is "a grant of land given by Kings (to Brahmins) for maintenance" and in Marathi "villages or lands assigned to Brahmins for their maintenance." The word indicates that it is a religious gift to a Brahmin for his maintenance. No idea of any limitation upon the absolute character of the gift is necessarily involved in the meaning of the word In effect it is a private gift to a Brahmin and is entirely distinguishable from a religious endowment in favour of a deity of a public character. The words of the gift must, therefore, in my opinion, be allowed to have their natural scope and cannot be understood to have any limited meaning, simply

because the gift is an Agrahar gift. The clauses in the deed relating to the necessity of the donees residing in the same village, in my opinior, amount to no more than an expression of a pious wish on the part of the donors to see that the donees fulfilled the purpose of the gift by staying in the village and by living the ceremonial life of a Brahmin. This is indicated by the provision in the document that if any one through obstinacy or through any other reason fails to live in the village, it shall be considered an act of irreligiousness, and the whole body of Brahmins residing in the village should appoint another Brahmin in his place. It is contended on behalf of the appellant that the provision in the document, that the other Brahmins would have the right of appointing a substitute equally learned and of large family in case the condition as to residence is not fulfilled, indicates a legal right vested in the other Brahmins living in the village and that as a condition it is valid and ought to be enforced. On the best consideration that I can give to the question I have come to the conclusion that it is really an absolute gift and that the further provision in the document relating to the residence is in the nature of a recommendation to the donees. The consequences of non-observance of this direction are purely religious, and we are not concerned with the gravity of these consequences. That is a matter for the donees to consider.

This view is further strengthened, in my opinion, by the fact that there is an earnest appeal to the successors of the donors to see that the gift is not in any way disturbed. According to Hindu Law a religious gift is not revocable. The last verse of Yajnavalkya with Vijnanesvara's commentary thereon in the chapter on "resumption of gifts" clearly emphasizes this point. (See Gharpure's Translation of the Mitakshara, Vyavahara Adhyaya, pages 313—316.) Though the appellant maintains that she does not wish to revoke the gift, her attitude does involve that result in a sense.

But taking it that she only means that the donee, who fails to fulfil the condition as to residence, loses his right to the property and that the right for the disposal of the property in favour of a fit substitute is vested under the deed among the other donees in the village fulfilling the condition as to residence, the condition as to residence seems to me to be not valid in law It imposes not only upon the donees but upon their sons and grandsons and descendants in perpetuity the obligation not to leave the village without forfeiting the gift. Such a condition seems to me to involve a very serious restriction upon the enjoyment of the property, and should not be enforced, unless there is any special rule of Hindu Law necessitating its enforcement. No such rule has been referred to in the argument before us, and I am not aware of any such rule. The enforcement of such a condition appears to me to be opposed to public policy; and it seems to me to be in consonance with the general spirit of Hindu Law to hold that the gift is absolute and the words of restriction as to residence have no legal effect.

The provisions of the Transfer of Property Act have no direct application to this case. But it may not be inappropriate to refer to section 11 of that Act as indicating that such a serious restriction upon the ordinary enjoyment of the property given by way of gift cannot be treated as valid, apart from any special rule of Hindu Law validating such a restriction.

The only reported case relating to an Agrahar gift cited before us is *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* (1). This was a case of an Agrahar gift and the condition considered by the Court in the case related to the restrictions against alienation. The judgment delivered by Mr. Justice Muttusami Ayyar shows that the condition imposing a restriction on alienation was held to be invalid, that the Agrahar gift was treated as a gift with a religious motive and that the grant was held not to stand on the same footing with a religious endowment. The point of importance is that the restriction as to alienation was held to be bad according to the ordinary rule of law, even though the grant was an Agrahar grant. It is true, as pointed out by the learned Pleader for the appellant, that in that case the condition laying down the restriction against alienation was not inserted in the deed of gift, but was to be found in a contemporaneous separate document, and that the decision in terms refers to that circumstance. I

(1) 4 M. 200; 1 Ind Dec. (N. S.) 874.

am, however, unable to accept this fact as affecting in any way the *ratio decidendi* of that case relating to the application of the rule for not enforcing restrictions against alienation to an Agrahar gift. In that case the learned Judges did not decide the question as to whether the grant was subject to residence in the Agrahar and to the study of religious books, as it did not arise in that case. In the present case the question as to the validity of the condition relating to residence does arise; and it seems to me, having regard to the decision in that case, that that condition could not be treated on any footing other than that on which the condition relating to restrictions against alienation was treated. Though in terms the condition as to residence does not involve any restriction against alienation, it seems to me that it is a condition of the same nature and that indirectly it involves a restriction upon the power of alienation. On a construction of the document in question I have come to the conclusion that the condition as to residence is not enforceable and that view seems to me to derive support from the decision in *Anantha Tirtha Chariar's case* (1).

I am, therefore, of opinion that the order of the lower Court reversing the decree of the trial Court and remanding the suit is correct, though on different grounds.

In the view I take of the condition as to residence it is not necessary to examine the finding of the lower Appellate Court as to whether the condition has been duly fulfilled by the donee in question.

I would affirm the order of the lower Appellate Court and dismiss the appeal.

The appellant to pay the plaintiff respondent's costs of this appeal. The other respondents will bear their own costs.

I would make the same order in the other appeal (No. 20 of 1917) from order.

HAYWARD, J.—I agree. The Agrahar grant by the original deed of 1799 included these terms:—

"I have given to you, all the Brahmins, this deed of gift and have established you; you and your descendants, *i. e.* sons and grandsons, etc., should enjoy the said lands and reside in the respective dwelling houses and perform the six-fold religious duties and should dwell in the village. None of these donees should abandon his house and go to another place and enjoy his Vritti given to him in connection with the Agrahar. In case any one of them wishes to leave the said village and live elsewhere, he should substitute in his place a Brahmin equally learned and who has a large family and who is approved by all, and should hand over to him the house and the Vritti. We have given to you these houses and Vritti of our free will and pleasure. You should, therefore, enjoy the same and remain in peace. If any one of you has to go out, you can go after having got nothing to do with the Agrahar. If, instead of acting in this manner, any one through obstinacy live at another place and desire to enjoy the income of the Vritti in connection with the Agrahar, his conduct shall be considered an act of irreligiousness and the whole body of the Brahmins residing at the Agrahar should appoint another Brahmin and hand over to him the house and the Vritti."

One Ambekar obtained, what has been taken to be, a re-grant of these rights in 1888, and he enjoyed the proceeds of the property up to 1899. He left the village in 1904 and sold his rights in 1911. The plaintiff, who purchased them from him, brought this suit in 1912 to recover the property as private property. The defendant objected as the successor of the grantor that he was not entitled to do so, as the grant had been forfeited by his vendor having left the village contrary to the terms of the grant. The question, therefore, to be decided was this: whether the condition as to residence in the village was a restriction on the grant which was valid in law.

There is unfortunately an absence of authority as to what an Agrahar grant exactly is. The question, therefore, before us is one of considerable difficulty. But it would appear that such a grant is a grant given for private religious purpose, and there would not appear to be authority for holding that a necessary part of such a grant was the grantee residing upon the property. This appears not inconsistent with the recited terms of this grant. It was an absolute grant to "you and your descendants, *viz.*, sons and grandsons." It was no doubt thereafter stated that the grantee

should not abandon his house and that if he did, another should enjoy the Vritti. But there was no express clause that in such a case the grant should be forfeited to the grantor. The penalty was on the contrary stated to be, what from a religious point of view would no doubt be a heavier penalty, the penalty of being branded as irreligious and of having another person appointed to his place by the other Brahmins. If this is the true interpretation of the grant as a private religious grant, then the condition as to residence would not be binding, but would have to be regarded as no more than a pious wish expressed by the grantor, similar to such wishes held not to be binding in Wills. But it seems to me that even if the condition could be placed on a higher level than this, it would not be binding. It would offend against the general rule of law that where an interest is created absolutely in favour of any person, but the terms of the transfer direct that such interest should be enjoyed by him in a particular manner, that person shall be entitled to receive such interest as if there were no such direction. This general rule would apply in default of any special rule of Hindu Law by reason of sections 2 and 11 of the Transfer of Property Act. The general rule was applied to the Agrahar grant in the case of *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* (1) by the Madras High Court, and no other case has been quoted before us nor has reference been made to any special rule of Hindu Law. It has been said that grants for pious purposes might be accompanied by conditions such as that the donor should be maintained by the donee during his lifetime, and that his exequial ceremonies should be performed after his death, that the donee should defray expenses of the worship of the idol, and that the property should pass to another in a particular event, yet provisions which are repugnant to the nature of a grant, such as restraint upon alienation or partition, would be invalid, and where the gift is in itself good, conditions which are repugnant are ineffectual, but the gift itself remains good. These remarks are quoted from paragraph 375 of the 8th Edition of Mayne's Hindu Law. It is true that the general rule applied in the case of *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* (1) was that against a condition restraining alienation prescribed by section 10 and not that against the unrestrained enjoyment of property prescribed by section 11 of the Transfer of Property Act. But it seems to me that the reasoning which was applied to the one rule would equally apply to the other, and that if a restriction against alienation were invalid under section 10, equally so would a restriction against the full enjoyment of the property be invalid under section 11 of the Transfer of Property Act. That decision would also support the view that a grant of this particular nature should be regarded as one for private religious purposes and would not stand on the same footing as a public religious endowment. Considerations of a different nature would apply to the latter, and it might in such a case be possible to enforce restrictive terms in a regular suit under section 92 of the Civil Procedure Code

It seems to me, therefore, that the view taken of this matter was incorrect both in the original and Appellate Courts. There seem to me also serious difficulties in the way of the view, that the condition as to residence had not been broken, taken by the lower Appellate Court. But it is not necessary to discuss further this latter view, as the remand order must, in my opinion, be upheld upon the particular view of the law relating to such grants for religious purposes taken by this Court.

Order affirmed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 238 OF 1917.

March 23, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

MR. JOHN PIERPONT MORGAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu RAMJEE RAM—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 22

PIERPONT MORGAN *v.* RAMJEE RAM.

(3), 17[2]—Thikadar, *purchase of occupancy right by, effect of—Purchase made before* 1907, *validity of—Purchase made after expiry of* thica—*Agreement in lease not to set up occupancy rights, validity of.*

Prior to the Bengal Tenancy (Amendment) Act of 1907 the acquisition by a *thikadar* of an occupancy right by purchase was not barred by section 22 (3) of the Bengal Tenancy Act, and the amendment of the Act in 1907 did not take away rights of occupancy which had already vested in a *thikadar*. [p. 369, col. 2; p. 370, col. 1.]

Section 22 (3) of the Bengal Tenancy Act relates only to acquisitions of occupancy rights made by an *ijaradar* while still holding the *ijara* It has no application to purchases of such rights made after the expiry of the *ijara*. [p. 371, col. 2.]

A *thikadar* who purchases an occupancy holding acquires it as a non-occupancy holding [p. 371, col. 1.]

Any agreement in a lease not to set up rights of occupancy in lands in which such rights have accrued is void under section 178 of the Bengal Tenancy Act. [p. 371, col. 2.]

Appeal from a decision of the Subordinate Judge, Muzafferpore, dated the 1st August 1917.

Messrs. *Pringle Kennedy* and *A. K. Roy*, for the Appellants.

Messrs. *L. N. Singh* and *Gargadhar Das*, for the Respondent.

JUDGMENT.

ADAMI, J.—This appeal comes before us after remand to the Subordinate Judge, Muzafferpore, for the determination of certain issues.

It appears that in the year 1903 there was a Collectorate partition of Mouza Rela Narain, and the plaintiff's predecessor-in-title obtained an eight-annas share in the Mauza which was formed into a separate Patti bearing Touzi No. 295. While the Mouza was still in joint possession of all the Maliks, a *thika* lease was granted of its entire area to the India Development Company who owned an indigo factory known as Athur Factory, and it seems that this Company were in possession under successive leases for the period of about 40 years. On the 6th July 1905 Mr. Hickley, as manager of the company's factory, obtained from the plaintiff's father a fresh lease of the Patti bearing Touzi No. 295 for the period of five years, at an annual rent of Rs. 672-11-6 During the period of this lease the defendants, who are a firm carrying on the business of growing indigo and sugar-cane, purchased the right, title and interest in the Athur Factory and the lands covered by the lease from the Indian Development Company. The lease should have expired in July 1910 but by consent the defendants were allowed an extension of one year, so that it actully expired on the 6th July 1911.

It will be convenient to set forth here the following extracts from the *kabuliyat* which are necessary for the proper understanding of the case:—

"(1) I, therefore, give this *kabuliyat* in writing (and do declare) that I, the declarant, shall year after year, till the term of this *kabuliyat*, appropriate the produce of the land by personally cultivating it or getting it cultivated by others with indigo or sugarcane, or by entering into any negotiations or settlement with tenants according to my wishes.

"(2) That I shall not allow any land declared by the survey as *khudkasht* to go into the *kasht* of any tenant.

"(3) That if within the term of the *thika* I, the declarant, bring any suit against any tenant for arrears of rent and purchase at auction the *kasht* of any tenant in execution of the decree obtained therein, I shall keep it in my possession till the term of the *thika* and after the expiry of the term of this *thika* I shall give up possession of the same on receiving the purchase money from the Malik and shall not bring forward any excuse in doing so.

"(4) After the expiry of the term of this *kabuliyat* in 1317... I shall give up possession of the land and to this I, the declarant, my heirs and representatives shall have no objection, that I, the declarant, shall not set up right of occupancy to any land except in respect to the land purchased at auction from the tenants, which, according to the terms laid down above, the said Malik may not have taken back on payment of purchase money after the expiry of the term of the *thika*, that if contrary to this, I, the declarant, set up any claim, the said Malik is and will be entitled to take possession of the Dakhili land of me, the declarant, and to realise mesne profits up to the date of delivery of possession at the rate of Rs. 25 per *bigha* per annum by bringing a suit in Court."

It is the plaintiff's case that in the Patti leased to the defendants there were 99 *bighas* 12 *kathas* 1 *dhur* 8 *karants* of *zeriat* and *bakasht* land and that on expiry

of the lease, while giving up possession of the rest of the lands in the Patti, the defendants continued in possession of the 99 *bighas* 12 *kathas* 1 *dhur* and 8 *karants*, and even when, on the 5th February 1913, a notice was served on them to relinquish these lands, the defendants delivered possession of 27 *bighas* 14 *kathas* only, claiming to have a right of occupancy, obtained by purchase, in the rest which, they alleged, measured 63 *bighas* 7 *kathas*.

The plaintiff, therefore, brought this suit on the 27th September 1915 for a declaration of his proprietary right to 71 *bighas* 18 *kathas* 6 *dhurs* still in possession of the defendants and for the ejectment of the defendants therefrom. He also claimed mesne profits at the rate of Rs. 25 a *bigha* per annum up to 1320 in respect of the 27 *bighas* 14 *kathas* delivered up in 1913, and up to the date of the suit in respect of the other lands.

The defendants resisted the suit, claiming that they had acquired occupancy rights in all the lands of which they were still in possession, measuring 68 *bighas* 6 *kathas* 13 *dhurs*, having purchased the occupancy right of tenants either privately or in execution of rent decrees before, during and after the terms of their *ijara* lease, and that, therefore, they could not be ejected. They denied that any of the land was *zeriat*. They relied on the terms of the lease whereunder the plaintiffs, on the expiry of the lease, were to get back the lands purchased by the defendants from tenants on payment to the defendants of the purchase price, and contended that, as no offer of payment had been made within three years of the expiry, the plaintiffs must be taken to have waived their right and were now barred by limitation from enforcing it.

With regard to mesne profits the defendants characterised the rates claimed as incorrect and excessive and alleged coercion and undue influence. They denied that there had been any usurpation, since the plaintiffs had failed to pay the purchase price to them.

The learned Subordinate Judge came to the conclusion that the greater part of the land in suit was landlord's *bakasht* at the date of the lease, though it is difficult to discover on what evidence he based this conclusion. We cannot find sufficient material in the record to justify it. Having formed this opinion he held that under the terms of the lease the defendants could not claim occupancy rights in landlord's *bakasht* and that they were mere trespassers after the lease expired, while during the lease, the *thikadars* stood in the shoes of the proprietor and any purchase made by the former would enure to the benefit of the latter. He held that under sub-section (3) of section 22 of the Bengal Tenancy Act, as it stood both before and after the amendment of the Act in 1907, the *thikadar* could not claim either an occupancy right or any kind of tenancy. With regard to *wasilat* the learned Subordinate Judge believed the plaintiff's case that the defendants did not surrender the 27 *bighas* till the receipt of the notice in February 1913 and granted *wasilat* for all the rest of the land claimed, except 13 *bighas* proved to have been purchased in auction, for the three years preceding the suit, that is to say, for 1320—1322. He found that the *wasilat* must be paid at the rate of Rs. 25 a *bigha* according to the terms of the lease, as no undue influence or coercion was proved and the bargain was not hard or unconscionable. He allowed Rs. 248 to be deducted from the claim on account of purchase money advanced by the defendants.

On appeal to this Court the question was raised whether the lands covered by the *kabalas* and sale certificates, relied on by the appellants to prove their purchase before and after the term of the lease, could be identified as lying within the ambit of the plaintiff's Patti. As there was no material for the ascertainment of their identity, two issues were remanded to the lower Court for trial, one relating to the lands purchased before the lease and the other to those bought after it had expired. It seems that an Amin was taken to the lands by the defendants and that this Amin with the help of a Tahsildar, and by inquiries from villagers, came to certain findings as to the identity of the lands. The Amin and the Tahsildar were examined by the lower Court, who relied on their evidence and decided the two issues accordingly. The plaintiff did

not produce any witness who could give evidence as to identi y.

Mr. Kennedy for the appellants had, when the appeal first came before this Court, classified the lands in their possession under three separate headings :

(1) 31 odd *bighas* of land in which they acquired *raiyati* interest prior to the lease of July 6th, 1905 ;

(2) 15 odd *bighas* of land in which they acquired *raiyati* interest during the pendency of the lease; and

(3) 12 odd *bighas* of land in which they acquired *raiyati* interest after the expiry of the lease.

The findings of the lower Court on remand show that out of the 31 *bighas* covered by the *kabalas* and sale certificates showing purchases before 1905, only 20 *bighas* 18 *kathas* 13 *dhurs* are within the plaintiff's Patti and that out of the 12 *bighas* covered by the sale certificates granted after 1911, only 2 *bighas* 6 *kathas* 10 *dhurs* fall therein. Mr. Kennedy admits that he can claim the protection of occupancy rights only with regard to the 15 *bighas* bought during the term of the lease and the 20 *bighas* 18 *kathas* 13 *dhurs* and 2 *bighas* 6 *kathas* bought before and after it respectively, in all 38 *bighas* odd, and that his client will be liable to pay damages for retaining possession of the remainder of the land in suit, amounting to 30 *bighas* or so. He points out, however, that on the 12th September 1917 the defendants appellants, having relinquished all the lands in suit pending decision of the appeal, made petition before the Executing Court that notice might be given to the decree-holders, present respondents, that possession had been given up and such notice was accordingly served. The appellants cannot, therefore, be made liable for damages subsequent to that date.

The main question in this appeal deals, then, with 38 *bighas* within the Patti, which have been purchased by the defendants from tenants who held them as occupancy *raiyats*, and we have to determine whether the defendants, by the purchase, obtained occupancy rights in the purchased land which will save them from ejectment.

The lands are divided into three categories; those purchased before, those purchased during and those purchased after the term of the lease, and each class must be considered separately.

First, as regards the 20 *bighas* 18 *kathas* 13 *dhurs* bought previous to the lease of 1905, namely, in 1894, 1893, 1889, 1891 and 1895: There appears to be no doubt that the defendant's predecessors, when they made the purchases, were *thikadars* under their then existing leases, and the question is whether under the terms of section 22 (3) of the Bengal Tenancy Act, they could, as such, acquire an occupancy right by purchase. Before 1907, sub-section (3) ran :—

"(3) A person holding land as an *ijaradar* or farmer of rents shall not, while so holding, acquire a right of occupancy in any land comprised in his *ijara* or farm."

The question then arose whether the word "acquire" was to be taken to relate only to acquisition under the provisions of the Act, or would include acquisition by purchase or other forms of transfer. It was held in *Ramrup Mahto* v. *H. Manners* (1) that the word would not include "purchase" but was confined to acquisition of the status of occupancy *raiyat* as described in the Act. The Bengal Tenancy Act was amended in 1907, and, to make it clear that any kind of acquisition of occupancy right was to be barred, the words "by purchase or otherwise" were inserted after the word "acquire" in sub-section (3) of section 22. Then, in 1911, in the case of *Raghubir Mahto* v. *H. Manners* (2) Mukerjee, J., questioned the decision in *Ramrup Mahto* v. *H. Manners* (1), and expressed the opinion that the amendment merely gave effect to what had always been the law. The fact remains that before the amendment the Court interpreted the sub-section as excluding acquisition by purchase and the Legislature, by finding it necessary to make the amendment, admitted that it was not clear that such acquisition was included. We must hold, I think, that prior to the Act of 1907 the acquisition by a *thikadar* of an occupancy right by purchase was not barred by section 22 (3) and that, therefore, the defendants acquired such a

(1) 4 C. L. J. 209.
(2) 11 Ind. Cas. 389; 13 C. L. J. 568.

right in the 20 *bighas* 18 *kathas* 13 *dhurs*.

Learned Counsel argues that the defendants by their conduct have shown that they did not claim *raiyati* rights in the land, and throughout treated the holding as belonging to the Maliks He points out that the defendants themselves looked after the survey proceedings and had these 20 *bighas* described in the Record of Rights published in 1897 as *bakasht thikadar*. It is true that the defendants are not recorded as *raiyats* of the lands, but a Settlement Officer, finding that they were *thikadars* of the Patti and that they were themselves cultivating the lands would naturally enter them *bakasht thikadar*, which simply means that they were lease lands which the *thikadar* was cultivating himself. The amendment of the Act in 1907 could not take away rights of occupancy already vested in the defendants.

There is no good evidence that these lands were the landlord's *bakasht* at the date of the lease, or that the lands were *zeraiat*. It is contended that, at the time the lease of 1905 was executed, the defendants did not set up any *kashtkari* right, and, in fact, agreed not to claim such right. There is no evidence that in any previous lease the defendants agreed not to claim the right, and whatever they may have undertaken in this respect in the lease of 1905 could not affect the occupancy right which, we have found, was acquired by purchase previous to 1907. Any such agreement in the later lease would be void under the provisions of section 178 of the Bengal Tenancy Act.

The condition in the lease as to giving up the *kasht* of any tenant purchased at auction refers only to purchases made during the term of the lease, and not to previous ones.

We next come to the acquisitions made during the term of the lease. It is not contended by the appellants that they could acquire an occupancy right by purchase after 1907. Mr. Kennedy urges, however, that though no occupancy right could be obtained, section 22 (3) does not bar the purchase of a non-occupancy right and further, that, under the conditions of the lease, the defendants can set up a right of occupancy in land purchased at auction from the tenants for which on the expiry of the lease the plaintiff has not offered to the defendants the auction purchase money paid by them. It is, I think, plain that the defendants could not acquire occupancy rights in these lands. There is the express provision in the law against it, whatever may be the terms of the contract. The question to be decided in regard to these lands is whether the purchase gave the defendants non-occupancy rights. If it did, the suit to eject the defendants from these lands is clearly barred by limitation under Schedule III to the Bengal Tenancy Act.

Mr. Kennedy relies on the cases of *Jawadul Huq* v. *Ram Das Saha* (3) and *Rom Mohan Pal* v. *Sheikh Kachu* (4), in contending that where an *ijaradar* purchases an occupancy holding, such holding does not cease to exist but only the occupancy right is terminated, and also on *Sheonandan Singh* v. *Ramhit Singh* (*Deo Saran Singh*) (5), where it was held held that an *ijaradar* who has purchased an occupancy holding acquires it as a non-occupancy holding. Both of the two first mentioned cases deal with the purchase of an occupancy right by a co owner and with section 22 (2), but they decided that it is the occupancy right and not the holding which is extinguished by the transfer: the holding is merely divested of the incidents which attach to an occupancy holding. The principle laid down in those cases would apply in a case under sub section (3) which does not bar an *ijaradar* from acquiring non-occupancy rights. On the other hand Mr. Singh cites the cases of *Raghubar Mahto* v. *H. Manners* (2) and *Manners* v. *Satroghan Das* (6). The decision of Mukerjee, J., in the former would seem to disagree with the opinion he formed in *Sheonandan Singh* v. *Ramhit Singh* (*Deo Saran Singh*) (5), cited above, but it is clear that the facts were different. In neither *Raghubar Mahto* v. *H. Manners* (2) nor *Manners* v. *Satroghan Das* (6) was the main question the effect of the purchase of an occupancy holding by the *ijaradar*. In both of them the question

(3) 24 C. 143; 1 C. W. N. 166; 12 Ind. Dec. (N. S.) 761.

(4) 32 C. 386; 9 C. W. N. 249 (F. B.); 1 C. L. J. 1.

(5) 13 Ind. Cas. 598; 15 C. L. J. 647.

(6) 36 Ind. Cas. 178; 20 C. W. N. 800.

seems to have been mainly whether the lease was a cultivating lease or the lease of a tenure and whether occupancy rights had accrued through long possession, though in the former the *ijaradar* seems to have induced the tenants to give up lands to him. In *Manners* v. *Satroghan Das* (6) Sharfuddin, J., considered the case from the point of view of merger. Now if it was contemplated that when an *ijaradar* purchases an occupancy holding the occupancy right merges in the *ijara*, the framers of the Act would surely have found it sufficient to omit the word "permanent" from sub-section (1) of section 22, which would then have the desired effect in the case of a purchase by an *ijaradar*. It is clear that sub-section (3) does not mean that the occupancy right merges; it simply means that no occupancy right passes.

In *Sheonandan Singh* v. *Ramhit Singh* (*Deo Saran Singh*) (5) Mukerjee, J., states: "Assume, therefore, for a moment that a person holding land as an *ijaradar* is not entitled, while so holding, to acquire by purchase a right of occupancy in any land comprised in his *ijara*. The result is that if an *ijaradar* purchases an occupancy holding, he acquires it as a non-occupancy holding."

In the present case, as was held in the one just cited, the defendants' character as purchasers conferred upon them the status of *raiyats*, but not of occupancy *raiyats*. It may be contrary to the intention of the framers of the Act that landlords and tenure-holders should be allowed to acquire *raiyati* rights, but until sub-section (3) is amended it cannot prevent the acquisition of non-occupancy rights.

Having found, then, that the defendants were, on the expiry of the lease, non-occupancy *raiyats* of these 15 *bighas*, we must hold that under Schedule III to the Bengal Tenancy Act, the suit to eject them from those lands is out of time.

With regard to the undertaking in the *kabuliyat* to give up the *kasht* lands purchased in execution of rent suits against the tenants on receipt of the purchase money, and not to set up a right of occupancy in such lands except where the plaintiff failed to offer to pay the purchase money, it need only be remarked that the plaintiffs up to the date of the suit had not offered payment of the purchase money. The reason they give is that there was so much *wasilat* due from the defendants that it was only necessary to set off the purchase money. That reason, however, was not a good one. They were bound to make the offer if they wanted the lands.

With regard to the last class of lands, those purchased after the expiry of the lease in execution of decrees for rent which fell due during the lease, there is, I think, no doubt that the defendants must be held to have acquired occupancy rights, for section 22 (3) relates specifically only to acquisitions of occupancy rights made while still holding the *ijara*.

We hold, therefore, that the defendants acquired occupancy rights in the lands purchased before 1905 and after 1911, and that they cannot now be ejected from the lands purchased during the lease, in which they have non occupancy rights, because the suit was instituted beyond time.

The last point to be decided is that of *wasilat* or damages. Under the terms of the *kabuliyat* the defendants' predecessors undertook to pay mesne profits at the rate of Rs. 25 a *bigha* per annum if, on the expiry of the term of the lease, they did not give up possession of the lands and if they set up any claim to a right of occupancy in respect of any lands other than lands purchased at auction from tenants for which the lessors had not offered payment according to the terms of the lease.

So far as concerns the lands in which the defendants have been found to have acquired occupancy rights before the lease was executed, it is clear that no mesne profits or damages are payable, the lease referred only to occupancy holdings purchased during its term. The defendants have a right to remain in possession of those lands. Any agreement in the lease not to set up right of occupancy in lands in which such right had accrued would be void under section 178, Bengal Tenancy Act.

We have found that, with regard to occupancy holdings purchased during the term of the lease, the suit to eject the defendants is barred by limitation, they

being in possession as non occupancy *raiyats*. The defendants, however, undertook to give up these lands on the expiry of the lease if the plaintiff offered payment of the sum paid by the defendants as auction-purchasers, and it was agreed that the rate of Rs. 25 per *bigha* should not be payable by the defendants in respect of the lands if the lessor did not make payment of the purchase price. The lessor has not offered payment up till the date of the institution of the suit, which was over three years after the expiry of the lease. The defendants contend that this offer of payment was not made within a reasonable time and that the lessor must be taken to have elected not to exercise his option.

What is a reasonable time depends on the facts in every case, but it is not necessary for us to decide the question in this case, since we have found that the defendants were up to the date of the suit in rightful possession as non occupancy *raiyats* and cannot be ejected, and offer of payment of the purchase-money had not up till then been made.

For lands in which occupancy rights have been acquired by purchase after the date of the suit mesne profits will of course not be payable since before the expiry of the lease and the date of the acquisition, such lands were in possession of occupancy *raiyats*. Thus we find that no mesne profits are payable in respect of the *raiyati* lands acquired by the defendants before, during, and after the lease, that is to say, an area of 33 *bighas* 4 *kathas* 13 *dhurs*.

For the remaining area out of the total of the 68 *bighas* 6 *kathas* 13 *dhurs*, namely, 30 *bighas* 2 *kathas*, Mr. Kennedy admits that *wasilat* will have to be paid up to the date when notice of abandonment of the lands was given to the plaintiff, namely, up to 12th September 1917, but contends that the rate of Rs. 25 per *bigha* per annum is far too high and was fixed as a penalty.

The learned Subordinate Judge has found that there was no undue influence or coercion and that the bargain to pay at this rate was not hard and unconscionable.

The plaintiff's witnesses themselves have deposed that the highest rate for land in the village is Rs. 10 per *bigha* per annum and that the usual rate is Rs. 8, so that it is clear that the rate of mesne profits stipulated for is far above the ordinary rate. The defendants contracted to hold the land for the term of the lease paying an annual rental of Rs. 672-11-6 and to deliver up the land under certain conditions on the expiry of five years. If they failed to deliver up possession or made any claim, they were to pay mesne profits to the lessor at the rate of Rs. 25 per *bigha*, that is to say, they were to pay Rs. 2,475 a year for the 99 *bighas*. The contract to pay mesne profits is a secondary one intended to secure the fulfilment of the primary contract to relinquish the land on the expiry of the lease: it may be just and reasonable that the lessor should be thus secured, but the high rate agreed on is clearly by way of a penalty and it is open to this Court to award reasonable compensation in lieu of such an excessive rate.

We are of opinion that the highest rate of rent for land in the village as shown by the plaintiff's witnesses would be a fair rate in this case and we accordingly decide that the defendants should pay at the rate of Rs. 10 per *bigha* per annum for the 30 *bighas* 2 *kathas*.

As a result the appeal will be allowed in part, and the decree of the lower Court will be modified to the extent that the plaintiff will be declared entitled to recover possession of the said 30 *bighas* 2 *kathas* of the lands mentioned in schedule II and will be allowed *wasilat* at the rate of Rs. 10 per *bigha* per annum for the 27 *bighas* of land of schedule II for 1320, and for the 30 *bighas* 2 *kathas* out of the lands mentioned in schedule II, *wasilat* at the same rate for three years from 1320 to 1322 F. S. There will be no deduction on account of purchase money paid by the defendants.

The parties will get costs in both Courts proportionate to their success.

DAS, J.—I agree.

Appeal partly allowed.

RAM LAL SEN *v.* BIDHUMUKHI DASI.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 44 OF 1916.

July 3, 1919.

Present:—Mr. Justice Greaves.

RAM LAL SEN—PLAINTIFF

versus

BIDHUMUKHI DASI AND OTHERS—DEFENDANTS.

Hindu Law—Will, construction of—Bequest to wife for life with remainder to sons—Accumulation, direction for, validity of.

A direction in the Will of a Hindu testator to accumulate the surplus income of devised property with a gift of the accumulations is not fundamentally bad: it only fails if it offends some independent rule of Hindu law [p. 376, col. 2; p. 377, col. 1]

A testator by his will appointed his wife his executrix and trustee and "gave devised and bequeathed unto her the rest and residue" of his moveable and immoveable properties for her life and after her death to his five sons in equal shares, with directions to incur certain expenses and to accumulate the surplus income for the benefit of the sons:

Held, that the provision for accumulation of the surplus income was not bad. [p. 378, col. 1.]

Mr. *N. N. Sircar* (with him Messrs. *L. P. E. Pugh, H. C. Majumdar* and *B. C. Ghose*), for the Plaintiff.

Mr. *B. Chakraverty* (with him Mr. *C. C. Ghose*), for the Defendants Sankar Lal and Rash Behary.

Mr. *N. Mukerjee*, for the Defendant Champa Dasi.

Mr. *S. C. Bose*, for the Defendant Bipin Behary Sen.

Mr. *S. N. Banerjee*, for the Defendants, Manik, Nitya and Gour.

Mr. *D. Bose*, for the Defendant Barai Dasi.

Mr. *S. K. Chukerbutty*, for the Defendant Gosto Behary Sen.

Mr. *B. K. Ghosh* (with him Mr. *H. D. Bose*), for the Defendant Sham Lal Sen.

Mr. *C. R. Das* (with him Mr. *B. L. Mitter*), for the Defendant Bidhumukhi Dasi.

JUDGMENT.—The plaintiff in this suit seeks to have the Will of one Ram Gopal Sen construed and the rights, shares and interests under the said Will of the parties to the suit ascertained and for administration of the estate of Ram Gopal Sen under the direction of the Court and for an account of the estate from the defendant Bidhumukhi Dasi from the testator's death and for partition. The plaintiff is a son of Ram Gopal Sen, the 1st defendant is his widow and the executrix of his Will, the defendant Sham Lal Sen is a son, the defendants Manick Lal Sen, Nitya Lal Sen and Gour Lal Sen are sons of a deceased son Heera Lal Sen who survived the testator and died after the institution of the suit, the defendants Sankar Lal Sen, Rash Behary Sen and Gosto Behary Sen are sons of another son of the testator named Bolai Chand Sen who survived the testator and died in the year 1895, the defendant Champa Dassi is the widow of another son Adhar Lal Sen who survived the testator and died in 1885 without leaving a son but leaving four daughters, three of whom are dead, two of them having left male issue, the defendant Bepin Behary Sen is a son of Doyal Chand Sen, a son of the testator who predeceased him, and the defendant Srimati Barai Dassi is a daughter of another son of Doyal Chand named Amrito who is dead. Srimati Barai had a son born to her last April. Amrita had a son Ganesh who died some time in or after the year 1905.

Ram Gopal Sen died on the 16th November 1880 a Hindu governed by the Bengal School of Hindu Law leaving a Will, dated the 9th October 1878, probate whereof was granted out of this Court in the year 1882 to the defendant Srimati Bidhumukhi Dasi, the executrix therein named. The heirs of Ram Gopal Sen at the time of his death were his five sons Bolai Chand, Sham Lal, Ram Lal, Adhar Lal and Heera Lal, and his two grandsons Bepin Behari and Amrita Lal.

The testator by his said Will appointed his wife, the defendant Srimati Bidhumukhi Dasi, executrix and trustee thereof and directed her to pay his debts and funeral and testamentary expenses and to expend a certain sum therein named on his first Sbrad and after giving certain legacies, including a sum of Rs. 20,000 in Government 4 p. c. securities, to his wife for her life, to the end that she might spend and enjoy the interest thereof during her life, gave, devised and bequeathed the rest and residue of his estate moveable and immoveable unto his wife and her assigns for life interest to collect the rents, issues and profits thereof and to pay the ground rents, taxes and assessments payable in respect of the immoveable property and to keep the same in repair, and in the second place to expend according to her discretion a sum of not more than Rs. 3,600 a year

towards the maintenance and education of his family, consisting of his wife his five sons thereinafter named, and their wives and children and the widow and children of his deceased son Doyal Chand Sen, and in defraying other family and customary expenses, and in the next place to accumulate the surplus income for the benefit of his said five sons, they all living in commensality in his dwelling house, and he directed that in case any of his said sons should live apart from the rest of his family he should be paid a monthly sum of Rs. 25 for his maintenance. The testator then upon the death of his wife gave, devised and bequeathed his house No. 30, Sunker Halder Lane, and certain shares to his infant grandsons Amrita Lal and Bepin Behary in equal shares, subject to the charge of maintaining their mother, and provided that in the event of either of them dying without male issue his share would pass to the survivor, subject to the charge of maintaining his widow and female issue (if any) and marrying the latter, and he provided that in the event of both his grandsons dying without male issue the bequest, except the Railway shares which were to pass to the survivor's heirs, should revert to and become a part of his residue, to devolve on his said five sons and their heirs subject to the limitation thereunder provided. And he gave the rest and residue of his estate moveable and immoveable on the death of his wife to his five sons, whom he named, in equal shares and proportions, but he provided that in the event of the death of any of them without male issue his share should pass to the survivors or survivor, subject to the charge of maintaining his widow and marrying the daughter of the son so dying, should he leave any, and paying to such widow or daughter Rs. 1,000 or more, at the same rate if more than one.

The plaintiff contends that the provision for accumulation is bad not on the ground of the length of the period of accumulation but as being repugnant, and he contends that if there is no gift until the wife dies there is an intestacy as to the amounts directed to be accumulated until her death. The widow contends that the accumulation is good and that the suit is premature and that nothing is divisible until her death; alternatively she contends that she takes a life estate in the whole income, the provision for accumulation being merely discretionary, and in the further alternative she contends that she gets a life estate by implication.

If the widow's main contention, namely, that the provision for accumulation is not invalid, prevails, then no question at present arises for decision and the suit is premature as no case for an account has been made out. But it seems to me that to decide if the provision for accumulation is valid, it is necessary first to see whether under the Will the sons took immediate vested interests under the Will or if vesting is postponed until the widow's death. If the sons took vested interests at the testator's death, then one of the arguments levelled against the provision for accumulation goes, namely, that the accumulations having no owner until the widow's death the provision for accumulation is bad. The argument is based on a passage in Trevelyan's Hindu Law, 2nd Edition, page 41, where it is laid down that every part and interest in a property must have an owner, it cannot remain in suspense or abeyance without an owner, it must vest in some one.

Now the clause in the Will directing the accumulations contains no express gifts of the accumulations and I do not think that any gift can be implied from the words "for the benefit of my said five sons." The sons are entitled to be maintained out of the sum of Rs. 3,600 or if they separate, they get Rs. 25 a month from the estate, and if the words "for the benefit of my said five sons" were intended to confer an immediate gift of surplus income, it is at least unlikely that there would have been as well provision for their maintenance. Presumably, therefore, if the provision for accumulation is valid, the accumulations fall into residue and pass under the gift of the rest and residue of the estate to the five sons on the death of the widow. Did then this gift vest in the sons on the death of the testator or is vesting postponed until the widow's death? I think that the gift vested on the death of the testator. Section 47 of the Hindu Wills Act, which is section 106 of the Succession Act, provides

that where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the Will, become vested in the legatee on the testator's death and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is, from the testator's death, said to be vested in interest, and the explanation to the section states that an intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed or whereby a prior interest therein is bequeathed to some other persons or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives or from a provision that if a particular event shall happen the legacy shall go over to another person. I cannot see that in the Will before me any contrary intention appears, and the fact that there is a gift over to the surviving sons, in certain events, of a son's share (and the expression "his" share certainly looks like a vested interest) is not in my opinion a contrary intention and in fact the section so states.

That such a gift is a valid gift see section 59 of the Hindu Wills Act and it does not make the interest any less a vested interest but merely divests in certain events the estates or gift which has already vested. I think the five sons upon the death of the testator took immediate vested interests in the residue, which includes the accumulations, but I think that the estate of any son was liable to be divested upon his death without male issue during the lifetime of the widow. Counsel for Champa Dassee contended in reliance on *Poultney, In re*; *Poultney* v. *Poultney* (1) that "dying without male issue" meant death in the testator's lifetime, but unfortunately for his argument he has failed to notice that the decision of Joyce, J., in *Poultney, In re*; *Poultney* v. *Poultney* (1) was reversed on appeal see *Poultney, In re*; *Poultney* v. *Poultney* (2). I think that "dying without male issue" upon the true construction of the clause means death in the widow's lifetime and that Adhar's vested interest was divested upon his death in the widow's lifetime, without male issue, but of course under the terms of the Will the share of Adhar passed to the surviving sons, subject to the charge imposed on the gift of residue of maintaining Champa Dassee when the residue falls into possession and of making the payments to the widow and daughters directed by the Will. It did occur to me that a possible solution of any difficulty with regard to the accumulations might be found in holding that as under the gift of residue the accumulations pass to the sons eventually, they might upon the principle of *Saunders* v. *Vautier* (3) and like cases stop the accumulations at any time and claim the surplus income as it accrues. But two difficulties present themselves, (*i*) the gift over to the surviving sons in the event of a son dying without male issue in the lifetime of the tenant for life, (*ii*) the rights of Champa Dassee and her daughters respectively to maintenance and legacies out of Adhar's divested share of the residue, which includes the accumulations. The 1st point might be got over by the sons agreeing *inter se* to give up their rights of survivorship, but the 2nd point remains and could only be got over by Champa Dassee releasing her right of maintenance against the accumulations and by payment to her and her daughters of their legacies. But as matters stand I am of opinion that the principle of *Saunders* v. *Vautier* (3) has no application.

It remains, therefore, to consider under the circumstances of this case whether the provision for accumulation of surplus income during the lifetime of the widow is valid according to Hindu Law, bearing in mind the fact that according to the construction which I have put upon the residuary gift, the sons took immediate vested interests upon the testator's death. Now the question of the validity in a Will of a provision for accumulation of surplus income was recently discussed by the Appeal Court in *Watkins* v. *Administrator General of*

(1) (1912) 1 Ch. 245.
(2) (1912) 2 Ch. 541; 81 L. J. Ch 743; 107 L. T. 1; 56 S. J. 667.

(3) (1841) Cr. & Ph. 240; 10 L. J. Ch. 354; 54 R. R. 286.

Bengal, Suit No. 611 of 1907, Appeal No. 92 of 1913.* The case has escaped the vigilance of the reporters or perhaps I should rather say is unreported owing to their lack of vigilance. There Sir Lawrence Jenkins in delivering the judgment of the Court in unequivocal terms lays down, after discussing the cases that "A direction to accumulate with a gift of the accumu-

*The following is the judgment in Appeal No. 92 of 1913, dated March 4, 1914, decided by Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe

JENKINS, C J.—Once more the Will of Haridass Dutt is before the Court

The testator by this Will made provision, as he thought, for the adoption of a son or sons He died in 1877, and in the following year an adoption ceremony was performed as contemplated by the Will. In 1881 the boy died and after the lapse of a month the testator's widow, Swarnamoyee Dassee, again purported to make an adoption, the boy this time being Amrita Lal Dutt This boy was married in the family and throughout treated as a validly adopted son until he instituted a Suit No. 535 of 1894 against Swarnamoyee Dassee and her daughter and their sons, claiming the corpus of the estate and in any event the surplus income notwithstanding the provision for postponment of vesting and accumulation contained in the Will

By way of defence the validity of Amrita's adoption was denied and this plea was upheld by this Court on appeal and by the Privy Council. Since then the Will has been the subject of two more appeals to the Privy Council, and if the forecast of Counsel is correct, there are probably as many more appeals to that tribunal in store.

The determination of this suit turns on the true construction of clause 9 of the Will which is in these terms:—

"I direct my executors and executrix and trustees to pay out of the income and interest of my estate and effects monthly all necessary household expenses as well as for the worship of our family idol Sri Sri Radha Gobindji and to pay my wife monthly during her natural life for her sole and separate use the sum of Rupees two hundred and also the sum of Rupees fifty monthly to such adopted son, who shall live and attain his full age of 18 years, after his so attaining such age of 18 years during the lifetime of my said wife, provided he remains under her control and bears a good character, and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour, and for the purposes of such monthly expenditure my executrix, executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government securities in their joint names, but in no case shall such adopted son have or exercise any control, dominion over my estate and effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my estate and effects both real and personal immoveable or moveable whatsoever and wheresoever and of what nature or quantity soever to such adopted son who shall survive my wife, if he shall have attained his age of 18 years during the lifetime of my wife or on his so attaining such age after her decease, to whom and his heirs I give, devise and bequeath the same. But in case none of such adopted sons survive my said wife or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors after the death of my said wife or the death of such son after her but under such age of 18 years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without having any male issue surviving but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in case of the death of other daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike"

As there was and could be no adopted son, it is necessary to see what the testator's family was at his death Besides his widow Swarnamoyee, he left two daughters, Ranimoni Dasi and Premmoni Dasi, and three grandsons Radha Prasad Mullick, Kassi Prasad Mullick and Jyoti Prasad Mullick. After the testator's death two other sons were born to Premmoni Dasi, Peary Lall Mullick and Behari Lal Mullick, while Ranimoni claims to have taken Jugal Kishore in adoption in 1908.

The present suit was instituted on the 17th April 1907 by Mr. Watkins, described as the administrator *pendente lite* of the property and credits of Haridass Dutt, against the Administrator-General of Bengal as executor of the last Will of Swarnamoyee and Lal Mohan Dutt and Preolal Dutt as the executors of the Will of Dwarka Nath Dutt. With these Dutt defendants we now have no further concern, for the suit has been dismissed as against them Since the institution of the suit there have been several amendments On the 7th May 1909 Sreemati Premmoni Dasi and her son Radha Prasad Mullick were added as plaintiffs Both Mr Watkins and Premmoni died before the hearing and thereby Radha Prasad Mullick became and continued up to decree to be the sole plaintiff

Since the institution of the suit Ranimoni Dassi and Jugal Kishore Sen have been added as defendants as also the plaintiff's brothers Kassi Prosad Mullick, Peary Lal Mulick and Behari Lal Mullick.

The prayers to the plaint are numerous, but in effect what the plaintiff seeks to establish is that certain properties named or indicated in the plaint as well as the surplus income accrued during the widow's life form part of the trust estate: and that he and the added defendants are together entitled thereto to the widow's exclusion

This claim has been based on two alternative grounds. First, it is said that in the events which

lations is not fundamentally bad: it only fails if it offends some independent rule of Hindu Law. Thus it may infringe the rule against perpetuities, and so far as that goes it must be a question for consideration in each case whether there is such an infringement or not. Or the direction to accumulate may

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happened the daughters took vested interests in possession from the death of the testator, so that the whole income was payable to them from that date; failing that it is urged that the trust for accumulation was good, so that the daughters and their sons between them became entitled to the income and capital of the accumulated fund.

The Administrator-General on the other hand maintains that the daughters' interests did not vest in possession until the widow's death, that the trust for accumulation during her life was invalid, and that the income was not disposed of, and so went as on an intestacy to the widow as her husband's next heir.

The literal sense of the words in clause 9 of the Will makes the gift to the adopted son conditional on his surviving the widow and attaining the age of 18, and postpones the vesting of the daughters' interests until the death of the widow if there was no adopted son

This in effect is the interpretation placed on the Will by the Privy Council in *Amrito Lal Dutt* v. *Surnomoye Dasi* (1), for it was there said by their Lordships "By the ninth clause the testator provided an income for his wife and adopted son during the life of his wife and directed accumulation of the surplus income The adopted son is to take the property if he survives the widow and attains 18, otherwise it is given over to the daughters" See page 10(1. Later their Lordships describe the testator as "postponing enjoyment during the widow's life and making the boy's interest in the corpus contingent on his surviving the wife and attaining 18." Had the authority to adopt been effective any other construction would obviously have led to results that could not have been intended, seeing that successive adoptions were contemplated.

Though the possibility of an adopted son was out of the question from the first, still in form the gift to the daughters and their sons was on failure of the adopted son and after the death of the widow, and that this gift was good was decided by the Privy Council in *Radha Prasad Mullick* v. *Ranee Mani Dasee* (2). It was there held that the daughters were entitled to the testator's estate in equal shares for life with a remainder over to their sons.

The decision makes no special mention of the accumulations. But whether they be claimed by the widow as heiress, or the daughters and their sons as universal legatees, they are claimed as part of the testator's estate. The gift in the Will is of the "whole of my estate both real and personal," why then should not the accumulations pass to the universal legatees?

It is contended for the Administrator-General,

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first, that a direction to accumulate is absolutely bad, and secondly, that if not, still the direction here never had any effective operation as it was a part of a futile scheme for providing for the adopted son and nothing more.

The Will is governed by the Hindu Wills Act which makes applicable to the Wills of Hindus certain portions of the Indian Succession Act, 1865, that is to say, sections 46, 48, 49, 50, 51, 5 and 57 to 77 both inclusive, sections 81, 82, 85, 88 to 113 (both inclusive, sections 106 to 177 (both inclusive) and sections 178.

It is noticeable that sections 104 and 105 are not made applicable section 15 imposes a bar on bequests to religious or charitable works: section 104 is aimed against directions for accumulation. This omission was (in my opinion deliberate

It is no doubt provided by section 3 that nothing contained in the Act shall authorise any Hindu to create in property any interest which he could not have created before the 1st day of September 1870, but it cannot be said that every direction to accumulate comes within this ban

No case goes this length, though there is a diversity of opinion as to the extent to which accumulations can be validly directed

As far back as 1836 no less an authority than Colville, C.J., delivering the judgment of the Supreme Court, expressed the opinion that it was competent to a Hindu testator expressly to provide for the accumulations of the surplus income of his estate within the limits allowed by law and to make those accumulations subject to a limitation order as there described: *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* (3), while in *Bissonauth Chunder* v *Sreemutty Bamasoondery Dossee* (4) Lord Romilly, delivering the opinion of the Privy Council, refers to the absence from the Will of any direction to accumulate as a matter deserving of observation, a remark that would hardly have been made had it been their Lordships' opinion that the direction to accumulate was necessarily void

In *Rajendra Lall Agarwalla* v *Raj Coomari Dabi* (5) Harrington, J., held that there was nothing illegal in a direction to accumulate made by a Hindu and that, if such a direction was neither so unreasonable in its conditions as to be void as against public policy nor given for the purpose of carrying out an illegal object nor in its effect inconsistent with Hindu Law, it should be given effect to.

In *Natar Chandra* v *Ratanmala Debi* (6) it was held that a direction to accumulate for the purpose of providing for the marriage expenses of the testator's son was good, while in *Jamnabai* v. *Dharsey* (7) a direction to accumulate the income

(1) 27 C. 936: 27 I. A. 128; 4 C. W. N. 549; 2 Bom. L. R. 446; 7 Sar P. C. J. 633; 14 Ind. Dec. N. s. 652.
(2) 35 C. 886: 12 C. W. N. 729 P. C.; 35 I. A. 118 4 M. L. T. 28; 18 M. L. J. 287; 5 A. L. J. 460, 10 Bom. L. R. 604; 8 C. L. J. 48.
(3) (1855) 1 Boulnois 223; 3 Ind. Dec. (o. s.) 133.
(4) 12 M. I. A. 1; 2 Sar P. C. J. 344; 20 E. R. 256
(5) 34 C. 5; 11 C. W. N. 65.
(6) 7 Ind Cas. 921; 15 C. W. W. 66; 18 C. L. J. 85.
(7) 4 Bom. L. R. 893.

be repugnant and so void, as an attempt to deprive a person of the enjoyment of that which has become his property." And later in the judgment he states "What then is the period during which an accumulation can be validly directed? On principle I think it must be for so long a time as the absolute vesting of the entire interest can be withheld" (and I take him to mean by absolute vesting vesting in

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till a boy to be adopted attained the age of 16, was upheld.

In *Benode Behari Bose* v. *Srimati Nistarini Dassi* (8) the question of accumulation arose and their Lordships expressed the opinion, not that the direction was void, but that the widow, who in the circumstances was solely entitled to the fund directed to be accumulated, could *release* the directions for accumulation and enjoy the whole income.

It is true the direction to accumulate for 99 years which came under consideration in *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb* (9) was held to be bad, but it obviously offended the rule against perpetuities. And so a direction which aims at postponing the enjoyment of a presently vested interest created by the testator's Will fails for repugnancy, and to this may be referred the decisions in *Srimati Bramamoyi Dasi* v. *Joges Chandra Dutt* (10) and *Mokoondo Lall Shaw* v. *Gonesh Chunder Shaw* (11).

So far the cases present no great difficulty, but n *Amrito Lall Dutt* v *Surnomoni Dasi* (12), Trevelyan, J., in reference to the direction now under consideration said: "I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate."

I do not clearly understand what the learned Judge here intended to lay down. But though he evidently considered the direction to accumulate in Haridass Dutt's Will void, even he conceded that there might in appropriate circumstances be a good direction to accumulate.

He no doubt remarks that the fact that where there is a minor accumulation can be allowed, and that an accumulation for the purpose of paying debts did not help. Lord Eldon, however, when delivering judgment in the House of Lords in *Thellusson* v. *Woodford* (13) evidently regarded the fact that there would be of necessity an accumulation during lunacy as pertinent to the question whether a direction to accumulate was good. It is worthy of notice that the other members of the Bench declined to express agreement with the views of Trevelyan, J. How then does the matter stand on principle? Under the ruling of the Privy Council "the intention of the testator was to create in favour of his daughters an estate for life with remainder over to their sons." [*Radha Prasad Mullick* v. *Ranee Mani Dassee* (2).]

This gift to the daughter was of the whole of the testator's estate after the death of their mother.

(8) 32 I. A. 193 at p. 200; 15 M. L. J. 331; 7 Bom. L. R. 887; 33 C. 180; 2 C. L. J. 189; 9 C. W. N. 961.

(9) 2 B. L. R. (O. C.) 11.

(10) 8 B. L. R. 400.

(11) 1 C. 104; 1 Ind. Dec. (N. S.) 68.

(12) 25 C. 662; 2 C. W. N. 389; 13 Ind. Dec. (N. S) 435.

(13) (1805) 11 Ves. 112; 8 R. R. 194; 1 Bos. & P. N. R. 357; 32 E. R. 1030.

The gift has been held to be good so far as it relates to the property of the testator at the death. Why should it be bad so far as it relates to the income of that property up to the widow's death?

A direction to accumulate with a gift of the accumulations is not fundamentally bad, it only fails if it offends some independent rule of Hindu Law. Thus it may infringe the rule against perpetuities, and so far as that goes it must be a question for consideration in each case whether there is such an infringement or not. Or the direction to accumulate may be repugnant and so void, as an attempt to deprive a person of the enjoyment of that which has become his property. But if, as the decisions I have cited imply, it was within the power of a Hindu testator to direct the accumulations of property to be added to or made part of his own property, then there would seem to be no difficulty in the way of his making a gift of it to a person who under the same gift may become entitled to the original corpus of the testator's property.

What then is the period during which an accumulation can be validly directed?

On principle, I think it must be for so long a time as the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable, or its course or its devolution can be directed and controlled by a testator.

I know of no other test, and if that be the true test, then the direction to accumulate in this Will is within its bounds and valid.

Therefore, the accumulations passed under the gift to the testator and his sons as a part of the testator's estate.

I think there is no force in the argument that the direction to adopt was inoperative as it merely was an incident of the scheme to make provision for an adopted son. It may be that the expectation that there would be an adopted son was the leading motive for the direction, but it did not on that account cease to operate merely because there could not be an adopted son.

The testator's intention was that the intermediate surplus income should go first to his adoted son and failing that to his daughters and their sons, and that it should so go in the form of accumulations.

The income according to the plaintiff's case has in fact been accumulated, and even if the accumulation had been unnecessary that could not deprive the donees of their right to it. But while I am so far in favour of the plaintiff, I do not think the decree in its present form can stand, for it delegates to the Official Referee the trial and determination of complicated questions of law and fact which should be tried and determined by a Judge of the Court.

possession), "or, for so long a time as that during which the corpus of the property can be rendered inalienable or its course or devolution can be directed and controlled by a testator." This decision of course is binding on me and I have not accordingly thought it necessary to refer to the authorities which are discussed and referred to in the judgment. It remains to apply this decision to the Will before me. Now accumulation is only directed during the lifetime of the widow, consequently there is no perpetuity as this is a period, namely, a life in being, during which the corpus can be rendered inalienable and its course and devolution directed and controlled by the testator. Nor in my opinion is the provision for accumulation repugnant having regard to the form of the residuary gift, and for the reasons which I have already stated. Consequently I hold upon the authority of the above case that the provision for accumulation of surplus income in the Will now before me is not invalid. This disposes of the suit and it is not necessary in the view I take for me to decide whether the widow took a life-estate in the whole income, as I understand that she only desired to press this in the event of the provision for accumulation being held bad. I have expressed my view with regard to Adhar Lal's share, as it was I think necessary for me to do so for the purposes of this judgment; but I do not propose to make any declaration with regard to this share as Adhar Dal's daughters and their representatives are not before the Court and accordingly no declaration which I made would be binding on them. The suit accordingly fails and must be dismissed.

Suit dismissed.

It is specially necessary that the hearing should be before a Judge in view of the difficult points of limitation that may arise.

The suit was instituted on the 12th August 1907, two days within the period prescribed by Article 98 of the Limitation Act of 1877.

The sole plaintiff was Nowell Shaw Watkins. He died before the trial and no one was substituted in his place. Radha Prasad Mulick and Premmoni were not added as plaintiffs till the 5th May 1909.

Over and above this it is suggested that Mr Watkins, was not a competent plaintiff. These matters must be borne in mind when the defence of limitation comes to be considered.

The parties before us have asked us not to deal decisively with the question of limitation at this stage, but to leave this matter to be decided when the case of both parties has been fully placed before the Court.

All, therefore, that we now do is to set aside the decree of Fletcher, J., except so far as it ordered that an entry of the death of Mr. Watkins be made in the register of this suit and that the cause title in the said register be amended by striking out therefrom the name of Mr. Watkins.

And we direct that the case be remanded to the Court of first instance to be tried according to law.

WOODROFFE, J.—I agree.

Appeal allowed:
Case remanded.

PATNA HIGH COURT.
CIVIL REVISION No. 234 OF 1919.
March 22, 1920.
Present:—Mr. Justice Jwala Prasad.
SURAJ PRASAD PANDEY—DEFENDANT—PETITIONER
versus
MR. W. W. BOUCKE—PLAINTIFF—OPPOSITE PARTY.

Acknowledgment of debt, effect of—Suit, whether can be based on acknowledgment—Account stated, what is.

An acknowledgment of a debt only enures to the benefit of the creditor for the purpose of saving limitation if it is made before the original debt is time-barred; but the basis of a suit is always the original debt. No suit can be maintained upon a mere acknowledgment of a debt. [p. 380, col. 1.]

"An account stated" is one where several cross-items are set off one against the other and the balance is struck off in favour of one of the parties In such a case the law implies a new promise by the other party to pay the balance in consideration not merely of past debts but also of the extinguishment of the old debts on each side, and hence it is not necessary that a statement of account should be made within the period of limitation for the recovery of several cross-items. [p. 380, col. 1.]

Second appeal from a decision of the Additional District Judge, Mozuffarpore, dated the 19th May 1919.

Messrs. *Parmeshwar Dayal* and *Ambica Prasad Upadhya*, for the Petitioner.

JUDGMENT.—The plaintiff's case as stated in the plaint is that the defendant used to take loans from the plaintiff from time to time and that an account of what was due from him was made up on the 8th October

1917. On that day a sum of Rs. 359-12-0 was found due from the defendant to the plaintiff. The defendant acknowledged it and affixed his signature in the account book of the plaintiff. The basis of the plaintiff's case is stated in paragraph 4 of the plaint to be the said adjustment of account on the 8th October 1913 acknowledged and signed by the defendant.

No suit can be maintained upon a mere acknowledgment of a debt. An acknowledgment only enures to the benefit of the creditor for the purpose of saving limitation under Article 19 of the Limitation Act if the acknowledgment is made before the original debt is time-barred, but the basis of a suit is always the original debt. No doubt under Article 64 of the Limitation Act a suit may be brought within three years upon accounts stated between the parties. "An account stated" is one where several cross-items are set off one against the other and the balance is struck off in favour of one of the parties. In such a case the law implies a new promise by the other party to pay the balance in consideration not merely of past debts but also of the extinguishment of the old debts on each side, and hence it is not necessary that a statement of account should be made within the period of limitation for the recovery of several cross-items, *Hargopal* v. *Abdul* (1).

But the entry in the account of the plaintiff of the 8th October 1913 is merely a statement of the balance which was on that date due to the plaintiff from the defendant and cannot possibly be said to be an "account stated" between the parties under Article 64 of the Limitation Act. Hence the entry in the plaintiff's account book, call it an adjustment of accounts, a balance or an acknowledgment of past debts, cannot in itself be the foundation of a suit in Court. Suits based upon similar entries in account books were dismissed in the following cases:—*Ganga Prasad* v. *Ram Dayal* (2), *Tribhovan Gangaram* v. *Amina* (3), *Shankar* v. *Mukta* (4), *Debi Prosad* v. *Ram Ghulam Sahu* (5) and *Ishar Das* v. *Harkishan Das* (6) (Punjab Chief Court). There is, therefore, concurrent opinion of all the High Courts on the point. The plaintiff's suit must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 9 B. H. C. R. 429.
(2) 23 A. 50.; A. W. N. (1901) 150.
(3) 9 B. 516. 5 Ind. Dec. (N. S.) 343.
(4) 22 B. 513; 11 Ind. Dec. (N. S.) 923.
(5) 25 Ind. Cas 89; 19 C. L. J. 233.
(6) 35 Ind. Cas. 577; 148 P. W. R. 1916; 7 P. L. R. 1917.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No 80 OF 1919.

February 23, 1920.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

Musammat SHARIF-UN-NISSA—

—APPELLANT

versus

Qazi MASOOM ALI AND ANOTHER—

RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 19, cls. (d), (e)—Succession certificate, grant of, in respect of entire debt. Partial revocation or modification, when can be ordered.

If a certificate has once been granted in respect of an entire debt, and it becomes apparent to the Court that circumstances have subsequently changed so as to bring into operation clause (*d*), or (*e*), or both, of section 19 of Act VII of 1889, it is open to the Court to pass orders having the effect of a partial revocation of the succession certificate once granted, or to modify the terms of that grant in such manner as the interests of justice may seem to require. [p. 382, col. 1.]

First appeal from the order of the Second Additional District Judge, Aligarh, dated the 2 th of April 191?.

The Hon'ble Mr. *Narain Prasad Asthana*, for the Appellant.

Mr *Iqbal Ahmad*, for Respondent No. 1, and Mr *Haidar*, for Respondent No. 2.

JUDGMENT.—This is a first appeal from an order passed under the Succession Certificate Act. The first point taken is that the order complained of is not an order refusing a certificate, but is an order refusing to revoke a certificate against which no appeal is provided by section 19 of Act VII of 1889. In our opinion the order is in

effect one refusing to grant a certificate to *Musammat* Sharif-un nisa, the applicant, and we are bound to entertain the appeal. On the merits the case seems a clear one, except for one difficulty which has greatly influenced the decision in the Court below, namely, the principles laid down in the case of *Ghafoor Khan* v. *Kalandari Begam* (1) as to the granting of a succession certificate for the collection of the dower debt of a Muhammadan widow when her husband has died without satisfying her claim in respect of the same. The essential facts of this case are quite simple. The appellant before us is the daughter of Kazi Masum Ali by his wife *Musammat* Kifayat Fatima. That lady died with her dower-debt unpaid. Her heirs under the Muhammadan Law were her husband, to the extent of a one-fourth share, a brother named Husain Ali to the extent of a one-fourth share, and her daughter, the appellant, in respect of the remaining half share. Husain Ali applied for a succession certificate and the Court to which he applied, following the principles laid down in the ruling to which reference has already been made, compelled him to take out a succession certificate in respect of the entire amount of the dower-debt which was stated in his application at Rs. 25,000. On the strength of this certificate Husain Ali proceeded to institute a suit against Masum Ali, but in this suit he claimed only his own one fourth share of the dower debt. He made no attempt to recover on behalf of and for the benefit of *Musammat* Sharif-un-nisa the half share in the debt to which that lady was entitled. We understand that Husain Ali has obtained a decree but that this decree is still under appeal in this Court. *Musammat* Sharif-un nisa thereupon applied to the Court below asking either that the certificate granted in favour of Husain Ali should be revoked and a fresh certificate made out in her name, or in the alternative that her name should be associated with that of Husain Ali in the same certificate to the extent of the half share claimed by her. The Court below has held that no adequate case is made out under the provisions of section 18 of the Succession Certificate Act (No. VII of 1889) for the revocation of the certificate granted to Husain Ali and that, on the principles laid down by the Full Bench of this Court in the ruling already referred to, it is impossible to grant a certificate in any form which would be of any use to *Musammat* Sharif un-nisa. The appeal before us is against the order of the Court below rejecting her application *in toto*. The position arrived at is, in our opinion, an impossible one and calls for rectification by this Court. As matters now stand, *Musammat* Sharif-un nisa is absolutely precluded from instituting a suit for the enforcement of what on the facts stated seems to be a perfectly just claim. We think that the Court below could have revoked the certificate granted to Husain Ali, or at least have revoked the same in part, on more than one ground. In the first place, the proceedings which took place when Husain Ali obtained his certificate were seriously defective in substance within the meaning of clause (*a*) of section 18 of Act VII of 1889. *Musammat* Sharif-un-nisa was at the time a minor and her father, whose interest in this matter was obviously opposed to hers, he being the debtor whose liability it was sought to enforce by means of the application, was allowed to accept service of notice on her behalf. We are not saying that Husain Ali himself was to blame for this; but there was this serious defect in the procedure adopted by the Court. Over and above this, the certificate granted to Husain Ali has now become practically inoperative so far as *Musammat* Sharif-un nisa's share in the debt is concerned, and the decree made in his favour by a competent Court for the recovery of a fractional share only of the dower debt renders it proper and desirable that some further order should be passed enabling *Musammat* Sharif-un-nissa to claim her legal rights. The learned District Judge would probably have taken very much the same view, but he felt himself constrained by the decision of this Court in *Ghafoor Khan* v. *Kalandari Begam* (1) to hold that he could only choose between one of two courses, namely, rejecting *Musammat* Sharif-un nisa's application, or revoking altogether the certificate in favour of Husain Ali and granting a fresh certificate to *Musammat* Sharif-un-nisa for the recovery of the entire amount of the dower-debt. The difficulties felt by the learned Judges of

(1) 9 Ind. Cas. 127; 33 A. 327; 8 A. L. J. 79.

this Court in applying the terms of the Succession Certificate Act to the case of a debt of a peculiar nature like the dower-debt of a Muhammadan widow are obvious enough from the judgment delivered in the case above referred to. Undoubtedly it is impossible in dealing with the matter under the Succession Certificate Act to treat the dower-debt as anything but a single debt due to the deceased woman, and the procedure laid down under the Act does not afford any suitable method for deciding conflicting claims as between the heirs of the deceased lady to specific shares in the debt claimed. We do not, therefore, desire to express any dissent from the principles laid down by the Full Bench of this Court, which indeed we are bound as a Divisional Bench to follow. At the same time it seems to us unnecessary to apply those principles beyond the original granting of the certificate. We are of opinion that, if a certificate has once been granted in respect of the entire debt, and it becomes apparent to the Court that circumstances have subsequently changed so as to bring into operation clause (*d*) or (*e*), or both, of section 18 of Act VII of 1889, it is open to the Court to pass orders having the effect of a partial revocation of the succession certificate once granted, or to modify the terms of that grant in such manner as the interests of justice may seem to require. It might be possible for us to treat *Musammat* Sharif-un nisa's share in the dower debt as representing the only debt now remaining to be paid to the heirs of the deceased lady; but this would involve treating the decree passed in favour of Husain Ali as equivalent to complete realisation of his share, which is not precisely the case, more particularly in view of the fact that an appeal is pending against the decree. Nor do we wish to pass any order which should throw difficulties in the way of Husain Ali's realising his claim, presuming it to be a just one. We think, however, that it is competent to us under the terms of the Act to pass the following order.

We revoke the certificate granted in favour of Husain Ali to the extent of half of the sum specified in the said certificate, namely, to the extent of Rs. 12,500, and we direct that a certificate for the realisation of this amount, as a debt alleged to be due from Masum Ali to *Musammat* Kifait Fatima, be granted in favour of the appellant *Musammat* Sharif-un-nisa. The appellant is entitled to her costs of this appeal, including fees on the higher scale.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 185 OF 1916.

November 30, 1916.

Present:—Mr. Mittra, A. J. C.

HARSALSA—PLAINTIFF—APPELLANT

versus

BAPU—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Sale-deed, unregistered, of immoveable property of the value of Rs. 20, admissibility of, to prove nature of possession.

Defendant relied upon an unregistered sale-deed to prove a sale of an open site for Rs. 20. There was oral evidence of the delivery of the site in dispute:

Held, (1) that the sale-deed did not require registration under the provisions of the Registration Act, but it created no title to the site by virtue of section 54 of the Transfer of Property Act; [p. 383, col. 1.]

(2) that although inoperative as a conveyance, the sale-deed was admissible as evidence of the agreement in pursuance of which delivery of possession took place. [p. 383, col. 2.]

Second appeal by the plaintiff against the appellate decree of the District Judge, Nimar, confirming on the 23rd December 1915 the decree of the Munsif, Khandwa, decided on the 8th September 1915.

Mr. *V. R. Pandit*, for the Appellant.

Mr. *S. Ramdas*, for the Respondent.

JUDGMENT.—One Nathu and his brother were Malguzars of a village. The plaintiffs derive their title from them under two documents, one executed in 1910 and the other in 1913. The plaintiffs seek to eject the defendant from a plot in the *abadi* after the removal of building, he having purchased from one Ghansiam who, in his turn, obtained a house under a Will executed by Madho Sonar. The plaintiffs' case is that none of these people had a transferable interest in the site. The defence was that Madho Sonar purchased the site in dispute from Nathu, the then Malguzar,

under an unregistered sale-deed, dated the 25th June 1895, for a consideration of Rs. 20. Exhibit D-1. The lower Appellate Court has dismissed the suit. The District Judge has found that Exhibit D-1 was executed by Nathu, and that the site conveyed by it is identical with the plot in dispute. Both these findings have been questioned before me. I have, after careful consideration of the argument advanced by the learned Counsel for the appellants, come to the conclusion that these findings cannot be successfully impeached in second appeal. With regard to the identity of the plot, there was no plan attached to the sale-deed, and the description given is clearly of a very imperfect character, and the oral evidence on the record justifies the findings of the District Judge.

Now the document (sale-deed) being for Rs. 20 was admissible in evidence, so far as the provisions of the Registration Act are concerned, but under the Transfer of Property Act, it did not create a title. As pointed out in *Musammat Rupa Telin* v. *Bisambar Teli* (1), there is nothing to prevent the defendant proving a title by delivery of possession, as required by section 54 of the Transfer of Property Act. This has been found in favour of the defendant, but in determining the question as to the identity of the plot, the lower Appellate Court has relied upon the sale-deed to find the dimensions of the plot sold. It is urged for the appellants that this is in effect treating the unregistered document as a sale-deed. There is some force in the argument. The finding of the lower Court would have been equally justified by the oral evidence, which vaguely refers to the plot in the possession of the defendant, but having regard to the nature of the controversy raised by the plaintiff, it was difficult to avoid all reference to the boundaries and dimensions given in the sale-deed. If the document had been one for the validity of which registration was essential, as was the case in the two cases cited for the appellants, I would have agreed with this contention: *Parmanand* v. *Birkhu* (2), *Narayan Bisnoi* v. *Jaswant Singh* (3). I think the document may be regarded as an agreement to sell, on the principle laid down in the case of *Burjorji* v. *Muncherji* (4). At page 151, West, J., referring to the document in the case before him says: "It is, in terms, a conveyance, that is an instrument translative of ownership. * * I could not consider it as in its purport nothing more than an agreement to convey....But that principal purpose failing, the secondary one becomes the principal, and the document might, I think, be used to ascertain what the formal and final conveyance ought to be." The document, Exhibit D-1, fails to be operative as a conveyance. It is, however, admissible in evidence and may, therefore, be regarded as evidence of the agreement, in pursuance of which the delivery of possession took place.

It is urged that the document merely conveys a right to occupy the site and does not purport to sell the site. Such a construction cannot be adopted. It was an open site without any building on it. The instrument is described as a sale-deed and the site is sold for Rs. 20. I see nothing improbable in a Malguzar selling a small site in 1895 to a non-agriculturist for Rs. 20.

It is urged that Nathu's brother Govind Rao did not join in the conveyance, and, therefore, a good title has not been made out. The answer to this is that any right which Govind Rao may have had to object to the sale by his elder brother was barred by limitation long before the date of the suit, even prior to the purchase of the village by the plaintiffs, and it is not, therefore, open to the plaintiffs to raise any such plea.

The appeal fails and is dismissed with costs.

Appeal dismissed

(1) 8 C. P. L. R. 1.
(2) 1 Ind. Cas. 903; 5 N. L. R, 21.
(3) 1 N. L. R. 147.
(4) 5 B. 143; 3 Ind. Dec. (N. S.) 96.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 52 OF 19 9.

September 18, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

PONNUSWAMI CHETTY AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

THE VELLORE COMMERCIAL BANK, LTD., BY AGENT KUMARASWAMI AIYAR —PLAINTIFF—RESPONDENT.

Promissory note—Evidence, admissibility of, to fix date of payment—Cause of action, accrual of—Limitation Act (IX of 1908), Sch. I, Arts 69, 80.

Where a promissory note is executed for a loan, evidence is receivable to fix the date of payment. [p. 385, cols. 1 & 2.]

Defendant applied to the plaintiff Bank for a loan on one of the Bank's printed forms, and mentioned therein six months as the period for repayment; his application was accepted and he executed a promissory note in favour of the Bank Upon a suit by the Bank to recover the amount of the promissory note:

Held, (1) that the application to the Bank was admissible in evidence to fix the date of payment; [p. 385, col. 2.]

(2) that the cause of action arose on the expiry of the six months mentioned in the application, and that either Article 69 or 80 of Schedule I to the Limitation Act provided the period of limitation for bringing the suit. [p. 385, col. 2.]

Appeal against the order of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 130 of 1918, preferred against the decree of the Court of the District Munsif, Vellore, in Original Suit No. 587 of 1916.

FACTS appear from the judgment.

Mr. *A Viswanatha Aiyar*, for the Appellants.—The suit is barred. The cause of action arose on the date of the pro note. Neither the application for loan nor the endorsement thereon could be looked into to supplement what is not expressly stated in the pro note. The promissory note should itself fix the time for payment. Besides, under rule 24 of the Bank's Rules the Bank has the option of suing before the due date.

The proviso to Article 73 of the Limitation Act does not apply, as Exhibit B neither restrains nor postpones the right to sue. Article 69 will apply only when the promissory note in terms fixes the period for payment.

Mr. *N. Chandrasekhara Aiyar*, for the Respondent.—The pro-note and the loan application should be read together. The latter is admissible to supplement the terms of the pro note. Exhibit A contains a promise to pay and the contemporaneous document, Exhibit B, fixes the time for payment. The cause of action arises only on the expiry of that period. Article 69 or Article 80 governs the case.

Rule 24 of the Bank's Rules is a provision intended for the Bank's benefit and does not affect the accrual of the cause of action.

JUDGMENT.—The suit was brought upon a promissory note, Exhibit A. The question is when the cause of action arose for the suit. The defendant applied to the Bank at Vellore by Exhibit B for a loan. The application is in a printed form and he filled up the blank by inserting the words "for 6 months' *thavanai*." Thereupon the application was referred to an officer of the Bank who made an endorsement to this effect: "The applicants are responsible men. I am of opinion that Rs. 3,000 may be lent to them for six months' *thavani* at 12 annas per mensem." On the same date the promissory note was executed. In the accounts of the Bank, Exhibit C, six months' interest was deducted from the money paid to the defendant. On these facts the question is whether the cause of action arose on the date of the note or whether it arose only after the six months provided for in the application form, Exhibit B. Mr. Viswanatha Aiyar referred us to one circumstance which may be disposed of at once. He referred to rule 24 of the Rules of the Bank, which provided for the Bank anticipating the due date and suing before the six months are over. That was a provision made in the interests of the Bank and certainly has no effect upon the date upon which the cause of action starts. That provision was doubtless made to enable the Bank to bring a suit, if it found that the defendant had become an insolvent or was likely to leave the jurisdiction of the Court. In our opinion that provision could not in the least affect the starting period of limitation. The learned Vakil for the appellant argued that the exception provided for in Article 73 can have no application to this case. There is something to be said for this argument, because the article speaks of an agreement in writing restraining or postponing the right to sue.

It is doubtful whether Exhibit B really restrains or postpones the right to sue. The proper mode of looking at Exhibit B is to regard it as forming part of the same transaction as Exhibit A and as fixing the period of payment six months after the date on which the document was executed.

The first question is whether this document is receiveble in evidence. If we understand Mr. Viswanatha Aiyar's arguments rightly, he seemed to suggest that if Exhibits A and B are read together, then stamp duty will be payable as on a promissory note payable six months after date. But we regard Exhibit A as containing a promise to pay and Exhibit B, which is contemporaneous with Exhibit A, as fixing the time for payment. That such a document is receivable in evidence is clear from the judgment of Lord Dunedin in *Motabhoy Mulla Essabhoy* v. *Mulji Haridas* (1). In that case there was a promissory note for Rs. 50,000 and there was also a contemporaneous oral agreement that the document should not be sued on but that another document should be given for the amount. The suit was brought on a promissory note. The Judicial Committee, differing from the Courts below, held that this agreement, which had the effect of substituting a new contract for the promissory note, could be pleaded in defence and was receivable in evidence. The principle of the decision is applicable to the present case. It is open to defendant to plead that, notwithstanding the language of Exhibit A it was agreed between the parties that the cause of action for the money was not to commence until after six months of the date of the note. Further *Cumming* v. *Shand* (2) points out that the custom of the trade can be read into a promissory note or bill of exchange executed by a customer to the Bank. Here the printed form makes it clear that it is customary for the Bank to fix a period for payment. Therefore, the promissory note must be taken to have been given subject to that proviso. To the same effect is the ruling in *Brown* v. *North* (3).

For these reasons we are of opinion that the document, Exhibit B with the endorsement thereon, is receivable in evidence.

If they are receivable in evidence, the next question is under what article of the Limitation Act does the present suit fall. As we said at the outset, it may be open to argument whether Article 75 in terms is applicable. But we fail to see why Article 65 or Article 80 should not apply to this case. Article 69 provides for a suit upon a bill of exchange or money payable at a fixed time and the third column is "when the bill or note falls due." It was contended for the appellant that unless the promissory note itself in terms embodies this stipulation as to the period of payment, the article is not applicable. We are unable to agree with this contention. If evidence is receivable to fix the date of payment, then that would explain the contract which has been entered into and would have the effect of supplementing the contract on a matter on which it is silent and which is not in conflict with the terms of the note. Similarly, as regards Article 80, it is a general article which refers to all suits and promissory notes and the third column makes time commence when the bill or note or bond becomes payable. On our view that Exhibit B is receivable in evidence, that document makes the promissory note payable 6 months after the date of the execution of Exhibit A. For these reasons we are of opinion that the Subordinate Judge is right in holding that the cause of action arose six months after the execution of Exhibit A and not immediately after. We are supported in our view by the decision of the Full Bench in *Annamalai Chetty* v. *Velayuddu Nadar* (4), although this exact point was not decided in it.

We dismiss the appeal with costs.

M. C. P.

Appeal dismissed.

(1) 23 Ind. Cas. 223; 42 I. A. 103: 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom L. R. 460; 2 L. W. 524; (1915) M W. N. 522; 39 B. 399 (P. C.).

(2) (1860) 5 H. & N. 95; 29 L. J. Ex. 129; 8 W. R, 182; 1 L. T. 300; 157 E. R. 1114; 120 R. R. 498.

(3) (1852) 8 Ex. 1 at pp. 10, 16; 22 L J. Ex. 49; 91 R. R. 318.

(4) 32 Ind. Cas 869; 39 M. 129; 3 L. W. 38; 19 M. L. T. 64; 30 M. L. J. 51; (1916) 1 M. W. N. 93.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

THIRD APPEAL No. 10 OF 1918-19.
February 11, 1920.

Present :—Mr. Ferard, S. M., and
Mr. Harrison, J. M.

Musammat RAJ RANI—APPELLANT

versus

RAM KISHORE—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 17 (2)—Failure of respondent to appear—Duty of Court—U. P. Land Revenue Act (III of 1901), s. 219—Revision—Material irregularity.

The absence of the respondent on the date fixed for hearing an appeal is no justification for decreeing the appeal Under rule 17 (2) of Order XLI of the Civil Procedure Code the Court is bound to hear the appeal and record a judgment, and its failure to do so amounts to a material irregularity within the meaning of section 219 of the U. P. Land Revenue Act, involving interference by the Board of Revenue.

Third appeal from the order of the Commissioner, Jhansi Division, dated the 22nd of May 1919, in the case of correction of papers.

JUDGMENT.

FERARD, S. M.—(*January* 15, 1920.)—This is a third appeal under the Land Revenue Act, III of 1901. *Musammat* Raj Rani is appellant. Ramkishan is respondent. *Musammat* Rajrani won in the first two Courts. Ramkishan appealed to the Commissioner. The Commissioner, in a summary order with no apparent attempt to consider the merits of Ramkishan's appeal, gave him a decree simply because the respondent before him, *Musammat* Rajrani, had not appeared to reply to the appeal at the date fixed. This procedure on the Commissioner's part was too summary altogether. When an *appellant* does not appear, a Court may make a simple order dismissing the appeal under Order XLI, rule 17 (1), but when the appellant appears but the respondent does not, he has to hear the appeal under rule 17 (2) of the same Order (XLI), and he has further to write a judgment, as is apparent from the opening words of Order XLI, rule 21, and a judgment has to contain reasons for the decision on the points in dispute, under rule 31 of the same Order, which is made applicable to cases under the Land Revenue Act by rule 26 of Board's Circular 8-II.

Unless the Commissioner thinks the appellant's case a good one and gives reasons for so doing, he is not entitled to allow his appeal merely because the respondent has not turned up.

It is, however, argued that I cannot interfere in third appeal because of the specific section 201 of the Land Revenue Act. No doubt section 200 covers respondent as well as appellant and the word "order" in section 201 may be construed having in that section a wider meaning than it has in Order XLI, rule 17 (1), Civil Procedure Code, but this is immaterial in the present case. Taking the case to be that an appeal does not lie, a remedy is open by treating the case in revision under the latter portion of section 219, Land Revenue Act. The late Commissioner's order contained material irregularity and I would set it aside in revision and direct that the case be restored to his file and heard and decided on merits, opportunity being given to the appellant *Musammat* Rajrani to appear and reply as respondent before the Commissioner. Parties will pay their own costs in the present proceeding. Other costs will be determined by the Commissioner when he finally decides the appeal.

HARRISON, J. M.—(*February* 11, 1920).—I agree. Rules 17 and 21 of Order XLI are made applicable by rule 24 of the Board's Circular 8-II.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 10 OF 1916.
January 29, 1917.

Present:—Mr. Mittra, A. J. C.

NARHAR—PLAINTIFF—APPELLANT

versus

NARAIN—DEFENDANT—RESPONDENT.

Hindu Law—Joint family Purchase in name of one member—Benami transaction—Real owner, whether bound by result of litigation to which benamidar is party—Limitation Act (IX of 1908), s. 22—Party already represented, joinder of, after expiry of limi-

NARHAR v. NARAIN.

tation, effect of—Trusts Act (II of 1882), s. 83—Resulting trust—Purchase in name of one person with money supplied by several, effect of Person interested in litigation but not party to suit, whether bound by result.

A purchase in the name of one member of a joint Hindu family is a *benami* transaction, especially when that member is not the managing member or a representative of the family. [p. 388, col. .]

A *benamidar* is allowed to represent the real owner in suits both as plaintiff as well as defendant, and a decree obtained by a *benamidar* or against a *benamidar* is binding upon the real owner. [p. 388, col. 1.]

If a person is already represented in a suit by a party to the suit, his joinder is not the joinder of a new plaintiff or a new defendant, within the meaning of section 22 of the Limitation Act. [p. 388, col. 1.]

A resulting trust takes place where several persons jointly furnish the purchase-money and the purchase is made in the name of one of them [p. 388, col. 1.]

A person interested in a litigation is not bound to apply to have himself made a party and in default to be bound by the result of that litigation. [p 389, col 2.]

First appeal against the decree of the Additional District Judge, Nagpur, decided on the 30th October 1915.

Mr. *D. T. Mangalmurti*, for the Appellant.

The Hon'ble Sir *B. K. Bose* and Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT.—One Balaji died in 1883 leaving a widow Chandrabhaga and a stepmother Kaveri. Chandrabhaga died on the 21st December 1898 as found by the lower Court, and the present suit was instituted on the 19th December 1910 by the plaintiff, who is admittedly one of the nearest reversioners of Balaji. Chandrabhaga had executed four mortgages in the name of defendant No. 1, who was the sole defendant when the suit was instituted. Upon the basis of these mortgages two suits were instituted for foreclosure by defendant No. 1 and two decrees absolute were passed in his favour and possession was taken by him in 1895. The plaintiff's case is that there was no legal necessity for the mortgages, and that the plaintiff is entitled to recover possession of half share of the property either unconditionally, or subject to payment of so much of the mortgage money as is legally binding upon the reversioner. One Amrit, who is the grandson of the plaintiff's brother, has refused to join in the suit, and the plaintiff, therefore, claims only half share. Upon an objection raised by the defendant, by an order of the Court, his father and brother who were admittedly members of a joint Hindu family, were made parties after the period of limitation had expired. The lower Court has held that the mortgagee made enquiries as to the necessity for loans and was satisfied about its existence, and the lower Court has also held that the whole suit was barred by limitation.

There are two questions which arise for decision in this case. The *first* is whether the plaintiff's suit is barred by reason of joinder of the other defendants when more than twelve years had elapsed from the date of the cause of action. The *second* is whether there is legal necessity for the various loans and which of them.

I will take up the point of limitation first. The defendant No. 2, the father of the first defendant, who is since dead, was at the time of mortgage in the Government service, and in order to evade the rule relating to the conduct of Government servants, had the mortgage taken not in his own name, as a manager of a joint Hindu family, but in the name of his son, the defendant No. 1. It was this defendant who brought the two suits without joining his co-parceners. It was he in whose name mutation took place in revenue records. He is, therefore, a "benamidar" for the joint family consisting of himself and his co-parceners. It is urged before me that a transaction of this kind is not a "benami" transaction inasmuch as it is a purchase in the name of one member of a joint and undivided family, and it is argued that a resulting trust only takes place when property is acquired by one man in the name of a perfect stranger having no interest in the property so transferred. The answer to the first argument is to be found in the passage from the judgment of Mr. Justice Mitter in *Ohunder Nath Moitro* v. *Kristo Komul Singh* (1), cited by Mayne:—"So far as the ordinary and usual course of things is concerned, the practice of making *benami* purchases in the names of female members of joint undivided Hindu families is just as much rife in this country, as that of

(1) 15 W. R. 357.

making such purchases in the names of male members." It follows that a purchase in the name of one member of a joint Hindu family is a *benami* transaction, especially when that member is not the managing member or a representative of the family. As regards the principle of resulting trust embodied in section 83 of the Indian Trusts Act, the wording of the section is consistent with the view that a resulting trust takes place when three persons jointly furnish the purchase money, and the purchase takes place in the name of one of them. I have not been shown any authority against this view. Now a *benamidar* is allowed to represent the real owner in suits both as plaintiff as well as defendant. A decree obtained by a *benamidar* or against a *benamidar* is binding upon the real owner. If then he represents the real owner, the joinder of the other defendants was unnecessary, inasmuch as the decree even without their joinder would have been binding upon them. This view is supported by the decision of the Bombay High Court in *Ravji* v. *Mahadev* (2). The joinder of the real owner, after the period of limitation had expired, was held to be not a case contemplated by section 22 of the Limitation Act. The principle, I understand, is that if a person is already represented by a party to the suit, his joinder is not the joinder of a new plaintiff or a new defendant. Acting on this principle I hold that the suit was not barred by limitation.

I now proceed to discuss whether there was any legal necessity for the various mortgages which culminated in the foreclosure decrees. The lower Court finds that the defendant No. 2 made proper enquiries from not only the father of Chandrabhaga and her Muktiar but also from two persons Madho and Chintaman who are now dead. There is no doubt in my mind that there was necessity for the loan in favour of Jairam for Rs. 1,000. This was required for the purpose of obtaining possession of the estate of Chandrabhaga's husband which was then in the hands of his step mother. But it does not follow that there was necessity for all the loans which were taken to embark in the various litigations in which Chandrabhaga had figured. After obtaining possession of her husband's estate from *Musammat* Kaveri, Chandrabhaga embarked upon a litigation for rendition of accounts and mesne profits against *Musammat* Kaveri and her agent. Rs. 599 are said to have been advanced for this purpose as recited in the mortgage-deed Exhibit D-35. There was, of course, no necessity for this litigation. It was a foolish litigation, for it does not appear that anything could have been recovered from either of the persons against whom the suit was filed. It is impossible for me to pass this item as one incurred for legal necessity or binding upon reversioners. The taxed costs of suit for possession against *Musammat* Kaveri, which I have held to be a proper litigation, amounted to Rs. 492. The whole of the amount originally borrowed from Jairam, Rs. 1,000, would be more than enough for that litigation. On the mortgage deed, Exhibit D-34, therefore, I allow Rs. 1,042 8-0 paid to Jairam. On the date when Exhibit D-34 was executed, a decree had already been passed a week previously for possession of the estate. Therefore, I can find no justification for raising another item of Rs. 600 for the purpose of litigation. The slightest enquiry would have shown that no such money was needed. I think Rs. 1,042-8 0, is all that can be claimed as binding upon the reversioners under Exhibit D-34. Now dealing with the second mortgage Rs. 101-4-0, expenses in connection with a criminal case brought by Kaveri against Chandrabhaga may be passed as properly incurred. Similarly Rs. 202-4-0 taken for costs in a suit instituted by Kaveri for maintenance may be allowed, for Kaveri was claiming Rs. 15 per month as maintenance and the Court eventually reduced the claim to Rs. 10 per month. Rs. 65 borrowed for expenses in connection with the Sradh ceremony of Chandrabhaga's father-in-law appears to be a legitimate item. In the third mortgage-bond, Exhibit D 36, the purpose for which the money was taken is not recited. I am dealing with the case of a creditor who in the previous bonds gives full details of the purposes of the loans but deliberately omits to mention the purpose in this bond. I cannot accept the defendant No. 2's statement about enquiries and allow

(2) 22 B. 672; 11 Ind Dec. (N. S.) 1030.

his claim under this bond at all. The fourth mortgage bond ostensibly for Rs. 2,500 was never given full effect to. Money was borrowed by Chandrabhaga for filing a suit for specific performance against one Ahalya for the purchase of a village for Rs. 1,800, which she according to defendant No. 2 expected to sell for Rs. 3,000, thus making a profit of Rs 1,500. This was a speculation and it is obvious that the money borrowed for such a purpose cannot be held binding upon the reversioners: as a matter of fact only Rs. 816 were advanced under this bond and items regarding Court-fees and Pleader's fees in connection with this suit must be disallowed. The only other item to make up the total of Rs. 816 is Rs. 500 said to be due on a bond not produced but defendant No. 2 as witness says is a bond in connection with the suit for rendition of accounts and mesne profits. I have already held that was not a proper suit to have embarked upon and the money advanced for it cannot be claimed for the reversioners.

The lower Court has relied upon certain loose papers supposed to contain the accounts of Chandrabhaga and produced by D. W. No. 12. They are merely copies and the original was not called for and they are not admissible in evidence. Apart from this I cannot place any reliance upon these loose sheets of paper. Balkrishna who produced them makes a significant remark that he kept these papers with him, as he anticipated a claim from the plaintiff in respect of Chandrabhaga's estate. An agent may keep for his own protection copies of accounts for a few years during which he may be sued: but it is strange that he should have kept these carefully preserved and filed them in 1914. I think these accounts filed by D. W. No. 12 must be rejected.

The suit in which the first foreclosure decree was passed was instituted for the recovery of money due under the mortgage-deeds Exhibits D 34, D 35 and D-36. A decree was passed for the total amount due under them. It is in evidence that the present plaintiff knew of the first of the three mortgages. It is argued that although the plaintiff was not made a party, he ought to have redeemed so much of the mortgage or such of the mortgages as was binding upon the reversioners. No doubt if the suit had been based solely upon a mortgage binding in its entirety on the reversioners, a foreclosure decree obtained thereupon would have been binding upon the reversioners. But in the suit instituted by the defendant No. 1 against Chandrabhaga, he joined all three mortgages and so the reversioners could not have very well been asked to redeem part of the mortgage. Not being made parties, the reversioners were not bound to redeem and the widow's inaction in the matter cannot in the least prejudice the reversionary rights. The argument before me is that as the reversioner knew of the suit he should have applied to be made a party and sought to redeem so much of the mortgage as is binding. No authority has been cited in support of the proposition that a person interested in certain litigation is bound to apply to have himself made a party and in default to be bound by the result of that litigation. It is true that when a suit is carried on on behalf of a person not made a party he may be bound by the result of that litigation, but this was not a case of that kind. Here the suit was against Chandrabhaga and not against the reversioner. I hold that there is no force in the argument that the knowledge of the plaintiff of the litigation bars his making the present claim.

The plaintiff had knowledge and was present when the money was paid by Jairam. He in fact received Rs. 18 advanced to Chandrabhaga out of the consideration money from Jairam. Under the circumstances the propriety of the loan in favour of Jairam must be presumed. On this ground I will allow the whole of Rs. 1,042-8-0 paid by the defendant to Jairam. But the consent obtained from Chintaman when he was executing a bond in favour of the defendant is also relied upon as raising a presumption. Chintaman was then separate from his brother, the present plaintiff. It was, therefore, the consent of one of two reversioners or rather ratification by him. Ordinarily a presumption in favour of the propriety of a transaction is made when it has the consent or is subsequently ratified by the next reversioner, but the circumstances of the present case entirely rebut the presumption. The recitals of the document completely prove that money was being advanced for litigation, which was useless and

unnecessary. Therefore, I am not prepared to differ from the lower Court in its view that in regard to mortgages other than the one in favour of Jairam no presumption of their propriety should be made.

A small amount in respect of proportionate costs of stamp and registration would have to be added to the above items. The learned Pleader for the respondent tells me that the amount which I have declared to be a proper charge on the estate may be taken as satisfied out of the usufruct and, therefore, there need be no further enquiry as to the profits received by the defendants. The result is that the plaintiff's suit succeeds. The decree of the lower Court is set aside and in lieu thereof a decree for possession is passed as prayed for in the plaint. The respondent will pay the costs in both the Courts.

Decree set aside.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 7 OF 1919.

August 12, 1919.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice N. R Chatterjea.

NAKUL CHANDRA BARUA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SASTI CHARAN BISWAS—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Revenue sale—Purchaser, position of—Decree obtained by ex-proprietor, whether can be taken, advantage of—Tenants, position of.

The purchaser of an estate at a revenue sale is not bound by the act of the ex-proprietor. He gets the estate as it stood at the time of the Permanent Settlement. But it is open to the purchaser, if he wishes, to accept a previous decision between the ex-proprietor and his tenants as binding on himself and take advantage of it. If he does so, the tenants cannot object, because the purchaser is not in any worse position than the ex-proprietor and may elect to take advantage of the decree obtained by the latter, although the decree is not *res judicata* as between the purchaser and the tenants. [p. 391, col. 1.]

Letters Patent Appeal against the decree of Mr. Justice Beacheroft, dated the 26th of November 1918, in Appeal from Appellate Decree No. 1109 of 1917, reported as 49 Ind. Cas. 959, reversing that of the District Judge Chittagong, dated the 29th of March 1917.

FACTS appear from the judgment.

Babu *Chandra Sekhar Sen*, for the Appellants.

—Defendants are appellants here This appeal arises out of a suit for enhancement of rent on the ground of rise in the price of foodstuffs and also on the ground of the rent being lower than the prevailing rate.

In 1903 the ex-proprietor of the estate instituted a suit for ejectment or assessment of rent in the alternative. The 1st Court thought that the previous decree would be binding and decreed the suit. The lower Appellate Court found it would not be binding and dismissed the suit. Mr. Justice Beacheroft in this Hon'ble Court held that the previous suit was *res judicata* and would be binding and decreed the suit.

My first submission is that the decree in the previous suit would not be binding as between the tenant and the auction-purchaser of the estate at the revenue sale.

Sections 33—35 of the Bengal Tenancy Act show the modes prescribed by the Bengal Tenancy Act for enhancement of rent.

The rent-decree of 1903 cannot be said to be *res judicata* because the soil has undergone change since 1903.

The presumption under section 27 of the Bengal Tenancy Act would not arise in this case. Upon the findings of the Court of Appeal below no appeal lay before this Court.

[CHATTERJEA, J.—Fifteen years have not yet expired since the last enhancement in 1903.]

In section 37 the manner prescribed refers to sections 30, 31A, 31B, 32, 35 and 36 of the Bengal Tenancy Act.

Section 37 is only a part of the substantive law and limits the power of the landlord to enhance the rent. It is not a part of procedure.

Did the Legislature contemplate different procedure in case of contract and suit?

I submit it did not. If the ex-proprietor makes a contract and then the present proprietor institutes a suit, an anomalous position will arise under section 37. Therefore, section 37 is not a part of the procedure Refers to *Moonshee Buzlool Rahman* v. *Iran Dhun*

Dutt (1).

The previous suit is not *res judicata*. See *Radha Gobind Koer* v. *Rakhal Das Mukherjee* (2), *Gadadhar Bose* v. *Radha Charan Poddar* (3).

If the auction-purchaser does not derive his title from ex-proprietor, the previous decision does not affect the rights of the parties.

If these decisions are not binding, I submit that the finding that no evidence was there to assess an equitable rent is conclusive. His Lordship Mr. Justice Beachcroft is in error in deciding that point in second appeal.

Babus *Jogesh Chandra Roy* and *Charu Chandra Sen*, for the Respondents, were not called upon.

JUDGMENT.

WOODROFFE, J.—I do not decide this appeal as a question of *res judicata* for it may be said that the auction-purchaser was not a party to the previous litigation nor did he claim under the ex proprietor within the meaning of section 11 of the Code of Civil Procedure. The purchaser is not bound by the act of the ex-proprietor. He gets the estate as it stood at the time of the Permanant Settlement. But the position here is this. The matter would have been *res judicata* if the question had arisen between the ex-proprietor and the tenants and in such case the latter would be bound to pay the rent previously adjudicated, and it is open to the purchaser, if he wishes, to accept the previous decision as binding on himself and the advantage of it. If he does so, it seems to me that the tenant cannot object. The purchaser is certainly not in any worse position than the ex-proprietor and may elect to take advantage of the decree obtained by the latter. If this were not so, then at each and every sale all previous litigations might be re opened and the purchaser in such a case might be worse off than the ex proprietor from whom he had purchased. I do not decide here what would be the effect if the purchaser had not accepted the previous decision. No doubt mutuality is a test of *res judicata*, but this is not a question of *res judicata* as between the purchaser and the tenant, but it is a case in which the tenant would have been bound towards his previous landlord and in which the purchaser at the revenue sale has elected to succeed to the right in this respect of the ex-proprietor. The rights of the tenants are in no way enlarged by the revenue sale.

In my opinion, therefore, there is no ground for reversing the decision of this Court and the appeal must be dismissed with costs.

CHATTERJEA, J.—I agree.

Appeal dismissed.

(1) 8 W. R. 222.
(2) 12 C. 84; 6 Ind. Dec. (N. S.) 56.
(3) 34 C. 868.

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE MADRAS HIGH COURT.

March 18, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

ADUSUMILLI KRISTNAYYA AND OTHERS —APPELLANTS

versus

ADUSUMILLI LAKSHMIPATHI AND OTHERS - RESPONDENTS.

Hindu Law—Mitakshara—Dravada School—*Adoption by widow—Consent of nearest* sapindas, *whether necessary—Consent of more distant relatives, whether sufficient.*

Under the Mitakshara Law as administered in the Dravada country, a Hindu widow, although not authorised by her husband to adopt a son to him, may nevertheless make such an adoption with the consent of his nearest *sapindas*. [p. 392, col. 1]

The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. [p 392, col. 2.]

Save in exceptional cases, *e g*, minority, lunacy or absence in a distant country, the consent of the nearest *sapindas* must be asked and if it is not asked, it is no excuse to say that they would certainly have refused; but where a *sapinda* is clearly proved to have withheld his consent from corrupt or malicious motives, his dissent may be disregarded. [p 392, col. 2.]

The absence of consent on the part of the nearest *sapindas* cannot be made good by the authorisation of more distant relatives [p 392, col. 2.]

Veerabasavaraju Pantulu v. *Balasurya Prasada Rao*, 48 Ind Cas. 706; 45 I. A. 265; 41 M. 998; 25 M. L. T. 1; 17 A. L J. 34; 36 M. L. J. 40; 23 C. W. N. 251; 29 C. L. J 184; 9 L. W. 243; 21 Bom. L. R. 238; 1 U. P. L. R. (P. C.) 18, followed.

Consolidated appeals from a decree of the Madras High Court (Wallis, C. J, and Seshagiri Aiyar, J.), dated October 27th, 1915, reported as 32 Ind. Cas. 253, which (substantially) affirmed a decree of the Temporary Subordinate Judge, Masulipatam

ADUSUMILLI KRISHNAYYA v. ADUSUMILLI LAKSHMIPATHI.

FACTS of the case and the arguments adduced sufficiently appear from their Lordships' judgment. The case lays down no new law, having been for all practical purposes concluded by their Lordships' judgment in *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (1) delivered after these appeals were filed: but it is reported for the succinct summary which the judgment contains of the law of adoption by a Hindu widow in the Dravada country.

Mr. *De Gruyther*, *K. C.*, and Mr. *Dube*, for the Appellants.

Mr. *Dunne*, *K. C.*, and Mr. *Parikh*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals from a decree of the High Court of Judicature at Madras, which affirmed, with variations, a decree of the Subordinate Judge of Masulipatam. The question for determination is whether the adoption of the first appellant, Adusumilli Kristnayya, is valid under the Hindu Law as administered in the Madras Presidency.

The parties are subject to the Mitakshara Law of adoption as administered in the Dravada country: and that law, which has been considered by the Judicial Committee in several recent cases, is now free from doubt. It was decided in the *Ramnad case* [*Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2)] that under the law here referred to a Hindu widow, although not authorised by her husband to adopt a son for him, may nevertheless make such an adoption with the consent of his *sapindas*. In a later case, *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3), it was said that:—

"There should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives in order to defeat the interest of this or that *sapinda*, but upon a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

The reference in the last mentioned case to a "family council" gave rise to some doubt whether where there were agnatic relations closely related to the deceased, the assent of those standing in a remoter degree was either necessary or sufficient; but this doubt was resolved in the recent case of *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (1), where it was held that the absence of consent on the part of the nearest *sapindas* cannot be made good by the authorisation of distant relatives whose assent is more likely to be influenced by improper motives. This does not mean that the consent of a near *sapinda* who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either sufficient or necessary; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded. Nor does it contemplate cases where the nearest *sapinda* happens to be in a distant country, and it is impossible without great difficulty to obtain his consent or where he is a convict or suffering a term of imprisonment. The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must, however, be added that, save in exceptional cases such as those mentioned above, the consent of the nearest *sapindas* must be asked and if it is not asked it is no excuse to say that they would certainly have refused [*Venkamma* v. *Subramaniam* (4)]. Regard must also be had to the following observations of the Board in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (5):

"But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice

(1) 48 Ind. Cas. 706; 45 I. A. 265; 41 M. 998; 25 M. L. T. 1; 17 A. L. J. 34; 36 M. L. J. 40; 23 C. W. N. 251; 29 C. L. J. 184; 9 L. W. 243; 21 Bom. L. R. 238; 1 U P L R. (P. C.) 18.

(2) 12 M. I. A. 397; 10 W. R. P C. 17; 1 B L. R. (P. C.) 1; 2 Suth. P. C. J. 135; 2 Sar. P C. J. 361; 20 E. R. 389; 3 Mad. Jur. 298; 1 Ind. Dec. (N. s.) 1.

(3) 4 I. A. 1; 1 M. 174; 1 Ind Jur. 63; 16 W. R. 21; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353; 1 Ind. Dec. (N. s.) 116 (P. C.).

(4) 34 I. A. 22 at p 26; 9 Bom. L R. 89; 20 M. 50; 4 A L. J. 150; 5 C. L. J. 143; 11 C. W. N. 345; 17 M. L. J 114; 2 M. L. T. 91.

(5) 3 I A. 254; 1 M. 69; 11 Mad Jur 188; 25 W. R. 291; 3 Sar. P. C. J. 682; 3 Suth P. C. J. 263; 1 Ind. Dec. (N. s.) 45 (P. C.).

of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

Turning now to the facts of the present case, the relationship between the parties will be explained by the following pedigree:—

ADSUMILLI VENKATRAMUDU.

- Krishnamman, deceased
  - Janardanudu, defendant No. 5, died *pendente lite*
    - Venkataramayya, defendant No. 4, married Punnamma, defendant No. 2.
    - Venkata Gopaludu, defendant No. 6.
- Lakhminarayana, deceased,
  - Lakshmipathi, plaintiff No. 1.
- Lingarayudu, deceased
  - Venkatramanjaneyalu, plaintiff No. 3, died *pendent lite*,
    - Lingarayudu, plaintiff No. 5.
- Venkanna, deceased,
  - Venkatramudu, plaintiff No. 2.
  - Rama-Sastrulu, plaintiff No. 4.
  - Pulliah, deceased.
  - Subbiah, deceased.
- Sheshadri, died in 1887, married Narasamma, died in April, 1908,
  - Venkata Subbaiya, died in 1888, last male owner of the suit properties.
  - Sobanadamma, daughter, defendant No. 3
    - Punnamma, daughter, defendant No. 2, married Venkataramayya, defendant No. 4.
  - Kristnayya, alleged to have been adopted on February 20th, 1908, defendant No. 1.

Sheshadri, who was separated from his brothers, died in the year 1887 leaving a widow, Narasamma, and an only son, Venkata Subbaiya, who was then about thirteen years of age and unmarried. In the month of October 1888 this son was murdered, and his mother succeeded to the property of her husband, taking a Hindu widow's estate. Pulliah and Subbiah, two of the sons of Sheshadri's brother Venkanna, were charged with the murder, but were acquitted. They were then charged with the theft of some jewels which were on the person of the murdered boy before his death, but Pulliah died before the trial and Subbiah was ultimately acquitted on this charge also. On the 8th September 1901 Narasamma called a meeting of her husband's *gnatis* and obtained from 14 of them a deed authorising her to receive in adoption to her husband any boy she might like. At that time the nearest *sapindas* of Sheshadri were six in number, *viz.*, the fifth defendant Janardanudu, and the five plaintiffs; but of these only Janardanudu signed the deed, and the other signatories were *gnatis* of remoter degrees. Narasamma did not at once act on this authority, but upwards of six years afterwards, *viz*, on the 20th February 1908, she adopted the defendant Kristnayya, who was then of age. Before making the adoption she entered into agreements with Kristnayya and his natural father under which the greater part of the property of Sheshadri was put at her absolute disposal, and she, in fact, disposed of it in favour of the issue of her daughter. Narasamma died in April 1908 and shortly afterwards this suit was brought by the plaintiffs to set aside the adoption.

From the above statement of facts, standing alone, the obvious conclusion would be that the adoption was invalid for want of the assent of five out of the six nearest *sapindas*. But the defendants by their written statement in the case alleged that Narasamma had applied, first to Venkanna (the only brother of Seshadri who survived him), and after his death to the plaintiffs and Subbiah, for their authority to make an adoption; and that all those persons, "out of dishonest and corrupt motives" and by reason of the long-standing enmity caused by the charges of murder and theft made against Pulliah and Subbiah, and with the desire to succeed to the property of Venkata Subbaiya, had refused or neglected to grant the authority asked for. In support of this plea the defendants called evidence of four attempts to obtain the desired authority. First, it was alleged that Narasamma, through her *gumasta*, applied to Venkanna for his consent, and that he put off his reply and died shortly afterwards without giving the desired authority. Secondly, it was alleged that Narasamma personally requested the third plaintiff, Venkatramanjaneyulu to consent to an adoption and to get the other plaintiffs and Subbiah to consent, that he promised to consult them and let her know, but that he never, in fact, gave her a reply. Thirdly, it was stated that the plaintiffs and Subbiah were invited to and were present at the meeting of *gratis* on the 8th September 1901 and that on being requested to agree to an adoption they replied that "there was no hurry" and shortly afterwards left the meeting. Fourthly, it was alleged that shortly before the actual adoption in 1908 Narasamma again sent an emissary to the plaintiffs (Subbiah being then dead) and asked for their consent to an adoption, but that they refused to give it except on payment of Rs. 10,000. The evidence relating to these allegations was examined both by the Subordinate Judge and by the High Court, and both tribunals came to the conclusion that none of the alleged requests had been proved. Notwithstanding these concurrent findings, their Lordships were pressed by Counsel for the appellants to examine the evidence on this question; and as the findings of the Subordinate Judge were by no means clear and his reasons were somewhat inconsistent, they have considered the evidence which was brought to their notice by Counsel on both sides. As the result of this consideration they have come to the following conclusions:—

1. The finding of the Courts on the question of these alleged applications was mainly based upon the view that, having regard to the hostility existing between the plaintiffs and Narasamma, it was unlikely that they would have been asked for their consent: but the evidence as a whole does not appear to support this view. The first plaintiff was not on unfriendly terms with Narasamma and at one time got her lands cultivated for her; and the Subordinate Judge in one part of his judgment says that there was "no ill feeling" between them The third plaintiff was plainly on speaking terms with Narasamma and was from time to time consulted by her; and the Subordinate Judge himself says that "it is not unlikely that he was requested by Narasamma to give his consent and also ascertain the wishes of his cousins, as probably the other persons were not quite so well disposed towards Narasamma as the third plaintiff." As to the other plaintiffs there was no clear evidence; and although it is very probable that the charges made against their brothers caused an estrangement between the second and fourth plaintiffs and Narasamma, the Subordinate Judge expressed a doubt whether this feeling continued in the same intensity down to the year 1901. Upon the whole, the true inference appears to their Lordships to be that, while there was some unfriendliness between Narasamma and two of the plaintiffs, this did not extend to the other plaintiffs and was not in any case such as to prevent Narasamma from asking for their consent to an adoption. Further, in no case is there evidence of such malice on the plaintiffs' part as would prevent them from forming an honest judgment on the matter.

2. It appears probable that Venkanna was asked for his consent: but as he died without giving a reply and there is no evidence of ill feeling on his part, this circumstance is immaterial.

3. It is also not improbable that shortly before the meeting of September 1901, the third plaintiff was consulted on the question

of an adoption and was asked to ascertain the views of the other plaintiffs and Subbiah; but there is nothing to show that he did in fact ask for their consent or that his reply was delayed by reason of spite or malice. This circumstance, therefore, is also of little importance.

4. With regard to the meeting of the 8th September 1901 the evidence is conflicting. The defendants' witnesses say that the plaintiffs were present, and on being consulted said that there was no hurry about the matter and went away; but this is denied by the surviving plaintiffs. The defendants' witnesses were not believed by the Subordinate Judge, and it must be held that this allegation is not proved.

5. As to the alleged request in 1908, the defendants' evidence is conflicting and unreliable, and this allegation also breaks down.

The result of the above survey of evidence is that, in their Lordships' view, Narasamma is proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest *sapindas* is proved to have withheld his consent for any malicious or corrupt reason. It follows that the necessary assent of *sapindas* was not obtained, and the adoption was invalid.

Counsel for the appellants put forward an alternative argument, *viz*, that in view of the finding of the Courts in India that there was great hostility between the plaintiffs and Narasamma, it was unnecessary for her to ask for their consent; but this argument cannot be entertained. It is inconsistent, not only with the defendants' pleading, but with the whole of their evidence and arguments in the Courts below; and it is not open to them to make an entirely new case before this Board. In any case the argument derives no support either from the facts or from the law as above explained.

Apart from the absence of the necessary assent, other objections to the adoption were put forward on behalf of the respondents. It was said (1) that an authority given by *sapindas* to adopt "any boy at any time" is invalid [see *Suryanarayana* v. *Venkataramana* (6)]; that an authority given by *sapindas* in 1901 could not validly be executed in 1908 when several of the signatories were dead and the opinion of others might have altered; and (3) that an authority to adopt asked and given for religious motives and in order to keep up the line of succession to Seshadri was not properly exercised by the adoption of Kristnayya on the terms that he should give up to the adopting widow or to her relatives the greater part of her late husband's estates. These questions, although raised in the Courts below, were not the subject of decision there; and their Lordships accordingly refrain from expressing any opinion upon them. But it is certain that these circumstances do not detract from the obligation imposed upon the Courts in cases of this character to require a strict compliance with the conditions imposed by law.

For the above reasons their Lordships will humbly advise His Majesty that these appeals be dismissed with costs.

Appeals dismissed.

Solicitor for the Appellant:—Mr. *Douglas Grant.*

Solicitors for the Respondent:—Messrs. *Barrow, Rogers & Nevill.*

(6) 26 M. 681.

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE MADRAS HIGH COURT.

February 20, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

RAMATHAI VADIVELU MUDALIAR —APPELLANT

versus

PERIA MANICKA MUDALIAR AND OTHERS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66, object of—Court sale—Agreement by purchaser to convey property purchased, whether enforceable.

The object of section 66 of the Code of Civil Procedure is to put an end to purchases at Court auctions by one person in the name of another. [p. 398, col.]

An agreement by an auction-purchaser subsequent to the purchase to convey a portion of the property

to another is not affected by section 66 of the Civil Procedure Code and is enforceable. [p. 395, col 1]

Amrutam Venkatappa v. *Vavilala Jalayya*, 51 Ind. Cas 111; 42 M. 615; 9 L. W. 598; 26 M. L. T. 46; (1919) M. W. N. 355; 37 M. L. J. 98 (F. B.), approved.

Consolidated appeals from the decrees of the High Court, Madras, dated 10th April 1916, reversing the decrees of the Subordinate Judge, Chingleput.

FACTS.—These were suits to enforce an agreement to convey land purchased by the defendant at an execution sale. The facts are fully set out in their Lordships' judgment. The trial Court dismissed the suits on facts alone and did not deal with the issue as to whether the suits were barred by section 66 of the Code of Civil Procedure. On appeal the High Court found that the auction-purchaser was a real purchaser but that he had agreed to convey to the plaintiffs such portions of the property for which they had already paid or had under such agreement to pay the balance of the purchase-money which took the case out of the purview of that section, and granted plaintiffs decrees.

Mr. *Dube*, for the Appellant.—The agreement, if proved, and even as found by the High Court, established that appellant was a *benamidar* and was governed by section 66 of the Code of Civil Procedure. That section requires (1) a suit to be brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser. The suits were, therefore, not maintainable.

Kishan Lal v. *Goruruddhuraja Prosad Singh* (1), *Ganga Baksh* v. *Rudar Singh* (2), *Suroj Narain* v. *Ratan Lal* (3).

Mr. *Kenworthy Brown*, for the Respondents.—The purchasers at the Court auction sale were real purchasers who had agreed to convey to the plaintiffs in these suits or their predecessors in-title such portions of the property for which they had already paid or for which a balance remained to be paid under the agreement. The plaintiffs were beneficially interested in the purchase and in no way affected by section 66. *Ganga Sahai* v. *Kesri* (4).

The original agreement had been ratified on two occasions subsequent to the sale: the agreements subsequent to the sale were unaffected by the section and were enforceable. *Amrutam Venkatappa* v. *Vavilala Jalayya* (5), *Kumbalinga Pillai* v. *Arisputra Padiachi* (6).

Mr. *Dube* replied.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals from two decrees of the High Court of Judicature at Madras reversing two decrees of the Subordinate Judge of Chingleput, and giving judgment in both suits for the plaintiffs. The following statement of the facts is founded upon the findings of the High Court, which, for reasons which will hereafter appear, their Lordships accept as correct.

One Sundarammal was the owner of certain lands in the village of Kovur and elsewhere in the Chingleput District, subject to a first mortgage for Rs. 25,000 and interest and to a second mortgage for Rs. 9,500 and interest, and had incurred other debts. In the year 1902 the second mortgagees brought a suit to enforce their mortgage, obtained a decree for the sale of the mortgaged property, and themselves purchased it at the auction at a low price. Thereupon Sundarammal, in order to get this sale set aside under section 310A of the Civil Procedure Code and to provide for her other debts, entered into an agreement with four persons named Murugappa, Kandasami, Munisami and Ponnambala, for the sale of the whole property to them at the price of Rs. 65,000, being a sum sufficient to pay off the mortgage and other debts and to provide a small balance for the vendor. These persons were friends of Sundarammal, and it was understood that they should dispose of the lands

(1) 21 A. 238; A. W. N. (1899) 42; 9 Ind. Dec. (N. S.) 861.

(2) 22 A. 434; A. W. N. (1900) 152; 9 Ind. Dec. (N. S.) 1327.

(3) 40 Ind. Cas. 988; 44 I. A. 201; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 40; 33 M. L. J. 180, 19 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159 (P. C.).

(4) 60 Ind. Cas. 265 42 I. A. 177 at p. 182; 19 C. W. N. 1175; 18 M. L. T. 203; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998; 37 A. 545; 22 C. L. J. 408; (1915) M. W. N. 713 (P. C.).

(5) 51 Ind. Cas. 111; 42 M. 615; 9 L. W. 598; 26 M. L. T. 46; (1919) M. W. N. 355; 37 M. L. J. 98 (F. B.).

(6) 18 M. 436; 5 M. L. J. 200; 6 Ind. Dec. (N. S.) 653.

piecemeal and, after paying out of the proceeds of sale the mortgage and other debts of Sundarammal and any money due to themselves, should pay over to her any balance which might remain. The property was accordingly conveyed to the four persons above named (who will be referred to as "the vendees") on the 10th August 1902; and on the 15th August 1902 they paid into Court a sum of Rs. 15,598, being a sum sufficient to satisfy the second mortgagees, and got the sale to those mortgagees set aside. On the 27th September 1902 the vendees divided amongst themselves about sixty acres of the land, which were taken to represent in value the amount which they had paid for redeeming the second mortgagees; and some time afterwards, as no sale could be made of the remaining lands in Kovur, the vendees made a similar division of those lands among themselves on the understanding that each of them should be responsible for his share of the debts. On this division a part of the land was reserved for Sundarammal, apparently in satisfaction of her interest in the ultimate balance to arise on realisation. Murugappa died, and his interest in the lands became vested in his widow and certain alienees from her. Meanwhile the first mortgagees, who had not been parties to the arrangements above recited, became dissatisfied; and in the year 1904 they took proceedings to enforce their mortgage, and on the 14th March 1904 obtained a decree for sale. The sale was fixed for the 3rd May 1905; and it is obvious that the persons claiming under the deed of 1902 ran the risk, unless they made some arrangement, of losing the benefit of their purchase and of the monies which they had found to satisfy the second mortgagees. They accordingly determined to bid for the property and for that purpose got together a sum of about Rs. 10,000, which they contributed in unequal shares. It was then ascertained that the appellant Vadivelu and two other persons named Vythilingam and Dharmakartha Kandasami were also proposing to bid, and it was in order to meet this difficulty that the agreement giving rise to these suits was entered into. The agreement was entered into orally between the three persons last named, that is to say, the appellant, Vythilingam and Dharmakartha Kandasami, and the four original vendees or their representatives, and was to the effect that the vendees should not bid for the property but should permit the above named three persons to buy, that if they bought the vendees should advance to them the above sum of about Rs. 10,000 to assist them in providing the deposit and completing the purchase, and that whichever of them became the purchaser of any property allotted on the first or second division to any of the original vendees (with an exception to be immediately mentioned) should convey such property to such vendee or his representative, on payment by him of such proportion of the auction price as might be found to be due from him on an adjustment of accounts. An exception was made in the case of Ponnambala, one of the four vendees, who was not anxious to get back the property allotted to him on the second division; and, so far as he was concerned, the arrangement applied only to the property passing under the first division, and it was understood that, as regards the properties allotted to him on the second division, the appellant should stand in his shoes.

The auction accordingly took place, and the appellant was declared the purchaser of Lot No. 3, comprising about 115 acres of the Kovur lands, for Rs. 21,500, other lots being purchased by Vythilingam and Dharmakartha Kandasami. The vendees duly made the contribution of Rs. 10,000 which they had promised; the balance required was raised from other sources, and sale certificates were issued to the purchasers and possession given to them. The lots purchased by Vythilingam and Dharmakartha Kandasami have been dealt with in accordance with the agreement and need not be further referred to.

In February or March 1906 there was an adjustment of accounts between the appellant and the vendees or their assignees in accordance with the arrangement above referred to. The decision of the questions which arose on the adjustment was entrusted to a *panchayat*; and it appears from the evidence that the appellant and the other persons concerned signed a written undertaking to abide by the award of the *panchayatdars*. In the course of this adjustment

a slight variation was made in the allotment which had been previously made of the lands; and this variation was accepted by all parties and embodied in the award which fixed the amount payable by each of the vendees on taking his conveyance. The appellant was then quite willing to deal with the allotted lands in the manner agreed before the auction sale and was a party both to the agreement to abide by the award of the *panchayatdars* and to the agreement to vary the allotments.

In the year 1907, the appellant having shown reluctance to carry out the arrangement, a suit (No. 6 of 1907) was brought against him by certain persons who were nominees of Munisami and Kandasami. This suit did not go to trial but was settled by a compromise, by which the appellant agreed to convey to the plaintiffs in that suit about fifty acres of the lands purchased by the appellant. At the time of this compromise the other persons representing the original vendees, that is to say, Ponnambala and the persons claiming under Murugappa, insisted upon the appellant conveying to them also their respective shares in the property; and the representative of the appellant, while pointing out that an agreement to execute such a conveyance could not be included in the *razinama* in which the compromise then in question was to be embodied, undertook that the conveyance should afterwards be made. At the same time a variation was made in the original agreement so far as the representatives of Murugappa were concerned, those persons undertaking to take over from the appellant certain further properties and to pay an additional Rs. 2,600 for them.

Notwithstanding the above mentioned transactions, the appellant afterwards refused to convey to Ponnambala and to the representatives of Murugappa the properties to which they were entitled under the arrangement; and ultimately, *viz.*, in the years 1912 and 1913, these suits were brought to enforce such a conveyance. The plaintiffs in one suit were the persons claiming under Murugappa, and the plaintiffs in the other suit were Ponnambala and persons claiming under him, the appellant being the defendant in both suits.

At the hearing of the suits two main points were raised by the appellant, *viz.*, (1) that the appellant had not in fact entered into the agreement alleged or received the contribution of Rs. 10,000; and (2) that in any case the suits were barred by section 66 of the Code of Civil Procedure. The Subordinate Judge, by whom the suits were tried, found the first issue in favour of the appellant, and accordingly it was unnecessary for him to deal with the second question. On appeal, the High Court overruled this decision and held that the appellant had received the Rs. 10,000 and had agreed to convey the properties in manner alleged by the plaintiffs. The Court also held that section 66 of the Civil Procedure Code was not a bar to the suits, and accordingly passed decrees in favour of the plaintiffs. Thereupon this appeal was brought.

Upon the issue of fact their Lordships have no hesitation in accepting the decision of the High Court. The finding of that Court is precisely in accordance with and is practically based upon a statement made by the appellant himself in the Suit No. 6 of 1907 above referred to. The appellant in the course of the trial maintained that the statement which he had himself put forward in 1907 was wholly untrue and was made for some indirect purpose; but the High Court declined to accept this explanation, which was not supported by the other facts in the case, and their Lordships entirely agree with this view.

The alternative defence is based on section 66 of the Code of Civil Procedure, which is in the following terms:—

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The question to be determined is whether the facts proved by the plaintiffs in these suits bring them within this section. This point was dealt with in the judgment of the High Court as follows:

"On the first question, from the facts which we find to have been proved in this case, it is clear that section 66 is not a bar to the plaintiffs' claim for specific perform-

ance of the contract. Their case is not that the first defendant or Vythilingam or Dharmakartha Kandasami were merely *benamidars*, but that they were to be real purchasers, but they agreed to convey to the plaintiffs in each of these suits or to their predecessors in title such portions of the property for which (as we find) they had already paid or had to pay under that agreement the balance of the purchase money. That, we think, is a sufficient answer to the plea under section 66 of the Civil Procedure Code."

It was argued by Counsel for the appellant that the agreement relied upon by the plaintiffs, even as found by the High Court, amounted in substance to an agreement that the appellant should purchase as to certain parts of the property on behalf of the respondents or of the persons whom they represent; and he was able to point to certain expressions both in the plaints and in the evidence of some of the plaintiffs' witnesses which supported that view of the transaction. If the agreement entered into before the auction stood alone, there would be considerable force in this contention. The object of section 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow. But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale. It was decided in *Amrutam Venk tappa* v. *Vavilala Jalayya* (5) that an agreement subsequent to a purchase is not affected by the section, and there can be no question as to the correctness of that decision. In the present case agreements were entered into after the sale, namely, first, at the time of the *panchayat* in 1906, and secondly, on the occasion of the compromise of the suit of 1907, by which the appellant bound himself to carry out the original contract with the respondents, with certain variations which were then agreed to and accepted by all parties. These subsequent agreements are unaffected by the section and are accordingly enforceable against the appellant.

For the above reasons their Lordships will humbly advise His Majesty that these consolidated appeals fail and should be dismissed with costs.

Solicitors for the Appellant:—Messrs. *Barrow, Rogers and Nevill.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 709 OF 1917.

August 25, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

SADASHIV RAMCHANDRA DATAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TRIMBAK KESHAV VAZE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 443—Minor—Mother, as guardian of minor, consenting to arbitration and decree—Omission by Court to appoint guardian, effect of—Decree, whether binding on minor.

An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit, or reasonable and proper for the protection of his property, but the award would not be binding if that were not the case [p. 402, col. 1.]

Where a mother, as the natural guardian of her minor son, consented to a reference to arbitration and accepted the award on behalf of the minor and raised no objection to the passing of a decree in terms of the award, but no appointment of the mother as guardian of the minor had been made, as required by section 443 of the Code of Civil Procedure, 1882, and the subsequent result of the decree was a sale of the property in dispute for an undervalue:

Held, that the minor's interests had not been duly protected; that the omission to appoint a guardian was not a mere irregularity which could be condoned, and that the decree based on the award and the sale of the property were null and void. [p. 401, cols. 1 & 2.]

Second appeal from the decision of the Assistant Judge, Poona, in Appeals Nos. 230 and 231 of 1914, varying the decree passed by the Joint Subordinate Judge at Poona, in Civil Suit No. 298 of 1912.

Messrs. *Jayakar* and *V. V. Bhadkamkar*, for the Appellants.

Messrs. *Patwardhan* and *V. D. Limaye*, for the Respondents.

JUDGMENT.

SHAH, J.—The facts which have given rise to this second appeal are these:

The father of the present plaintiff mortgaged the house in suit on the 4th of December 1896 to defendant No. 1 for Rs. 1,000 with interest at 6 per cent.

The plaintiff's father died in 1899 leaving a son, the present plaintiff, and a widow, the plaintiff's mother. In 1901 the mortgage claim was refered to arbitration by the defendant No. 1 and the mother of the plaintiff who was then a minor. An award was made in May 1901, under which the minor represented by his mother was to pay Rs. 1,000 and Rs. 200 and odd as interest with further interest at 6 per cent. on the principal within one month and the property was to be sold in case the money was not paid within the time specified. The present defendant No. 1 applied to the Court on the 12th of June 1901 to have a decree in terms of the award, and the present plaintiff's mother filed a statement on the 13th of June 1901, in which she consented to a decree being passed in terms of the award and stated that she had no objection to the award being filed in Court. She appeared through a Pleader. A decree was accordingly passed in terms of the award on the 19th of June 1901. In execution of the decree the house was sold in November 1902 and purchased by the present defendant No. 1 for Rs. 1,700.

On the 10th of August 1912 the plaintiff after attaining majority filed the present suit to set aside the decree passed in terms of the award. The defendants contested the suit and several issues were raised representing the rival contentions between the parties.

The trial Court on a consideration of the evidence found that the plaintiff was not bound by the decree on the award, nor by the sale in execution of that decree and that he was entitled to the relief on the footing of the original mortgage of 1896. The accounts were taken under the Dekkhan Agriculturists' Relief Act as the plaintiff was an agriculturist, and a decree was passed in respect of the amount that was found due to the mortgagees on the mortgage.

The defendants appealed to the District Court of Poona, and the learned Assistant Judge has affirmed the decision of the trial Court on the main point that the plaintiff was not bound by the decree on the award, and subject to a certain variation in the amount payable to the mortgagees, has upheld the decree of the trial Court.

The defendants have appealed to this Court, and it is urged on their behalf that the decree is binding upon the present plaintiff. It is urged that it was open to the mother as the natural guardian of the plaintiff to refer the matter to an arbitration and that as neither fraud nor undue influence is proved, the award must be taken to be binding upon the parties. It is also urged that though there may have been some irregularity in the proceedings to file the award in Court in so far as no formal order was made appointing the mother as the guardian of her minor son, under the circumstances it must be taken to be a mere irregularity, which has not in any way prejudiced the interests of the minor.

It is conceded before us that apart from this objection relating to the decree on the award there is no further objection to the decree as passd by the lower Appellate Court, that is, if the plaintiff is entitled to have relief on the footing of the mortgage of 1896 without any reference to the award proceedings, the decree now under appeal is not open to any objection. The principal question, therefore, is whether the lower Courts are right in holding that the decree in terms of the award is not binding upon the minor and that it is liable to be set aside at his instance.

It has been urged in support of the view taken by the lower Courts that there was no appointment of a guardian as required by section 443 of the Code of 1882 and that all the proceedings which resulted in the decree and the sale of the property are null and void, and further that under section 462 of the Code of 1882, corresponding to Order XXXII, rule 7, of the present Code the leave of the Court for filing the award was necessary and that in the absence of such leave the decree based on the award is voidable at the instance of the minor.

The lower Appellate Court has found that in the present case there has been a serious prejudice to the minor, as he has been deprived effectively of the benefit of the provisions of the Dekkhan Agriculturists' Relief Act, as the full amount was found payable by him without taking any account under the Dekkhan Agriculturists' Relief Act, as no instal-

ments were allowed and as the time fixed for the payment of the whole sum was only one month. The lower Appellate Court has not gone into the question of the valuation of the house and has not expressed any opinion on the finding recorded by the trial Court that the house was in fact sold for nearly half the amount of its real market value.

I shall first deal with the point relating to the irregularity in the proceedings initiated by the present defendants on the award arising in consequence of no appointment of a guardian for the minor defendant having been made in those proceedings. It is clear that under section 443 of the Code then in force it was incumbent upon the Court to appoint a proper person to be the guardian for the minor defendant in those proceedings which under the provisions of the Code were to be treated as a suit. All the papers connected with those proceedings are before the Court; and it is clear from those papers—and that is the conclusion reached by the lower Appellate Court—that as required by section 443 no appointment of the mother or any other person as the guardian of the minor defendant was made. The question is as to the effect of this omission to appoint a guardian. When due regard is had to all the circumstances connected with these proceedings, it is difficult to avoid the inference that the minor's interests were not protected. The appearance of the mother as soon as the application for a decree in terms of the award was presented through a Pleader who is now stated by the mother to have been selected for her by the present defendant No. 1, and her consenting to a decree being passed in terms of the award are circumstances of some suspicion. When we have due regard to the terms of the award and the subsequent result of the decree, namely, a sale for an undervalue in favour of the defendants, the conclusion of the lower Appellate Court that the minor's interests had not been duly protected must be accepted. The inference is clear that the minor was not effectively represented in the proceedings initiated by the present defendants in 1901 and that the decree passed in those proceedings on the award and the subsequent proceedings in execution resulting in the sale of the property in favour of the defendant No. 1 must all be treated as null and void.

It is not necessary to refer to all the decisions which have been cited in the course of the argument: but I may refer to the case of *Partab Singh* v. *Bhabuti Singh* (1) as supporting the above conclusion. The appellants have relied upon the decision in *Musammat Bibi Walian* v. *Banke Behari Pershad Singh* (2), but the *ratio decidendi* seems to me to be against the appellants. Their Lordships clearly point out in that case that it is obligatory upon the Courts to comply with the provisions of section 443, and the irregularity in that case was condoned on the ground that on the particular facts, the minor was held to have been effectively represented.

In the present case the question whether the omission on the part of the Court to comply with the provisions of section 443 should be condoned on a similar ground or not, is a matter which must be decided with reference to the facts of this case. Both the Courts have taken the view on the facts against the defendants, and it seems to me that the conclusion reached by the lower Courts on this point is right.

In view of this conclusion it is not necessary to consider the further question which has been argued at some length in this appeal, as to whether the leave of the Court under section 462 was necessary to give effect to the consent of the mother that a decree might be passed in terms of the award. This question involves the consideration of the point as to whether, when the mother appeared through a Pleader on the 13th of June 1901 and gave her consent to a decree being passed in terms of the award, she acted in pursuance of any agreement between her and the defendant No. 1 or not. If the facts could reasonably give rise to the inference that there was such an agreement between the parties, no doubt the provisions of section 462 would apply and the absence of any leave of the Court for such an agreement with reference to the suit to

(1) 21 Ind. Cas. 288; 40 I. A. 182; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 35 A. 487 (P. C.).

(2) 30 I. A. 182; 5 Bom. L. R. 822; 7 C. W. N. 774; 30 C. 1021 (P. C.); 8 Sar, P. C. J. 512

file the award in Court would entitle the minor on attaining the age of majority to avoid the decree. Whether there was such an agreement between the plaintiff's mother and the defendant No. 1 is really a question of facts. It is urged for the plaintiff that the facts justify an inference as to such an agreement between his mother and the defendant No. 1 and that the decision in *Mahadev Balkrishna Kelkar* v. *Krishnabai* (3) supports their contention. On the other hand, it is urged that apart from the agreement to refer the matter to an arbitration there is no further agreement with reference to the suit to file an award in Court, and Mr. Jayakar has relied upon the recent decision of the Full Bench in *Hanmantram Raghakisan* v. *Shivnarayan Asuram* (4) It is not necessary to pursue this point, or to discuss the cases which have been cited with reference to the applicability of section 462 to facts such as we have in this case.

The appeal, therefore, fails and the decree of the lower Appellate Court is confirmed with costs

The cross objections which are not pressed are dismissed with costs.

HAYWARD, J.—I agree An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit or reasonable and proper for the protection of his property, but the award would not be binding on him if that were not the case. The question of its binding effect could of course be decided in subsequent proceedings in which the minor was properly represented by his guardian. Such proceedings would include those taken for filing the award, because the jurisdiction to file it would depend upon the question whether or not the award had been based upon due authority given on behalf of the minor by his natural guardian. It was held that that was a question to be decided in such proceedings in decisions on section 526 of the old Civil Procedure Code, and the substance of those decisions has been incorporated in the opening words "where the Court is satisfied that the matter has been referred to arbitration" of section 21 of the Second Schedule of the present Civil Procedure Code. Where the question of the legality of the reference is not taken in such proceedings, the ordinary inference would be that it was held to have been legal, so that here, where the legality was not called in question, the point to be considered would be whether the minor was only represented in the proceedings by his natural guardian, *i. e.* in the proceedings taken to file the award. Now a minor would not ordinarily be properly represented unless his guardian was formally appointed as such by the Court. But on the other hand where the guardian was tacitly accepted throughout the proceedings as a proper person representing the minor and where the irregularity of not formally making the appointment in writing had not affected the merits, then no doubt the minor would be held to have been duly represented by his guardian by reason of the provisions of section 578 of the old Civil Procedure Code, which is now section 99 of the present Code. So that the real question, in my opinion, has been reduced to this: whether the minor was or was not prejudiced by the irregularity of his natural guardian, his mother, not having been formally appointed by the Court. It has been definitely held that there was prejudice by the first Appeal Court, and it seems to me difficult for us to say that that finding is wrong in view of the several circumstances which were brought to light. It was thus found that the ordinary procedure for settling the dispute between the parties would have been one in which the whole history of past transactions would have been enquired into under the provisions of the Dekkhan Agriculturists' Relief Act and that in place of this ordinary procedure the special procedure was adopted of referring the matter to the sole arbitration of an arbitrator specially selected by the minor's opponents. It was *prima facie* not for the benefit of the minor to substitute this special procedure before the Special Judge chosen by his opponents, and this *prima facie* conclusion was proved to have been correct by the subsequent result. The award was for the whole amount claimed and ordered it to be paid within one month, instead of the six months which would have been the least allowed by the ordinary procedure, quite apart from the

(3) (1898) P. J. 609.

(4) 48 Ind. Cas. 238; 43 B. 258; 20 Bom. L. R. 970 (F. B.).

question whether or no instalments could not have been granted under the provisions of the Dekkhan Agriculturists' Relief Act. Then the sale that resulted was far from satisfactory. The property was sold for Rs 1,700 and was bought by the minor's opponents. The real value would appear to have been anything from Rs. 2,500 to Rs. 3,500. These latter facts were elicited at the trial, though they have not been referred to in the judgment of the first appeal Court. It seems to me that that is sufficient to justify us in holding that the irregularity of not formally deciding whether the minor's natural guardian, his mother, was or was not a proper person to represent him in the proceedings did affect the merits. It would seem to me that this circumstance tends strongly to show that the irregularity did most certainly affect the merits and prejudice the minor. If the question had been carefully considered, as it ought to have been, there is every probability that some other guardian would have been appointed such as the Nazir of the Court, who would have fully enquired into the circumstances of the arbitration. It seem to me that on this ground we ought to uphold the decree of the first Appeal Court.

It is not necessary in these circumstances to consider the other question argued before us, that is to say, whether there was an agreement between the minor's natural guardian, his mother, and the minor's opponents that the award should be filed without objection in Court. If there had been any such formal agreement, then no doubt it would have been necessary to have obtained the formal sanction of the Court. But it is not necessary here to discuss that matter further, as upon the other ground it seems to me clear that we ought to uphold the decree of the first Appeal Court and dismiss this appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 95, 126 AND 127 OF 1917.

April 15, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

IN F. A. No 95 OF 1917

Syed ABBAS *alias* ABOO SAHEB AND OTHERS—APPELLANTS

versus

MISRI LAL AND OTHERS—RESPONDENTS.

IN F. A. NOS. 126 AND 127 OF 1917.

Babu PURAN MAL AND OTHERS—APPELLANTS

versus

Babu MISRI LAL AND OTHERS—RESPONDENTS.

Mortgage—Co-mortgagees, position of—Payment to one co-mortgagee, whether discharges mortgage.

Co-mortgagees must, unless the contrary is shewn, be regarded as having a separate interest in the money advanced, although they take a joint security, and must be treated as in the position of tenants-in-common and not joint tenants Therefore, a payment of the mortgage-debt to one of two mortgagees would not amount to a discharge of the mortgagor's liability to the other mortgagee. [p. 410, cols. 1 & 2.]

Appeals from a decision of the Subordinate Judge, Patna, dated the 14th March 1917.

IN F. A. No. 95 OF 1917.

Messrs. *S. H. Imam*, *K Husnain* and *A. B. Mukherji*, for the Appellants.

Messrs. *P. K. Sen*, *Fakhrud lin*, *G. Das*, *B. C. Sinha* and *S. Lal*, for the Respondents.

IN F. A. NOS. 126 AND 127 OF 1917.

Messrs. *K. Sahay* and *B. Lal*, for the Appellants.

Messrs. *P. K. Sen*, *B. C. Sinha* and *S. Lal*, for the Respondents.

JUDGMENT.

MILLER, C. J.—These appeals arise out of two suits Nos. 49 and 82 of 1915, which were tried together before the Subordinate Judge of Patna on the 14th March 1917. In the former Misri Lal and his minor son Ram Birich Lal claim to recover possession of their share of certain properties with mesne profits held under a *zarpeshgi* lease or mortgage granted by Syed Abbas, the defendant No. 1 in that suit, to Saudagar Mahton, the father of Misri Lal, and Puran Mal the defendant No. 2. The defendants Nos. 3 to 11 are members of Puran Mal's family. The defendants Nos. 12 to 21 are subsequent

ijaradars holding under the mortgagor Syed Abbas and are now in possession of the property. The remaining defendants Nos. 22 to 27 are *pro forma* defendants, being other members of the plaintiff's family.

Misri Lal the plaintiff and Puran Mal the defendant No. 2 held a *zarpeshgi* lease of the property from Syed Abbas, and the latter contends that he redeemed the mortgaged property by payment of the *zarpeshgi* money to Puran Mal, co mortgagee with the plaintiff's father, on the 29th June 1915 and subsequently granted an *ijara* to the defendants Nos. 11 to 21 who are now in possession. The plaintiff claims in the alternative against Puran Mal and his family to recover the sum of Rs. 21,800, half the *zarpeshgi* money paid to him, in the event of the Court finding that such payment was a valid discharge of the debt due to both the mortgagees. Puran Mal's case is that the money was rightly paid to him, as he alone advanced the whole sum of Rs. 43,600 to Syed Abbas and that Saudagar Mahton's name was merely added as a mortgagee owing to an arrangement between them, whereby Saudagar was to remain in actual possession and manage the property for Puran Mal taking as payment therefor a half share in the profits after providing for interest on the loan and other outgoings.

In the second suit No. 82 of 1917 Puran Mal and other members of his family sued Misri Lal and the members of his family for an account of the profits arising from the management of the mortgaged property, of which Saudagar and after his death in 1907 his son Misri Lal are said to have been in possession as agents for Puran Mal.

The two cases were tried together before the Subordinate Judge of Patna on the 14th March 1917, who found that payment to Puran Mal was not a valid discharge of Misri Lal's interest in the mortgage debt and directed that Misri Lal should recover joint possession of a half share in the property in suit together with Syed Abbas and the *ticcadars*, and awarded him mesne profits from those defendants from the date of his dispossession. He further found that Saudagar Mahto and after him Misri Lal had been in possession of the properties as mortgagees under the *zarpeshgi* lease to the extent of their half share, and not as agents for Puran Mal and accordingly dismissed Suit No. 82 in which Puran Mal claimed an account from Misri Lal of the profits realised during the currency of the mortgage.

From this decision three appeals have been preferred. Appeal No. 95 of 1917 arises out of Suit No. 49 of 1915 and is brought by Syed Abbas, who contends that the payment made to Puran Mal was a valid discharge of the debt. Appeal No. 127 arising also out of Suit No. 49 is brought by Puran Mal, who contends that the money advanced in consideration of the mortgage was advanced by him alone and that Misri Lal had no interest in the same. Appeal No. 126 arises out of Suit No. 82 and is brought by Puran Mal, claiming that he is entitled to an account from Misri Lal on the grounds already stated.

The properties in suit consist of three villages named Subanwa, Bhabhandigha and Kalyanpur, which form part of a *wakf* estate of which Syed Abbas is the *mutwalli*. It appears that in the year 1900 Saudagar Mahton held from Syed Abbas a *zarpeshgi ticca* of the villages in question at a rent of Rs. 4,500. He had also advanced a sum amounting to one year's rent to be repaid at the termination of the lease. The properties of the *wakf* estate, including the three villages in question, were hypothecated to one Baijnath Singh under a simple mortgage which took priority over Saudagar's *zarpeshgi* and which had then fallen due. The amount due to Baijnath amounted to Rs. 54,000, but Syed Abbas was unable to raise the whole of this money. Saudagar had been in possession of these villages as *ticcadar* since about the year 1890 on apparently advantageous terms and as he had an unexpired term of three years to run, it was to his interest that the mortgage to Baijnath should, if possible, be discharged. As Syed Abbas required financial assistance to raise the greater part of the money necessary to liquidate his debt to Baijnath, he approached Saudagar with a view to obtaining a loan of Rs. 46,300 for this purpose proposing to grant him a fresh *zarpeshgi* lease of the property for a period of 10 years on somewhat more favourable terms than the existing lease. Saudagar was not in a position to advance the whole of the money

required, but according to the plaintiff Misri Lal's case he was able and willing to advance half that sum if he could find any one prepared to join with him in the transaction and advance the other half. He, therefore, approached Puran Mal, a Mahajan residing at Patna, with a view to obtaining the balance required. According to Misri Lal's case Puran Mal agreed to advance half the amount at an interest of 11 annas per cent. per mensem and in conjunction with Saudagar to take a *zarpeshgi* lease of the villages for a period of 10 years at a rent of Rs. 5,300, out of which the interest on the advance amounting to Rs. 3,597 and the Government revenue and cesses, etc., amounting to Rs. 1,701-2-5 were to be deducted, leaving a trifling balance of under Rs. 2 payable to the landlord. The rents of the villages amounted to considerably more than Rs. 5,300 and the net profits were to be divided equally between the two mortgagees. Each party was to be put in possession either by himself or his agents and collect half the dues recoverable by him. Saudagar lived on the spot at Kalyanpur. His Patwari was one Nanrangi Lal and according to the case of Misri Lal he was appointed to act for both parties as Patwari whilst Puran Mal appointed as his Gomashta Bishun Singh and subsequently Shakawat Hussain, and by this arrangement half the proceeds were paid over to Bishun Singh and afterwards to his successor Shakawat Hussain, the other half going to Saudagar and after his death to Misri Lal. An instrument in writing dated the 19th August 1900 was accordingly drawn up and executed by the parties to carry out the arrangement come to. By the terms of this document a *zarpeshgi* lease or mortgage was granted by Syed Abbas to Puran Mal and Saudagar Mahton for a period of 10 years. After reciting the necessity of borrowing money, it proceeds, "accordingly Babu Puran Mal and Saudagar Mahton have agreed to take lease by making an advance of the sum of Rs. 46,300 carrying interest at 11 annas per cent. per mensem for a period of 10 years" of the Mauzas in question. Provision was then made for paying off Saudagar's advance of Rs. 4,500 at the end of three years. The rent was also to remain at the old rate of Rs. 4,500 for the same period and from this the sum of Rs 3,597 was to be deducted for interest on the new loan and the balance of Rs. 903 was to be paid to the mortgagor. For the remainder of the term of 10 years the rent was to be Rs. 5,300 including Government revenue and cesses and the balance, as already stated, of something under Rs. 2 was payable as *hakhajri* to the mortgagor. The mortgagor also had the option of paying off the whole or a portion of the advance of not less than Rs. 5,000 during the currency of the term, in which case the rent would be increased by the amount of interest proportionate to the sum repaid. The whole of the *zarpeshgi* money or such portion as had not been repaid under the above option was payable at the end of Jeyth 1317 F. (June 1910 A. D.), when the lease should come to an end and the mortgagor would be entitled to get direct possession. But in the event of non payment of the whole *zarpeshgi* money by last year of the term, the lease with all its conditions was to remain in force until the whole or such part of the debt as was still due had been paid up.

There can be no doubt from the terms of this document that both Saudagar Mahton and Puran Mal are referred to as the persons advancing the money and acquiring the interest in the property. In addition to the passage already quoted the following clause appears:—

"Therefore, of our own free will and accord we" (Syed Abbas and his brother who at that time also had an interest in the property) "have given in lease as detailed below for 10 years on receipt of Rs. 43,600 in advance carrying interest at 11 annas per cent. per mensem to Babu Puran Mal * * * * and to Saudagar Mahton * * * * the whole and entire 16 annas of each of the Mauzas."

Throughout the document these two are referred to as the lessees. Only one other passage in this document need be referred to. It provides that "till payment of the *zarpeshgi* money the said Mauzas shall stand mortgaged and liable." The effect of this document was to create a mortgage over the leasehold interest in the property as security for the re-payment of the advance, with the stipulation that the lease should continue in any event for 10 years on payment of the reserved rent notwithstanding the earlier discharge of the debt. The lessor could only

redeem on re-payment of the loan, otherwise the lessees' interest would continue indefinitely.

No portion of the loan was repaid during the currency of the term and Saudagar having died in 1907, his son Misri Lal succeeded him as *karta* of the family. The 10 years' term expired on the 30th Jeyth 1317 F. (June 1910 A. D.). But nothing was then done by way of repayment and the lessees remained in possession until 5 years later, when a sum of Rs. 41,770-6-9 was paid to Puran Mal on the 29th June 1915, *i. e.*, on the 2nd Asarh 1322 F. or two days after the end of Jeyth that year. The balance of the *zurpeshgi* money, amounting to Rs. 1,829-9 3, was deducted on account of certain sums said to be due from Misri Lal to Syed Abbas for rent of another Mauza and other small items which Puran Mal agreed to settle in account with his co lessee. It was alleged on behalf of Syed Abbas that Misri Lal and Puran Mal went together at his request to his house some 3 or 4 days before the 30th Jeyth and that they both agreed on that occasion to these deductions, and said they would come again on the 30th Jeth and receive, the money, but that Misri Lal alone came on the 30th, Puran Mal not being present, and on that occasion the money was tendered to Misri Lal, who said that he had not the *patta* in his possession as it was with Puran Mal who would return it. This evidence was given by Raghubans Sahay, the Mukhtar-am of Syed Abbas. This witness further stated that later on in the evening of the 30th Jeyth Puran Mal did turn up, but for some reason not explained the money was not tendered to him then. The next day was a holiday and on the following day the 2nd Assarh the money was paid to Puran Mal as already stated. Between the 30th Jeyth and the 2nd Assarh Raghubans consulted his employer's Vakil, Rai Bahadur Purnendu Narain Sinha, as to how payment should be made and was advised that as the money was payable to joint mortgagees he could get a good discharge by paying it to one. The Rai Bahadur was called as a witness on behalf of Puran Mal. Syed Abbas had been his client for some years and he had been present when the *zarpeshgi* deed of the 19th August 1900 was executed and was an attesting witness thereto. He had no very clear re-collection of anything that Puran Mal told him about the document on that occasion, but he was evidently stating the facts impartially to the best of his re-collection, and he says that he was informed by Puran Mal when the deed was executed that the money was to be repaid to both Misri Lal and Puran Mal. He further says that when Raghubans asked his advice as to the manner of payment in 1915, he was told by him that Misri Lal was endeavouring to avoid payment and did not turn up at the time when payment was due which was the 30th Jeyth. The complaint was that Misri Lal was endeavouring to evade payment within the month of Jeyth. The evidence of this witness can undoubtedly be accepted as accurate but it materially differs from the story put forward by Raghubans and as far as it goes, corroborates that of Misri Lal which will be referred to presently. The evidence of Raghubans was that Misri Lal agreed to everything suggested and was willing that the deductions referred to should be made from the *zurpeshgi* money, and that he in fact turned up at the house of Syed Abbas on the 30th Jeyth and that it was Puran Mal who did not come on that occasion and that Misri Lal was quite agreeable to the money being given to Puran Mal The account given by Misri Lal differs materially from that of Raghubans. His story is that on the 2nd Assarh a servant of Syed Abbas told him that the latter wanted to see him about paying off the *zarpeshgi*, whereupon he pointed out that as the 30th Jeyth had passed it was too late to take payment that year. Nothing else happened and he did not go to Patna or ever ask Syed Abbas or any one else to pay his share to Puran Mal or authorise the latter to receive it, nor did he agree to any deductions nor was any money ever tendered to him. The view he took of the *zarpeshgi* lease apparently was that it could only be terminated by payment at the end of Jeyth in any year and as that date had passed, the lease must continue for at least another year. If this story be accepted as it was by the learned Judge it follows that Misri Lal's interest as mortgagee was never redeemed; nor was any tender ever made to him of what was due. The learned Judge, who dealt very carefully with the evidence, arrived unhesitatingly at the conclusion that Misri Lal's story was true and that that of Raghubans and

Puran Mal and the other witnesses for the defendants could not be accepted. He was very unfavourably impressed by the evidence of Puran Mal who, he says, "hesitated, took time and did not tell us the whole truth." Puran Mal's evidence in the main supported that of Raghubans but differed from it in some important details. He confirms the latter in so far as he says that Misri Lal agreed that he should accept payment from Syed Abbas of the whole of the *zarpeshgi* money save the deductions already mentioned and that Misri Lal was quite agreeable that these deductions should be made. He differs from Raghubans as to what took place when he and Misri Lal went together to the house of Syed Abbas a few days before payment became due. Puran Mal says that Syed Abbas sent for him and when he went to the latter's house, he found Misri Lal sitting there but did not know for what business he had come. Syed Abbas did not say to Misri Lal that he would pay the *zarpeshgi* money, and there was no talk at the time as to whether the rent due to Misri Lal would be deducted. No details were discussed. All that Syed Abbas said was that he would pay the money, but when or where was not mentioned and he did not meet Syed Abbas again after that until the money was actually paid on the 2nd Assarh. These stories are, therefore, not in themselves consistent and it is highly improbable if the whole sum was due to Puran Mal and Misri Lal also owed him a sum of over Rs. 57,000, as he alleges in his plaint in Suit No. 82 in respect to these Mauzas that Puran Mal would readily agree to consent to a deduction of over Rs. 1,800 due from Misri Lal to the mortgagor on an entirely different transaction and take the chance of recovering it back from Misri Lal in addition to his existing liabilities, and I see no reason for disturbing the conclusions of fact arrived at by the learned Judge on this part of the case.

If, however, the whole of the loan was advanced by Puran Mal when the mortgage was executed, then payment to him would be a complete discharge of the debt. It remains therefore, to consider the evidence on this part of the case and to determine whether the learned Judge was justified in arriving at the conclusion that Sandagar himself advanced half the loan. I have already stated shortly the case put forward by Misri Lal as to how the advance came to be made, and up to a point there is no dispute between the parties. The case of Puran Mal, however, is that he advanced the whole of the money and allowed Sandagar and afterwards Misri Lal to remain in possession of the property as his agents to collect the rents on his behalf, taking as commission half the net profits after paying the interest due to Puran Mal and the Government revenue and other necessary outgoings. It is admitted that no written agreement was entered into between the parties at any time as evidence of this arrangement, although the *zarpeshgi* lease itself clearly indicates that the money was advanced by both the lessees and was repayable to them both. Puran Mal gives two reasons for allowing Sandagar's name to appear in the document as one of the lessees, first, that he had complete confidence in him, and, secondly, that there was a fear that the tenants might turn refractory if it were known that Puran Mal alone was the *ticcadar*. It appears, however, from Puran Mal's own evidence that his first acquaintance with Sandagar dated from 12 months before the transaction was entered into. It also appears that from the beginning the tenants knew that Puran Mal was one of the *ticcadars* and there is no suggestion that any trouble arose in consequence of this. It is almost inconceivable that a Marwari in the position of Puran Mal, who in addition had considerable Zamindari interests, would conduct his affairs in such an unbusiness-like manner and allow a comparative stranger, as Sandagar then was, to be joined with him as lessee and remain in possession of the property without some document in writting defining their relative positions. The only evidence which at all supports Puran Mal's story is the fact that the advance made to Syed Abbas in consideration of the *zarpeshgi* lease was made by a cheque drawn by Puran Mal on the Bank of Bengal on the 15th September 1900, about a month after the lease was executed. Puran Mal had previously had dealings with the Bank of Bengal and on the 5th September 1900 a new account was opened in his name with that Bank,

and between that date and the 13th September deposits amounting in all to over Rs. 59,000 were made to the credit of that account. It is Misri Lal's case that this account was opened for the express purpose of collecting the money to be advanced to Syed Abbas and that a deposit of Rs. 24,075 made on the 11th September included Rs 21,800 of Saudagar Mahton's money. Misri Lal's case is that this money was brought from Kalyan Bigha where Saudagar lived to Patna where Puran Mal lived on the back of an elephant and was taken to Puran Mal's *dukhan* on the 10th September, and on the following day deposited in the Bank together with a further sum of Puran Mal's own money making together the sum of Rs. 24,075. This story is corroborated by a number of witnesses, some of whom accompanied the elephant whilst others went by train from Kalyan Bigha to Patna City station where they transferred the money from the elephant to a *ticca gharry* and took it to Puran Mal's house. A further sum of Rs. 11,000 appears from the account to have been deposited by Puran Mal on the 13th September. There was then an amount of something over Rs. 59,000 to the credit of this account, and it is admitted that on the 15th of the same month Puran Mal drew a cheque for Rs. 59,000 in favour of Baijnath Singh, Syed Abbas's creditor. It is not disputed that this cheque included the Rs. 43,600 *zarpeshgi* money for the lease in question in this suit and a further sum payable by Syed Abbas to Baijnath in respect to another transaction in which Puran Mal was financing him. Puran Mal contended that the whole of this money was his own and that the account had been opened with the Bank of Bengal before the *zarpeshgi* was executed and that the deposits were not made for the purpose of collecting the *zarpeshgi* money and paying it by cheque. This story, however, is not borne out by Gobind Ram, the brother of Puran Mal and one of his witnesses, who says that the account was opened with the Bank of Bengal after the lease was executed for the express purpose of collecting the money, and the account itself appearing from the Bank books shews that the first deposit was made on the 5th November. Puran Mal was cross examined as to the source from which these deposits came, but was unable to give any account except that he said he got the money from Calcutta. He said, however, that he had a *jama kharach* book which would shew from what source the money was obtained at the time of depositing in the Bank, and unfortunately he was not cross-examined further as to the specific item of Rs. 24,075 deposited on the 11th September, which the plaintiff claims included his money, and the evidence of Misri Lal's witnesses was not taken until after Puran Mal had been examined. It was strongly urged before us that this lack of cross-examination upon a vital point in the case went a long way to support Puran Mal's case and that the story as to money being brought to Patna and handed over to Puran Mal on the 10th September ought not to be accepted. There is no doubt considerable force in this argument, and it would certainly have assisted Misri Lal's case had the learned Vakil appearing on his behalf put the whole story with regard to the payment of this money by his client and the subsequent deposit in the Bank to Puran Mal in cross-examination instead of confining himself to a few questions as to the source from which the deposits came. There are, however, so many improbabilities in the story presented by Puran Mal that I am not prepared to say that the learned Judge who saw the witnesses was not justified in disbelieving his evidence and accepting that of Misri Lal. No documents were produced by Puran Mal in support of this part of his story, nor had he the *jama kharach* book with him upon which he relied. This book he stated was in the possession of an arbitrator at Calcutta who at that time was sitting upon an arbitration in a partition case between Puran Mal and other members of his family, and the Court ordered a telegram to be sent to the arbitrator asking for the book to be sent. The telegram was sent the same day that Puran Mal gave his evidence, and a reply was received from the arbitrator that there must be some misconception as the account books had been taken away by Puran Mal and his brother some time in the previous year and were not in his possession About a week later a letter was addressed to the Peshkar of the Subordinate Judge's

Court from the arbitrator, stating that although none of the account books of Puran Mal were in his possession, some of them were with Babu Kanhai Lal Mahsuddi, who was apparently another arbitrator engaged in the same case, and that he had asked the latter to forward them. The railway receipt for these books, when they were sent by Kanhai Lal, was received by the Peshkar but returned presumably with the consent of the Judge as there had been no order of the Court requesting Kanhai Lal to send them. On the 2nd March when the evidence of both parties was closed, Puran Mal petitioned the Court to appoint a Commissioner to examine these account books, but the Judge rejected the petition on the ground that he did not consider it a *bona fide* one and that every possible opportunity had been given to the petitioners to produce their documents at an earlier period. It was urged before us that Puran Mal had been unfairly treated in this matter, first, because after he had agreed to the two cases being tried together his evidence was taken first by the order of the Judge and that he did not think at that time that these documents would be necessary, and that he ought to have been given an opportunity after Misri Lal's witnesses were examined of calling rebutting evidence. I do not think that he has any grievance from the fact that he was ordered to begin and call his witnesses first. He was the plaintiff in Suit No. 82 and the trial had originally been fixed for hearing on the 9th May 1916 in that suit, by which date he was ordered to be ready with his witnesses and evidence. The case did not in fact come on for hearing until many months later. According to the procedure by which the trial of actions is governed, the parties must produce at the first hearing of the suit all the documentary evidence of every description in their possession or power on which they intend to rely and which has not already been filed in Court, and no other documentary evidence shall be received at any subsequent stage of the proceedings unless good cause be shown to the satisfaction of the Court for the non-production thereof. These rules have the salutary effect in many cases of preventing documentary evidence from being fabricated for the purposes of the case. In the present case some documents had been produced on behalf of Puran Mal which the learned Judge rejected on the ground that they were not genuine, and I see no reason for interfering with his discretion in refusing the application to have these account books examined by a Commissioner in the circumstances. Throughout the record there is no documentary evidence apart from that already mentioned to suggest that Puran Mal alone advanced the *zarpeshgi* money, and such oral evidence as there was on this point was by no means convincing and was dismissed by the learned Judge as unworthy of credence. It is also very significant that if he alone was entitled to the whole of the interest on the sum advanced, he never in fact received, it from Saudagar or after his death from Misri Lal and although his case is that they failed to pay him this money and a large debt was accumulating against them without any security for its payment, he appears to have taken no effective steps to obtain any account from them upto the moment that Misri Lal's suit was instituted. In fact although Misri Lal instituted his suit for possession on the 10th July, a few days after he was dispossessed, and made an alternative claim therein against Puran Mal for half the *zarpeshgi* money, it was not until the 2nd December that Puran Mal filed his suit for an account. Although Saudagar died in 1907 without rendering any account to Puran Mal, Misri Lal was allowed without protest to continue in possession of his half share including the interest on the *zarpeshgi* money as well as half the net profits, and still no accounts were obtained from him and in the Record of Rights finally framed and published on the 1st August 1910 the names of Puran Mal and Misri Lal were recorded in the Khewat relating to these Manzas as interested in equal shares without any protest on behalf of Puran Mal. The only reason given by the latter for allowing this state of affairs to continue was that he had confidence in Saudagar whom he had met for the first time about a year before the *zarpeshgi* lease was executed. This confidence one would have expected to

have been seriously shaken when on his death no accounts were forthcoming, and yet we find that his son Misri Lal was allowed to continue in possession of his half share receiving half the interest and half the profits in the same way as his father had done before him It is alleged that Misri Lal rendered some accounts in the year 1909 which purported to be in the handwritting of Naurangi Lal the Patwari, but this would not explain why matters were allowed to go on some six years longer without any settlement of this account. Naurangi Lal denies that these papers are in his handwriting, and the learned Judge on comparing them with the admitted writing of Naurangi Lal rejected them as spurious, It was said that Naurangi Lal would be sent to explain these papers but it is admitted that he never came. Moreover, the papers relied on shew an entirely different state of affairs from that actually existing. These papers shew Danabandi, although admittedly the Manzas were Batai, and they further in other cases shew a higher rate of rent than that admittedly existing and differ in other respects from the existing facts, as pointed out by the learned Judge. I can see no reason whatever, after reviewing the whole of the evidence, to differ from the conclusions of fact arrived at in the trial Court.

The only question which remains is whether payment to one of two mortgagees is a discharge of the mortgagor's liability to the other. The common law rule that payment to one of two joint creditors discharges the debt due to both is subject to the equitable rule that mortgagees must, unless the contrary is shewn, be regarded as having a separate interest in the money advanced, although they take a joint security, and must be treated as in the position of tenants-in common and not joint tenants [see *Steeds* v. *Steeds* (1) and *Powell* v. *Brodhurst* (2)]. It was contended before us that this doctrine was not the law of this country and the case of *Barber Maran* v. *Ramana Goundan* (3) was relied on. It was held by the Madras High Court in that case that payment to one of two joint mortgagees was a good discharge of the debt to both, and this was followed by the majority of the Full Bench of that Court in the case of *Mannava Annopurnamma* v. *Uppala Akkayya* (4) where the question was whether one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the others. Of the three learned Judges who decided that case one of them, the Chief Justice, dissented. So far as mortgagees are concerned, the view of the Madras High Court has been repeatedly dissented from by the High Court of Calcutta [see *Husainara Begum* v. *Rahmannessa Begum* 5) and *Umes Chandra Banerjee* v. *Dinabandhu Mahanti* (6) and other cases. The Madras decision in *Barber Maran* v. *Ramana Goundan* (3) (*ubi sup.*) may be justified on the ground that the mortgagees in that case were in fact joint and took as joint tenants, but in my opinion the rulings in *Seeds* v. *Steeds* (1) and *Powell* v. *Broadhurst* (2) (*ubi sup*) are good law in this country and mortgagees will be regarded as having several interests unless the contrary be shewn, and the decisions of the Calcutta High Court correctly lay down the law on this matter. It was contended that an offer of performance had been made to Misri Lal on the 30th Jeth, but as already stated the evidence of this tender to Misri Lal cannot be accepted. Section 38 (3) of the Indian Contract Act was relied on as shewing that the legal consequence of the offer subsequently made to Puran Mal and the acceptance by him was to put an end to the debt. It will be observed, however, that this part of the section relates to joint promisees and the presumption is that co-mortgagees are not joint. It is unnecessary, therefore, to consider further the effect of this section. I may mention that the Allahabad High Court has taken the same view as that of Calcutta, that one of two mortgagees who have advanced the mortgage

(1) (1879) 22 Q. B. D. 537 at p. 540; 58 L. J. Q. B. 302; 60 L. T. 318; 37 W. R. 378.

(2) (1901) 2 Ch. 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 532; 17 T. L. R. 501.

(3) 20 M. 461; 7 M. L. J. 269; 7 Ind Dec. (N. S.) 327.

(4) 19 Ind Cas. 12; 36 M. 544; 13 M. L. T. 268 (1913 M. W. N. 3-8; 24 M. L. T. 433.

(5) 8 Ind Cas. 837; 38 C. 44; 13 C. L. J. 8.

(6) 29 Ind. Cas. 956; 21 C. L. J. 570.

money equally cannot give a good discharge of the entire mortgage debt without the consent of the other.

In my opinion these appeals should be dismissed with costs.

COUTTS, J.—I agree.

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 830 OF 1917.

September 9, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

AMRIT VAMAN INAMDAR—PLAINTIFF—APPLLEANT

versus

HARI GOVIND KULKARNI—DEFENDANT—RESPONDENT.

Bombay Hereditary Offices Act (III of 1874), s 15—Settlement of village—Survey number, exclusion of—Burden of proof—Inams and saranjams, grant of—Presumption—Grant of royal share of revenue or of soil.

Where a *sanad* evidencing a settlement under section 1 of the Bombay Hereditary Offices Act mentions a whole village, a party who alleges that a particular survey number of that village is outside the scope of the settlement must prove his allegation. [p. 414, col.].]

In the case of *inams* and *saranjams* in the Bombay Presidency the ordinary presumption in respect of such a settlement as the foregoing is in favour of the grant being limited to the royal share of the revenue, in the absence of any words to indicate a grant of the soil, but the absence of such words would not necessarily establish that the grant is of the royal share of the revenue only [p 4 5, cols &]

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 253 of 1914, reversing the decree passed by the First Class Subordinate Judge at Belgaum, in Suit No. 489 of 1913.

Messrs. *Jayakar* and *K. H. Kelkar*, for the Appellant.

Messrs. *Dhurandhar*, *D. R. Manerikar* and *H. G. Kulkarni*, for Respondent No. 1.

JUDGMENT.

SHAH, J.—The plaintiff in this case sued to recover possession of a part of Survey No. 45 in the village of Rajgoli Khurd with Rs. 101 as profits for one year from defendant No. 1 and his tenants. He alleged that the property was Watan property, and that the alienation thereof effected by his father in favour of defendant No. 1 was not valid beyond his lifetime under section 5 of the Bombay Hereditary Offices Act, that his father died in January 1912, and that he was entitled to the possession of the land.

The defendant No. 1 resisted the claim on the ground that under the decree on an award in Suit No. 253 of 1910 obtained by him against the plaintiff's father, he was entitled to retain possession of the land in suit until the Shake year 1842 (1930 31 A. D.), that it was not Watan property and that the plaintiff's father had authority to effect the alienation in his favour.

The trial Court found that the property was Watan property and that the plaintiff's father had no power to alienate it beyond the term of his natural life. It passed a decree in favour of the plaintiff for possession and mesne profits.

The defendant appealed to the District Court, and the learned Assistant Judge who heard the appeal found that the original grant was not a grant of the soil but merely of the royal share of the revenue of the village, and that there was nothing to show that the land in suit was not held by the original Inamdar at the time of his grant as his private property. Accordingly he allowed the appeal and dismissed the plaintiff's suit with costs.

The plaintiff has appealed to this Court, and it is urged in support of the appeal that the conclusions reached by the lower Appellate Court are erroneous. In order to appreciate the rival contentions of the parties in this appeal, it is necessary to state briefly the history of the grant of the village of Rajgoli Khurd, of which the land in suit forms a part.

The earliest document relating to the grant of this village is the order issued by the then Maratha ruler, Shambhu Chatrapati, to the Mukadam of Mouje Rajgoli Budruk and Mouje Rajgoli Khurd in the year 1734 A. D. The grant is in these terms:—

"The respected Virupakshara Yamaji of Gotra Gautama, who is the most devoted servant of the Swami (King), has been rendering service (to the Swami) with singleness of purpose and, therefore, it is necessary for the Swami to provide for his maintenance by the grant of an Inam

to him. Therefore, the Swami is now graciously pleased to grant to him as new Inam the whole of the aforesaid two villages Koolbab and Koolkanoo (*i. e.*, all taxes and assessments) but exclusive of the (Haks of)Hakdars and Inamdars. You should, therefore, acting in obedience to this order continue the said Inam to him, his sons, grandsons and so on from generation to generation."

The material words in Marathi are:—

"*Nutan inam koolbab koolkanoo kherij hakdar wa inamdar karun sadarhu donhi gaon darobasta inam dilhe ast.*"

Some years later in a letter written by Balaji Bajirao Pradhan the grant is referred to in the same terms, and there is a command that the entire *amal* of the two villages should be continued as Inam hereditarily according to the King's letter, the Marathi word for 'entire' being *darobasta*. In 1858 the Inam Commissioner examined the history of this grant and decided under Act XI of 1852 as follows :—

'It seems proper and it is ordered that the village of Monje Rajgoli Khurd exclusive of the Hakdars and Inamdars must, under Appendix 2, section 2, of Act XI of 1852, be continued as long as the line represented by the sons, grandsons and so on born of the original acquirer Virupaksha Yamaji, the great-grandfather of the claimant Yamajipant, continues...This Faisalnama is only meant to show how long the village is to be continued as Mafi (free from the payment of revenue)."

In the reasons for the decision the village is referred to as standing at the time in the name of Yamajipant *bin* Virupakshapant Mutalik Desai as service Inam in the records of the Collector.

In 1884 the Inamdar accepted the settlement in respect of various lands including the village of Rajgoli Khurd in lieu of service on the conditions mentioned in the Sanad. The terms of the Sanad are these:—

Whereas in the Zilla of Belgaum certain lands and cash allowances are entered in the Government accounts of the year 1862-63 as held on service tenure as follows:—

Name of the Watan	Lands assessed at	Cash allowances	Total Emoluments (after deducting Mamool Joodee)
Mootalik Desai.	1,189-4-7	20-8-0	1,209-12-7

and whereas the holders thereof have agreed to pay to Government a fixed annual payment in lieu of service:—

It is hereby declared, that the said lands and cash allowances shall be continued hereditarily by the British Government, on the following conditions: that is to say, that the said holders and their heirs shall continue faithful subjects of the British Government, and shall render to the same the following fixed yearly dues:—

				Rs.	a.	p.
Mamool Joodee	...	...	...	0	0	0
in lieu of service	...	...	...	230	11	0
		Total	...	230	11	0

at 5 annas in the Rupee 9 13 0
at 8 annas in the Rupee 220 14 0
Two hundred and thirty and annas eleven only.

In consideration of fulfilment of which conditions—

1st—The said lands and cash allowances shall be continued without demand of service, and without increase of Land Tax over the above fixed amounts, and without objection or question on the part of Government as to the rights of any holders thereof, so long as any male heir to the Watan, lineal collateral, or adopted within the limits of the Watandar family, shall be in existence,

2nd—No Nuzzerana or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral, or adopted within limits of the Watandar family, and, permission to make such adoptions need not hereafter be obtained from Government.

3rd—When all the sharers of the Watan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the Watan, on the payment from that time forward in prepetuity of an annual Nuzzerana of one anna in each Rupee of the above total emoluments of the Watan.

DETAILS OF LANDS AND CASH ALLOWANCES.

Name of the Taluka	Name of the Village	Lands to continue (as Watan)			Cash allowances	Total Rupees	Mamool Joodee Rupees	
		Nos. of the Fields	Acres	Revenue Assessment				
			A. G.	Rs. a. p.	Rs. a. p.	Rs. a. p.	Rs. a. p.	
Belgaum	Those about which there is a Tharao (Settlement) Inam Committee Resolution No. 3:01, dated the 30th of April 1858 A. D., in respect of the whole village Mouje Rajgoli Khurd.			738 0 7	0 0 0	738 0 7		On the gross income, watan settlement judi at 3 annas in the rupee amounting to Rs. 138-6-0.

This settlement is on the lines of the Gordon Settlement; and the lands including the village of Rajgoli Khurd are assigned on certain terms in lieu of service. There is no provision in the Sanad giving to the Watandar any right to alienate the Watan beyond his lifetime, and the Watan is mentioned as the Mutalik Desai Watan. There are other documents of minor importance, which need not be referred to.

In 1910 the defendant No. 1 obtained a decree on an award against the plaintiff's father for a certain claim and the possession of the land in suit, which is referred to in the decree as Watan land, was to be retained by the defendant for a certain number of years. The terms of this decree have not been referred to in detail in the argument before us. But the decree is accepted by both the parties as effecting an alienation by the plaintiff's father for a certain number of years. The land in suit forms part of the village lands.

It is clear from these facts that the settlement effected in 1884 is referable to section 5 of the Bombay Hereditary Offices Act, and is binding upon the parties. According to that settlement the village of Rajgoli Khurd is Watan property. Under section 5 of the Act no Watandar can mortgage, charge, alienate or lease for a period beyond the term of his natural life any Watan or any part

thereof to any person who is not a Watandar of the same Watan without the sanction of Government: and this provision applies to any Watan in respect of which a service commutation settlement has been effected under section 15 of the Act, unless the right of alienating the Watan without the sanction of Government is conferred upon the Watandars by the terms of the settlement The defendant No. 1 is not a Watandar of the same Watan and no such right of alienation has been conferred by the terms of the settlement. The Sanad in this case is in the usual form adapted to the Gordon Settlement, and it is clear, on the terms of the section as also on the decisions of this Court relating to the Gordon Settlement in *Arpati Bapuji* v. *Keshav Shamrav* (1) and *Bhau* v. *Ramchandrarao* (2), that in the absence of a sanction of the Government any alienation of the Watan property beyond the term of the Watandar's natural life is inoperative. The village of Rajgoli Khurd is Watan property having regard to the definitions of 'Watan property' and 'hereditary office' in the Bombay Hereditary Offices Act. If the land in question forms part of the Watan property, the alienation thereof could not be valid after the death of the plaintiff's father.

For the plaintiff it is urged that the burden of showing that the land in suit is not a part of the Watan property is on the defendant, that he has failed to discharge that burden, that the distinction between a grant of the royal share of the revenue and a grant of the soil which is recognised in this Presidency with reference to Inams and Saranjams cannot be, and has never been, extended to Watans, and that the presumption in favour of a grant being limited to the royal share of the revenue even in the case of Inams and Saranjams cannot be made in view of the observations of their Lordships of the Privy Council in *Suryanarayana* v. *Patanna* (3). Further it is contended that on the terms of the grant in this case it ought to be held that the grant was of the soil and not merely of the royal share of the revenue of the village.

It is urged for the defendant that the plaintiff has failed to show that the land in suit forms part of the Watan property, that the Watan property here only means the royal share of the revenue and not the soil of the village of Rajgoli Khurd according to the terms of the Sanad, that even according to the terms of the original grant confirmed by the Inam Commissioner it is limited to the royal share of the revenue and does not extend to the soil, and that this distinction is well recognised in this Presidency and ought to be accepted in this case in spite of the decision in *Suryanarayan's case* (3).

In the absence of any clear proof that the occupancy right in the Survey Number in suit was vested in the plaintiff's ancestor independently of the grant and that the land in suit was outside the lands dealt with in the Settlement of 1884, I think that it must be held to be Watan property like the village itself. 'Watan property' according to the Act means moveable and immoveable property held, acquired or assigned for providing remuneration for the performance of the duty appertaining to an 'hereditary office,' which expression includes such office even where the services originally appertaining to it have ceased to be demanded. It is difficult to treat the village mentioned in the Sanad as referring to the royal share of the revenue only. The Sanad refers to the lands and where the whole village is referred to, the lands of the village are not referred to in detail by their Survey Numbers. Thus where the whole village is mentioned in a Sanad evidencing a settlement under section 15 of the Bombay Hereditary Offices Act, it is for the party alleging that a particular Survey Number of that village is outside the scope of the settlement to prove it. In the present case there is no such evidence. The lower Appellate Court observes that there is nothing on the record to show that the land in dispute was not held by the original Inamdar as his private property at the date of the first grant. But at the same time there is nothing to show that it was so held. No document is referred to before us as showing that the Survey Number in question was held at anytime otherwise than as part of the Watan pro-

(1) 15 B. 13; 8 Ind Dec (N. s.) 9.
(2) 20 B 423; 10 Ind Dec (N. s.) 845.
(3) 48 Ind. Cas. 689; 45 I A. 209 at p. 218; 41 M. 1012; 25 M. L. T 50; (1918) M. W. N 859; 23 C. W. N. 27; 9 L. W. 126. 29 C. L. J. 153; 1 U. P L. R. (P.C.) 11; 36 M. L. J. 555; 21 Bom. L. R. 547 (P. C.).

perty. This conclusion is strengthened by the fact that in the decree in the suit of 1910 it is described as Watan land. In the case of Watan property the distinction between grants of the royal share of the revenue and grants of the soil, which is admissible in the case of Inams and Saranjams, cannot be conveniently made without detriment to the statutory restriction on the Watandar's power of alienation and should not be made unless it is clearly justified by the terms of the settlement. The statutory restriction would be limited in its scope if such a distinction were made. The terms of the Sanad in the present case do not justify such a construction of the grant under the Settlement of 1884. I do not say that such a distinction can never be made in the case of Watans. It is sufficient for the purpose of this case to observe that no basis for such a distinction has been made out on the terms of the Settlement of 1884 with reference to the land in suit.

So far my conclusion is based upon the terms of the Sanad of 1884, and is independent of the terms of the grant in 1734 as confirmed in 1858 by the Inam Commissioner. It is by no means clear on the terms of the original grant of 1734 that it is limited to the royal share of the revenue. It is quite true, as contended by the defendant, that in this Presidency in the case of Inams and Saranjams the ordinary presumption, in the absence of any indication to the contrary, is in favour of the grant being limited to the royal share of the revenue and that clear words are necessary to indicate a grant of the soil: see *Krishnarav Ganesh* v. *Rangrav*(4), *Ramchandra* v. *Venkatarao* (5), *Rayya* v. *Balkrishna Gangadhar* (6). It is also true that the words ordinarily used to indicate a grant of the soil are 'water, grass, wood (trees), stones, mines and hidden treasures', as pointed out in *Ravinarayan* v. *Dadaji Bapuji* (7), *Collector of Ratnagiri* v *Antaji Lakshman* (8) and *Balvant Ramchandra* v. *Secretary of State* (9). But the absence of these words cannot be treated as necessarily establishing that the grant is of the royal share of the revenue only. There is no decision which has gone so far as to lay down that no other expression can indicate a grant of the soil.

Assuming that the nature of the settlement in 1884 must be determined with reference to the terms of the original grant as confirmed by the Inam Commissioner, it is not a matter of presumption but a question of the construction of the words actually used. It is clear from the reference to section 2, Appendix 2 (Schedule B), of Act XI of 1852 in the decision of the Inam Commissioner that the Inam was then continued according to the terms of the old grant of 1734 A. D. Thus though the word *darobasta* is not used in the decision of the Inam Commissioner, it seems to me that by implication the grant is continued on the same terms as the old grant and that in effect the expression used by the Commissioner must be taken to be the expression used in the grant of 1734 A. D. That expression is by no means clear on the question as to whether the grant was only of the royal share of the revenue or of the soil also; and apart from authority I should have found it difficult to construe it as a grant of the soil. The difficulty is increased by the consideration that the usual words (*mala, taru, truna, pashana, nidhi, nikshepa*) indicating a grant of the soil are not used. I find it, however, difficult to distinguish the grant in the present case from the grant which was construed by this Court in *Vasudev Pandit* v. *Collector of Puna* (10). I think that we ought to follow this decision and hold that the grant in this case was a grant of the soil and not merely of the royal share of the revenue. The present case cannot be reasonably distinguished on the ground that the word *darobasta* is not used by the Inam Commissioner in his decision.

I do not say that the use of the word *darobasta* would necessarily indicate a grant of the soil. In the case of *Vaman Janardan Joshi* v. *Collector of Thana* (11) the grant was held to be limited to the royal share of the revenue. In that case, however, there was a clause to the effect that "the village should be continued to him as an Inam grant and the revenue of the said village,

(4) 4 B H. C. R. (A. C. J.) 1.
(5) 6 B. 598 at pp. 600, 603; 3 Ind. Dec. (N. s.) 864.
(6) 29 B. 415; 7 Bom. L. R. 439.
(7) 1 B 523; 1 Ind Dec N s 345.
(8) 12 B. 544 at p 544; 6 Ind Dec N. s.) 840.
(9) 29 B. 450 at p. 486; 7 Bom. L. R. 497.
(10) 10 B H. C. R. 471.
(11) 6 B. H. C. R. (A C. J.) 191.

including that of Kasba Chauk should be entered in the Taluka account to the debit of the Jcshi, on account of Inam." In the present case we have no such clause. It is not easy to reconcile all the observations in this case with the decision in *Vasudev's case* (10). But there is no necessary conflict between the two decisions. On the best consideration that I can give to the question, I think that on the terms used in the grant of 1734 and confirmed by the Inam Commissioner in 1858, the grant is of the soil as in *Vasudev's case* (10).

In this view of the matter, it is not necessary to consider the effect of the observations of their Lordships of the Privy Council in *Suryanarayana's case* (3), relied upon by the plaintiff as to the presumption made in this Presidency in favour of a grant being of the royal share of the revenue in the absence of any indication that the grant is of the soil, in the case of Inams and Saranjams. In a somewhat similar case their Lordships have referred to these observations and have pointed out that each case must be considered on its own facts and that in order to ascertain the effect of the grant resort must be had to the terms of the grant itself and to the whole circumstances so far as they could be ascertained: see *Upadrashta Venkata Sastrulu* v. *Diri Seetharamudu* (12). Both these cases were cases of ancient Agrahara grants: and the considerations applicable to Agrahara grants are naturally different from those applicable to secular grants for service. The question whether these decisions of the Privy Council require that no presumption that a grant is of the royal share of the revenue can be made where there is nothing to indicate that the grant is of the soil, is one of great practical importance: and it will have to be decided hereafter, when it arises. As the point is argued, I do not consider it inappropriate to point out the difficulties in the way of interpreting the observations of their Lordships of the Privy Council in the manner suggested by the plaintiff without expressing any opinion on the point. The presumption is made in this Presidency in favour of a limited grant of the royal share of the revenue in the absence of any words to indicate a grant of the soil, not because the Courts have felt any doubt as to the power of the rulers to make a complete grant of the land, but because the grants by the Crown must be construed strictly so that nothing more may be deemed to have been conveyed than what appears clearly from the words of the grant, and because suitable words are generally used when a complete grant of the soil is intended. This presumption may be only another form of stating the rule that the Crown grants should be construed according to their tenor as stated in section 2 of the Crown Grants Act XV of 1895. The history of the Inams in this Presidency and the words in the preamble of Act XI of 1852, showing that the Act was passed with a view to try and determine without delay the claims against Government on account of Inams and other estates wholly or partially exempt from the payment of land revenue, may go to indicate that the grant might be merely of the royal share of the revenue and of nothing more. The meaning of the word "resumption" under that Act, as explained by the Government in 1854 and accepted by this Court in *Vishnu Trimbak* v. *Tatia* (13) and in many other later decisions both as to Inams and Saranjams, may also show that there are many grants merely of the royal share of the revenue. The observations of their Lordships of the Privy Council in the above cases may not be irreconcilable with the decisions of this Court, in which it is pointed out that in the absence of any words indicating a grant of the soil, a grant by the Crown must be taken to be a grant of the royal share of the revenue only.

I would allow the appeal, reverse the decree of the lower Appellate Court and restore that of the trial Court with costs here and in the lower Appellate Court on the defendant No. 1.

I would make the same order in Second Appeal No. 929 of 1917.

HAYWARD, J.— I agree. It is simply a question of interpreting the deeds of grant, which include two from the time of the

(12) 51 Ind. Cas. 304; 46 I. A. 123 at p. 128; 21 Bom. L. R. 925; 17 A. L. J. 725; 37 M. L. J. 42; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 43 M. 166 (P. C.).

(13) 1 B. H. C. R. 22.

Maratha rulers and the Sanad under the Gordon Settlement from the British Government. There is, in my opinion, no sufficient ground for holding the grant to have been merely a grant of the royal share of the revenue and not a grant of the soil. It is similar to the case of *Vasudev Pandit* v. *Collector of Puna* (10). It is, of course, necessary in interpreting such grants to remember what words were in ordinary use at the time for distinguishing between grants of the royal share of the revenue only and for grants of the soil, but it has also to be remembered that this was a grant for service or a Watan grant and not an ordinary Inam or Saranjam grant. There is no authority excluding from consideration these matters. It was merely held that there was not *a priori* presumption that grants were limited to the royal share of the revenue and were not of the soil in the case of *Suryanarayana* v. *Patanna* (3) by their Lordships of the Privy Council.

Appeal allowed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 675 TO 680 AND 682 TO 687 AND 802 OF 1919.

March 22, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

Maharani JANKI KUER OF BETTIAH THROUH HER MANAGER MR. J. T. WHITTY, I. C. S.—PLAINTIFF—APPELLANT

versus

SAUDAGAR RAM AND OTHERS—DEFENDANTS —RESPONDENTS.

Landlord and tenant—Occupancy tenant, whether entitled to cut and appropriate trees—Custom—Burden of proof—Record of Rights, entry in—Presumption of correctness—Evidence before Court—Duty of Court.

The general rule is that an occupancy tenant has the right to cut the trees standing on his holding but the landlord has the right to appropriate them. If the tenant claims any right to appropriate the trees, he must prove a custom or usage to that effect. [p. 418, col. 1.]

An entry in a Record of Rights is entitled to the benefit of the presumption attached to it, but where the Court has before it the evidence upon which the record was prepared and where the plaintiff denies the correctness of the record, the Court is bound to come to a finding whether that evidence is sufficient to justify the entry. [p 418, col. 2.]

Appeals from the decisions of the Special Judges, Mozaffarpur, dated the 5th February 1919 and 22nd April 1919.

Messrs. *Kenndy*, *Fakhruddin* and *Jadubans Sahay*, for the Appellant.

Mr. *Bhagawan Prasad*, for the Respondents.

JUDGMENT.

MULLICK, J.—These thirteen second appeals arise out of thirteen suits instituted before the Assistant Settlement Officer of Champaran under section 106, Bengal Tenancy Act. It appears that 27 such suits were originally instituted. Twelve were decided by one judgment and 15 by another judgment, dated the 5th of April 1918.

The suits out of which these present second appeals arise belong to this latter batch. The plaintiff in all these suits was the proprietress of the Bettiah estate.

An entry having been made in the Record of Rights published under section 103A, Bengal Tenancy Act, that the tenants were entitled to appropriate the trees standing upon their occupancy holdings, the proprietress instituted suits before the Assistant Settlement Officer for a declaration that the entry was incorrect.

The Assistant Settlement Officer and on appeal the Special Judge both held that the proprietress had no title in the trees and maintained the entry.

It appears that the plaints in the suits were amended some months after they were filed. In the original plaints the landlord seemed to have recognised a custom by which the defendants were entitled to appropriate half the trees, but in the amended plaints she appears to have withdrawn from that position and to have pleaded that she was entitled to appropriate all the trees but that as she had in fact for many years only realised half the value of the trees, the entry should be amended by limiting her right to that extent.

The Assistant Settlement Officer framed the following issues.—

1. Is the plaintiff entitled to half share of the timber and trees standing on the present survey plots ?

2. What relief, if any, is the plaintiff entitled to ?

The ordinary law is that the tenant has the right to cut but the landlord the right to appropriate. If the tenant claims any right of appropriation, he must prove a custom or usage to that effect and, therefore, it was open to the officer who prepared the Record of Rights to enquire whether the tenants had discharged the onus which the law had placed upon them. But as section 103B, Bengal Tenancy Act, provides that the Record of Rights is presumed to be correct until the contrary is proved by evidence, the Assistant Settlement Officer was in my opinion right in placing the onus upon the plaintiff to show that she had the right to a half share.

From his judgment, however, it is not clear whether he appreciated the real position of the parties. He seems to have been under the impression that before the Revenue Officer the onus of proving a custom was upon the plaintiff. He also seems to think that in the proceedings before him it was for the plaintiff to show that there was a custom entitling her to appropriate the half share. He had before him the evidence upon which the Record of Rights was based, but he comes to no finding that this evidence was sufficient to prove a valid custom or usage in law. He relies entirely upon the weakness of the plaintiff's evidence as to realisation, in coming to the finding that the Record of Rights has not been rebutted.

In Second Appeal No. 802, the Special Judge, Mr. Boyce, appears to have adopted the same procedure and to have thrown the burden of proving the custom upon the plaintiff. He concludes his judgment by the observation that isolated instances of the collection of the price of timber are not sufficient to prove the custom set up by her.

Mr. Adami, the learned Judge who heard the remaining cases, has stated the legal position correctly and has come to the conclusion that while the plaintiff has failed to show before the Assistant Settlement Officer that there was no custom which would justify the entry, the defendants have proved that there was a custom and that the plaintiff had abandoned her rights. The learned Judge, however, does not discuss the evidence which he considers sufficient to prove the custom set up by the defendants and in my opinion there has been no proper trial of that issue.

The Record of Rights no doubt was entitled to the benefit of the presumption attached to it, but where, as in these cases, the Court had before it the evidence upon which the record was prepared and where the plaintiff denied the correctness of the record, the Court was bound, in my opinion, to come to a finding whether that evidence was sufficient to justify the entry. This view is in accordance with the decisions of their Lordships of the Calcutta High Court in *Sheonandan Persad Sukul* v. *Bacha Kaut* (1) and *Bagha Mowar* v. *Ram Lakhan Misser* (2).

The learned Special Judge Mr. Adami has held that a decision in a case under section 103 and a judgment in a case under section 106, Bengal Tenancy Act, regarding certain other tenants in the same village were inadmissible in the present suits, but in my opinion that view is incorrect. This decision and judgment would be relevant under section 13 of the Indian Evidence Act.

As in my opinion there has not been an adequate and satisfactory treatment of the issue on custom in the judgments of either of the two learned Special Judges, I think their judgments and decrees should be set aside and the cases remanded for re-hearing. The Special Judge now exercising jurisdiction in the matter must come to a clear and definite finding whether the defendants have proved a valid custom entitling them to a half share in the trees. For this purpose they will be entitled to adduce before him such additional evidence as they think necessary, while the landlord will be entitled to adduce rebutting evidence in reply. If the defendants decline to adduce further evidence, the learned Judge will dispose of the case upon the evidence already on the record.

The decisions in *Palakdhari Rai* v. *Manners* (3), *Dalglish* v. *Guzuffer Hussain* (4), *Sariatullah Sarkar* v. *Pran Nath*

(1) 4 Ind. Cas. 54; 9 C. L. J. 284.
(2) 41 Ind. Cas. 804; 27 C. L. J. 107.
(3) 23 C. 179; 12 Ind. Dec. (N. S.) 119.
(4) 23 C. 427; 12 Ind. Dec. (N. S.) 284.

Nandi (5) may be of some assistance to the Court in coming to a proper finding.

The appeals are, therefore, decreed and the cases are remanded to the lower Court for disposal in accordance with the directions herein given.

As there has been some carelessness on the part of the plaintiff in drawing up the plaint, neither party will be allowed costs in this Court.

SULTAN AHMED, J.—I agree.

Cases remanded.

(5) 26 C. 184; 13 Ind. Dec. (N. s.) 723.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 818 OF 1917.

October 14, 1919.

Present :—Mr. Justice Shah and Mr. Justice Hayward.

WAMAN BALVANT KASHIKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Babu HARSHET SHETE AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 9—Right of worship, nature of—Suit to enforce rights of worship and carrying processions, whether of civil nature.

The ordinary right of a citizen to worship, according to his own belief, any deity and in such manner as his belief requires him to do so long as he does not prevent others from carrying on similar worship according to their own belief, is a right of a civil nature and any interference with that right is a matter in respect of which relief would, in a proper case, be granted by a Civil Court. [p 421, col. 2.]

The right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. The right to carry on the worship of any deity in any manner that a person pleases, subject to similar conditions, is also a right inherent in every person. [p. 420, col. 2.]

Appeal from the decision of the Assistant Judge, Ratnagiri, in Appeal No. 478 of 1915, confirming the decree passed by the Second Class Subordinate Judge at Chiplun, in Civil Suit No. 160 of 1914.

Mr. *K. H. Kelkar*, for the Appellant.

Messrs. *Jaiyakar* and *S. S. Patkar*, for Respondents Nos. 1 and 3.

JUDGMENT.

SHAH, J.—The question in this second appeal is, whether the plaintiffs' claim is cognizable by Civil Courts.

The plaintiffs allege that their ancestors set up a new Bahiri temple at Chiplun for worship and devotional sports many years ago, that the present defendants' ancestors, who worshipped the same deity installed as the old Bahiri, filed Suit No. 28 of 1844 in the Court of the Munsif of Chiplun against the worshippers of the newly installed deity, and that in that suit they in effect sought to restrain the then defendants (plaintiffs' predecessors) from carrying on the worship of the new Bahiri in the same manner as the worship of the old Bahiri. A decree was passed in the suit and ultimately upheld by the Sudder Diwani Adawlut in Special Appeal No. 4631 in the year 1852, under which the then defendants were restrained from performing certain ceremonies as being appurtenant to the village deity, but were allowed to perform them on their passing an agreement to the Collector that they would not perform the particular ceremonies as village ceremonies but would perform them for sports and out of devotion. They further allege that in 1911 the District Magistrate passed an order under section 44 of the Bombay District Police Act at the instance of the present defendants restricting the plaintiffs in their worship to the four rites mentioned in the said decree and referred to in the prayer clause as items Nos. 1, 9, 11 and 13. They allege that they have been subsequently prohibited by an order made in October 1911 to use a *dhol* on the said occasions. They claim in this suit a declaration that they have a right to do certain acts of worship in connection with the new Bahiri and for an injunction restraining the defendants from obstructing them in the performance of the worship in that manner. They also claim damages to the extent of Rs. 5. The acts referred to in the plaint in the prayer clause are these:—

"1. *Palkhi* procession in the month of Falgun.

2. Performance of *tamasha* on the same

before the god and *tamasha* procession along with the *palkhi* in the town.

3. Moving about in the town playing *dhulwad* (playing with mud, etc.,) and along with *nishans* and *zendes* (banners) on the first day of the latter half of Falgun.

4. Moving about in town playing *shenwad* (playing with cowdung) along with *nishans* and *zendes* (banners) on the 2nd day of the latter half of Falgun.

5. Procession of *rang* (colours) through the town and the throwing of colours on each other's body on the 5th day of the latter half of Falgun

6. Taking of the *palkhi* to Chetavali in Chaitra.

7. *Pal kiraka* procession in Jeshta and Ashad and on occasions a *kiraka* procession of and killing of a goat.

8. To do *jagar* in Shrawan and on the full-moon day in Shrawan taking of a cocoanut in procession from the temple to the Bunder (harbour) for offering to the water-deity.

9. Tying *povtis* (cotton thread) round the wrist of the god in Shrawan.

10. Taking of the *palkhi* in procession to Uktad in Bhadrapad.

11. Setting up (*ghat*) in the temple in Ashwin.

12. Making out *palkhi* on *Dasra* day for the worship of Shami tree.

13. Waiving lamp about the idol in *Diwali*.

14. Raising of the banner and the god going to hunting on the full moon day in Paush and the lowering of the banner and the return of the god on the full moon day in Magh.

15. And other acts required to be done occasionally, and to use the *dhol* on those occasions."

The defendants contend that the claim is not cognizable by the Civil Courts and that on merits the plaintiffs have no such rights. The plaintiffs gave a *purshis* to the effect that the right of performing the ceremonies mentioned in the plaint was not vested in the deity, but it was their right to perform the said ceremonies before the deity for sports and out of devotion.

Both the lower Courts have disallowed the plaintiffs' claim on the preliminary ground that the suit is not cognizable by the Civil Courts.

In the appeal before us we are not concerned with the merits of the plaintiffs' claim, nor with the extent and form of the relief, which the plaintiffs may be ultimately found to be entitled to. The only question that we have to consider is whether the claim is cognizable by the Civil Courts.

It will be convenient to state the terms of the decree in the suit of 1844 and of the order of the District Magistrate. In the suit of 1844 the Court had made the following order:—

"By doing ceremonies of *manasthiti* such as taking out *palkhis*, preparing *povtis*, etc, at the new temple in course of time it will not be possible to distinguish ceremonies of *manasthiti* from the other; and plaintiff will thereby suffer. Therefore, the ceremonies of *manasthiti* performed at the new temple, *i. e.*,

1. Taking out *palkhi* in Shimga,
2. Preparing *povtis* in Shrawan,
3. Setting up *ghat* in Ashwin, and
4. Waiving lamp in *diwali*

should not be performed by the defendants. But if the defendants pass a Muchalka (recognizance) or Karar to Government that they will perform them not as village ceremonies (*ganvkichi manasthiti*) but will perform them for sport and out of devotion (*kheladukhal bhaktichi*), there is no reason to forbid them to do so. They should follow their own devotion. Performing ceremonies of *manasthiti* at the new temple is not approved by Government. If defendants don't pass a Karar, they should not perform the ceremonies specified in the plaint.

The stone set up as idol by defendants is installed according to rites as stated by defendants' witnesses. There is, therefore, no reason to remove them. They will be treated like the several ones which some people set up out of devotion."

The District Magistrate passed a considered order under section 44 of the Bombay District Police Act (Bom. Act IV of 1890), in which he directed in paragraph 16 (2) that—

"The new Bahiri people should perform only the four ceremonies mentioned in paragraph 13 above after passing the Karar to Government that they would perform them for sport and out of devotion and not as of *manasthiti*; they shall not perform at all the other ceremonies referred to in

paragraph 14 above neither out of sport nor out of devotion nor as of *manasthiti* and shall not be allowed to pass any Karar concerning those other ceremonies."

The ceremonies referred to in paragraphs 13 and 14 of the order are the ceremonies which are now referred to in the plaint.

The question is whether the present claim of the plaintiffs is of a civil nature. There is no question in this suit as to the right to property or to an office and the explanation to section 9 of the Code has no application. It is not suggested in this case that the cognisance of this suit is either expressly or impliedly barred. In fact section 44 of the Bombay District Police Act expressly provides that any order made by the District Magistrate under sub-section 1 shall be subject to a decree, injunction or order made by a Court having jurisdiction. The question, therefore, simply is whether the suit as framed is of a civil nature within the meaning of section 9 of the Code. Almost all the prayers in the plaint relate to some processions to be carried in the town of Chiplun on some occasions accompanied with some ceremonies in connection with the new Bahiri. The plaintiffs claim the right to worship the deity in any manner they please and to use the public streets for the purpose of processions connected with the worship of the deity as detailed in the plaint and to use the *dhol* on these occasions, and they make it clear that they do not claim to carry on any worship in connection with the new Bahiri as if it was the worship of the village deity (Gram Devata). The order of the District Magistrate makes it clear that they are prohibited altogether from performing any of these ceremonies, except the four which are mentioned in the decree in the suit of 1844, even for sport or out of devotion. The pleadings in the present case and the terms of the order of the District Magistrate make it quite clear that the real dispute between the parties is as to whether the plaintiffs are entitled to carry on the worship of the new Bahiri as they please so long as they do not perform it as of *manasthiti*, or whether the defendants have the exclusive right to perform those ceremonies with reference to the village deity and to prevent other persons from performing similar worship in connection with another deity of the same name. The prayers in the suit also involve the claim to use the public streets for the purpose of certain religious processions as detailed in the plaint. The question in this case is, not whether the defendants shall be required to perform any ceremony or that the plaintiffs shall be required to do so, but whether the ordinary right of a citizen to worship, according to his own belief, any deity and in such manner as his belief requires him to do, so long as he does not prevent others from carrying on similar worship according to their own belief, is a right of a civil nature. After giving the best consideration to this point it seems to me that in substance the plaintiffs' suit is of a civil nature, and if they have a right to worship the new deity in any manner they please, any interference with that right is a matter with reference to which they can get relief in a Civil Court provided they are found entitled to that relief.

It has been held in several cases that the right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. Further the right to carry on the worship of any deity in any manner that a person pleases subject to similar conditions is also a right inherent in every person, and it is an important right. I do not think that the lower Courts are right in holding that the suit is not of a civil nature. In the present case the question does not relate to any religious rites or ceremonies, but to the right of the plaintiffs to be protected in the performance of the worship of their deity in any manner they please, subject to the conditions which I have already stated with reference to the right to use the public streets, and to their right to prevent the defendants from interfering with the performance of the worship in their own way.

This conclusion in the present case appears to me to be consistent with the view which the Sadder Diwani Adawlut took in the

suit of 1841 which came up to that Court. It was held by the learned Judges then that the suit was cognizable by a Civil Court under Regulation II of 1827, section 21, as it then stood, having regard to the nature of that suit and the relief claimed by the plaintiffs in that suit. The present suit seems to me to be of a similar nature. The present plaintiffs seek to be protected in the performance of their worship of the deity. I do not express any opinion as to the effect of the decree in that suit on the merits of the present claim. The District Magistrate has referred to this decree in his order, and it is a point in dispute between the parties as to whether the effect of the decree is in favour of the plaintiffs or the defendants in the present case. That is a matter which the Court dealing with the suit on the merits will have to consider and to decide. I refer to that suit at present only for the purpose of showing that it was held to be of a civil nature.

Several cases have been cited in the argument at the Bar; but I do not consider it necessary to discuss them. The nature of the present suit must be determined with reference to the allegations and the pleadings in the present case. The observations in the reported cases which have been relied upon on either side must be read with reference to and in the light of the nature of the particular suit in which they are made. I do not think that any decision referred to in the argument conflicts in any way with the view which I take of this case.

I would, therefore, allow this appeal, set aside the decrees of the lower Courts and remand the suit to the trial Court for disposal according to law.

All costs to be costs in the suit.

HAYWARD, J.— I agree. The cause of action is, in my opinion, of a civil nature, in so far as it relates to the conduct of the defendants tending to prevent the exercise of the ordinary rights of freedom of worship of the other side, whether in private or in public. It would seem, broadly speaking, that every citizen has a right to worship as he pleases so long as he does not thereby trench upon the rights of office or property of other persons. He has, broadly speaking, similarly a right to go in procession so long as he does not interfere with the rights of others to the unrestricted use of the public roads and streets. But the exercise of these rights is always subject to such orders as might be necessary to prevent disorder or riot by the Magistrates under section 44 of the Bombay District Police Act or section 144 of the Criminal Procedure Code.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 66 OF 1920.

February 5, 1920.

Present :—Mr. Justice Das and Mr. Justice Adami.

UGRA MOHAN CHAUDHURI—PLAINTIFF [—APPELLANT

versus

LACHHMI PRASAD CHAUDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c), (v)—Suit for declaration of title and possession—Court-fee payable.

Where a challenge is directly thrown on the plaintiff's title as the adopted son of a certain person and the plaintiff comes into Court in order to meet that challenge and claims a declaration of his title as an adopted son and also seeks to recover possession of his adoptive father's property, the suit falls within section 7 *(iv) (c)*, of the Court Fees Act and not within clause *(v)* of the section. [p. 424, col. 1.]

Appeal from a decision of the Subordinate Judge, Bhagulpore, in Trial Suit No. 125 of 1918, dated the 13th August 1919.

Messrs. *S. Z. Mullick, Rajendra Prasad* and *Sambhu Saran*, for the Appellants.

Messrs, *Lal Mohan Ganguly* and *Nitai Ch. Ghosh*, for the Respondents.

FACTS.—The plaintiff brought this suit for possession of an estate on the ground that he had been validly adopted by the widow of the last male owner under authority from the latter. He valued the suit at 5 lacs for purposes of jurisdiction and at Rs. 82,500 for purposes of Court-fee, as if it were a suit for possession, valuing the immoveable property at ten times the Government revenue for the purpose of Court-fee. The plaintiff prayed for the following reliefs:

"(1) For adjudication that the plaintiff is entitled to the properties set forth in schedule A below as the adopted son and heir of Shib Nag Chandi Nath Chaudhry and that the defendants 1st, 3rd, 4th parties have wrongfully kept him out of possession thereof.

"(2) For a decree for possession of the said properties in favour of the plaintiff against the said defendants 1st, 3rd and 4th parties, and for putting him in possession of the properties mentioned in part I of the said schedule A by ousting these defendants or any person claiming under them. and of the properties mentioned in part II of the said schedule by ordering the defendant 1st party to deliver them to the plaintiff or in default the value.

"(3) For a decree for Rs. 60,000 or such other sums as the Court may find just and proper on account of mesne profits of the properties set forth in part I of the schedule A from the Fasli year 1321 till the date of the suit as well as future mesne profits from the date of the suit till the date of the plaintiff's possession with interest against the defendants 1st, 3rd and 4th parties.

"(4) For costs of the suit with interest against the defendants."

The defendants denied that the plaintiff was the adopted son of Shib Nag Chandi Nath Choudhry and asserted that even if he was adopted, his adoption was invalid. The plaintiff's suit was dismissed. The plaintiff, therefore, appealed to the High Court. He valued his appeal as he had valued his suit both for the purposes of jurisdiction and for the Court fees. The Stamp Reporter objected to the Court-fees paid on the plaint as well as on the memo. of appeal, being of opinion that the suit was one for a declaratory decree with consequential relief and as such the plaintiff ought to have paid Court-fees *ad valorem* on 5 lacs, the jurisdictional value, both on the plaint and on the memo. of appeal under section 7 (IV) (*c*) of the Court Fees Act. He submitted the matter to the Taxing Officer, who agreeing with the reports of the Stamp Reporter observed as follows: —

"It is clear that by the 1st relief a declaration was asked for of plaintiff's title as the adopted son. This adoption was denied by the defendants and this was the main issue in the suit. The burden of proving adoption lies on the person who asserts the adoption, and without the declaration of title it would be impossible for the plaintiff to recover possession; and that this was recognized is clear from the reliefs claimed.

The learned Vakil for the appellants contended that it was only so when a document had to be got rid of that a declaration is required. But I think his argument is based on the fact that the rulings reported as *Lagan Burt Kuer* v. *Khakhan Singh* (1) and *Dhakeswar Prasad Singh* v. *Jioo Choudhry* (2) happened to refer to cases in which a document stood in the way of the plaintiff. What stands in the plaintiff's way in the present case is the fact that unless he can prove not only his adoption but the validity of his adoption, he cannot have any claim to recover possession. Had he left out the prayer regarding his adoption or had the defendants admitted the adoption, I should have held that in the former case we must be guided by the plaint, and in the latter case also the prayer for adjudication of the adoption was a surplusage. As it is the prayer is there; and so far from being a surplusage, it is the very foundation of the plaintiff's case, and it is hotly contested by the defendants. I, therefore, hold that this is a suit for a declaratory decree with consequential relief and that *ad valorem* Court-fees must be paid on the value of the suit. The proper Court-fee both on the plaint and on the memo. of appeal is Rs. 3,000. Rs. 1,350 having been paid on both, there is a deficit on each of Rs. 1,650, *i. e.*, a total deficit of Rs. 3,300. One month's time is allowed within which to pay."

The deficit Court-fee on the memo. of appeal to the High Court was paid within time, but the deficit of Rs. 1,650 due from the appellant on his plaint in the Court of 1st instance was not paid. The case was, therefore, placed before a Division Bench constituted of the Hon'ble Mr. Justice Das and the Hon'ble Mr.

(1) 43 Ind. Cas. 962; 3 P. L. J. 92.
(2) 43 Ind. Cas. 385; 3 P. L. J. 448.

Justice Foster for proper orders. The learned Judges on 29th January 1920 passed the following

ORDER.—This is a Court-fee matter.

The question involved is of considerable importance and in our view should be decided by a larger Bench. The point is this. Whether a suit for declaration of title as adopted son and for possession is a suit that comes within section 7, clause (IV), sub-clause (*c*) of the Court Fees Act, or within section 7, clause (V) of that Act. The learned Registrar has taken the view that it comes under section 7, clause (IV), sub-clause (*c*) of the Court Fees Act. Mr. Sushil Madhab Mullick on behalf of the appellant has argued that this view is erroneous inasmuch as every suit for possession must necessarily involve adjudication of the title of the plaintiff. He says that in every suit for possession the plaintiff must prove his title, and that consequently he must necessarily ask for declaration of his title. In my view the question depends on whether the suit is a suit that comes within section 42 of the Specific Relief Act. If it is a suit that comes within section 42 of the Specific Relief Act, then it must come under section 7, clause (IV), sub-clause (*c*) of the Court Fees Act.

It is true that every suit for possession does not involve a question of title in the sense that the plaintiff in an ejectment suit must prove his title. But that is not the case here. Where, however, a challenge is directly thrown on the title of the plaintiff, and the plaintiff comes to Court in order to meet that challenge, it is a suit clearly under section 42 of the Specific Relief Act, and it would accordingly, in my view, come under section 7, clause (IV), sub-clause (*c*) of the Court Fees Act. In this case it appears to me that there was undoubtedly a challenge thrown on the plaintiff's title. He came to Court to meet that challenge. He asked for a declaration that he was the adopted son of somebody and for consequential relief, that is, for possession. It is not the same thing as an ordinary suit for possession where the question of title incidentally arises. In my view the learned Registrar has taken an entirely correct view of the matter, but as the question is always coming before us in one garb or another, we think that it ought to be finally settled by a larger Bench. Place the record before the learned Chief Justice for necessary orders.

On 4th February 1920 the learned Chief Justice (Sir Dawson Miller, Kt.) declined to refer the matter to a Full Bench and passed the following

ORDER.—In my opinion this decision is correct. There is no other decision in conflict with the above and I do not think it is necessary to refer it to a Full Bench.

The case was again placed before the Division Bench consisting of Mr. Justice Das and Mr. Justice Adami, which on the 5th February 1920 passed the following

FINAL ORDER.—This matter now comes before us for decision. My learned brother Mr. Justice Foster and myself expressed our view in the order which we passed on the 29th January last. We thought that the matter was of general importance and should be settled by the decision of a larger Bench. We directed that the papers should be placed before the learned Chief Justice for the necessary orders. The learned Chief Justice does not think that there is any necessity to refer the matter to a Full Bench. My learned brother Mr. Justice Adami agrees with the view which I have already expressed in the case. Therefore, the order must be that the decision of the learned Registrar is right and that the appellant must pay the additional Court-fees on the plaint in the lower Court. We give him three weeks time to do so.

Order accordingly.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 487 OF 1918.

October 11, 1919.

Present:—Mr Justice Pratt.

JAMSEDJI F. SHROFF—PLAINTIFF

versus

HUSSEINBHAI AHMEDBHAI—DEFENDANT.

Receiver, suit against—Leave of Court not obtained before institution of suit—Leave obtained subsequently, whether cures defect.

Where a suit is filed against a Receiver without first obtaining the leave of the Court which appointed him, the defect can be cured by leave subsequently granted. [p. 425, col. 2.]

JAMSETJI v. HUSSEINBHAI AHMEDHHI.

Mr. *Kanga*, for the Plaintiff.

Mr. *Desai*, for the Defendants.

JUDGMENT.—The summons was issued on an application by the plaintiff for leave to continue the suit against the defendants who are Receivers of the estate of Ahmedbhai Habibbhai. The plaintiff claims to have been employed as a broker by the Receivers and sues for his brokerage. It is clear, therefore, that there is a question to be tried and the case is one in which the Court would grant leave as a matter of course: *Lane* v. *Capsey* (1) and *Braja Bhusan Trigunait* v. *Sris Chandra Tewari* (2).

The only difficulty arises from the fact that *per incuriam* the suit was filed without the previous sanction of the Court. It was held in *Pramatha Nath Gangooly* v. *Khetra Nath Banerjee* (3) that leave of the Court is a condition precedent to the right to sue and that that omission cannot be rectified by subsequent application. The judgment in that case is not supported by any reasons and was not followed in *Rustomjee Dhunjibhai Sethna* v. *Frederic Gaebele* (4). The various statutory provisions which require the consent of the Court or some other authority as a condition on which a suit may be maintained are collected in the case of *Chandulal Khushalji* v. *Awad* (5). The consideration of those and subsequent authorities shows that the words in the Statute have to be examined in each case in order to ascertain whether the provision is a bar to the Court dealing with the actior, or is a bar to the original institution of the suit. In the former case the suit may continue on leave subsequently granted: for instance, the leave of the Collector in a suit to which sections 4 and 6 of the Pensions Act XXIII of 1871 are applicable: *Nawab Muhammad Azmat Ali Khan* v. *Musammat Lalli Begum* (6), or leave under Order I, rule 8 (1), Civil Procedure Code: *Fernandez* v. *Rodrigues* (7), or leave under section 20, Civil Procedure Code: *Narayan Shankar* v. *Secretary of State* (8). But in the latter case, that is, when the bar is to the original institution of the suit, leave subsequently granted is of no avail: for instance, the consent of the Advocate-General under section 92, Civil Procedure Code: *Tricumdass Mulji* v *Khimji Vullabhdass* (9), or the leave of the Court under section 17 of the Presidency Towns Insolvency Act: *Dwarkadas Tejbhandar, In re* (10).

In the case of a suit against a Receiver there is no statutory provision requiring the leave of the Court. But the same principle would apply, and the defect can be cured by leave subsequently granted if there is no bar to the institution of the suit, that is to the jurisdiction of the Court to admit the plaint.

The necessity for leave to sue the Receiver rests upon two considerations: (1) that such a suit is incompatible with the dignity and authority of the Court; (2) that it might interfere with the duty of the Court to maintain the Receiver's possession. Neither of these considerations affects the jurisdiction of the Court. They are matters which the Court can deal with after the suit is filed: and the Court could order the suit to be stayed until it was satisfied that there was no encroachment upon its authority, nor want of attempt to interfere with the Receiver's possession.

Therefore, it seems clear that leave may be granted after the filing of the suit, and Mr. Desai with his customary fairness does not dispute this proposition.

Accordingly, I make the summons absolute but direct that plaintiff pay the costs of the summons. Counsel certified.

Summons made absolute.

(1) (1891) 3 Ch. D. 411; 61 L. J. Ch 55; 65 L T. 375; 40 W. R. 87.
(2) 47 Ind. Cas. 719; 4 P. L. J. 20; (1918) Pat. 337.
(3) 32 C. 270; 9 C. W. N. 247.
(4) 51 Ind. Cas. 486; 46 C. 352; 23 C. W. N. 496.
(5) 21 B. 351; 11 Ind. Dec. (N. S.) 237.
(6) 9 I. A. 8; 8 C. 422; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882; 4 Ind. Dec. (N. S.) 269.
(7) 21 B. 784; 11 Ind. Dec. (N. S.) 528.
(8) 30 B. 570; 8 Bom. L. R. 543.
(9) 16 B. 626; 8 Ind. Dec. (N. S.) 896.
(10) 31 Ind. Cas. 948; 17 Bom. L. R. 925; 40 B. 235.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 195 OF 1917.

March 3, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

Musammat ADHIKARI KUER—DEFENDANT—APPELLANT

versus

LOKENATH RAI—PLAINTIFF AND SHEO SHANKAR PROSAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, alienation by—Consent of reversioner, effect of—Necessity, proof of.

The consent of the immediate reversioner to an alienation made by a Hindu widow is presumptive proof of legal necessity and bars further enquiry into legal necessity. The consenting reversioner cannot subsequently say that there was no legal necessity. [p. 428, col. 1.]

Appeal from a decision of the Subordinate Judge, Arrah.

The Hon'ble Mr. *Purnendu Narain Sinha*, Messrs. *Naresh Chandra Sinha* and *Netai Ch. Ghosh*, for the Appellant.

Messrs. *Kulwant Sahai* and *Shambhu Saran*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of a suit instituted by the respondent Loknath Roy against the appellant and the *pro forma* respondents to enforce a mortgage bond executed by *Musammat* Adhikari Kuer and by Sheo Shankar, Uma Shankar and Rama Shankar on the 9th of August 1907. There is no dispute that *Musammat* Adhikari Kuer was in possession of the estate in her right as a Hindu widow and that Sheo Shankar, Uma Shankar and Rama Shankar, as her daughter's sons, were on that date the immediate reversioners. It appears that Rama Shankar was on that date a minor but that his name was actually signed by his eldest brother Sheo Shankar.

The learned Subordinate Judge has given a full mortgage decree to the plaintiff.

The first question which has been argued on behalf of the appellant is that there were certain part payments made by *Musammat* Adhikari Kuer and that those part payments are not shown in the account annexed to the plaint. The appellant's allegation is that she paid Rs. 200 to the plaintiff on the 30th of Bhado 1316 and Rs. 408 on the 30th of Aghan 1319. She relies upon two receipts alleged to have been granted by the plaintiff to her. It is noteworthy that these payments are not endorsed on the mortgage-bond.

Now, in order to determine this question it is necessary to examine whether the case of the defendant was at all put to the plaintiff. The plaintiff came to the witness-box and stated as distinctly as he could that the defendant had not paid anything to him on account of his dues. That was a clear statement that nothing had been paid to him by the defendant. There was absolutely no cross-examination on this point at all. The Hon'ble Mr. Purnendu Narain Sinha, on behalf of the appellant, relies on the fact that the defendant raised the question of part payments specifically in her written statement and that, therefore, it was for the plaintiff to deny that allegation in the witness-box. I do not agree with this contention at all. The plaintiff came to the witness-box to prove his case and it was for the defendants, if they had a specific case on the point, to put that specific case to the plaintiff. It is, in my opinion, not fair to rely upon receipts alleged to have been executed by Loknath without giving Loknath an opportunity to deny his signatures on those receipts.

In the next place the evidence as regards the payments is, in my opinion, not sufficient. I will take the second receipt. That receipt is alleged to have been granted on the 30th of Aghan 1319. Now, it is the defendant's case that on the 5th of Fagun 1317 the defendant executed a Mukhtarnama in favour of the plaintiff's son, appointing him her agent for the purpose of collecting rents, issues and profits. Therefore, on the date, when she is alleged to have paid Rs. 408 to the plaintiff, she was not in possession of the estate at all. The Mukhtarnama has been read to us by the Hon'ble Mr. Purnendu Narain Sinha and it appears that the lady appointed Ram Nihora, the son of the plaintiff, as her Manager on a salary to make collections on her behalf, to pay Government revenue and other public demands out of such collections and to pay her Rs. 30 a month for her expenses and at the end of each year to account to her for such collections and to make over to her the balance in hand. Now one of the witnesses for the defendants was asked from where defendant No. 1 got Rs. 408, which she made over to the

plaintiff in part payment of what was due from her to the plaintiff. This witness is Kailas Bihari, who is a servant of the defendant and undoubtedly looks after her interest. His answer was 'I cannot say.' The defendant herself, in her evidence, says that arrears were due to her from the tenants and that these arrears were being realized by her servant Jankey Lal and that she made the payments to the plaintiff out of these collections. It seems to me that this is an impossible story. The Mukhtarnama shows that Ram Nihora was there to make collections on her behalf. The Mukhtarnama makes no distinction whatever between rents as they fell due and arrears of rent. Therefore, if the Mukhtarnama was at all acted upon, these collections would undoubtedly have been made by Ram Nihora and not by Jankey Lal. Now, if the second receipt goes, then, in my view, it must throw suspicion on the whole story of part payments. In my view, these circumstances, coupled with the fact that the receipts were not shown to the plaintiff when he came to the witness-box to give his evidence, make it impossible for us to accept the story of part-payments.

The next point argued by the Hon'ble Mr. Purnendu Narain Sinha is that the defendant appointed the plaintiff her agent to collect rents on her behalf and that, therefore, the plaintiff cannot claim an account of the money due to him from the defendant on the foot of the mortgage-bond, without accounting to her for the monies that came into his hands by virtue of the Mukhtarnama. The principle is well established that he who claims an account must also render account, if he is at all accountable. But in this case the Mukhtarnama is not in favour of the plaintiff, but in favour of the plaintiff's son. The evidence of the defendant, no doubt, is that though the name of Ram Nihora was used in the transaction, it was the plaintiff who actually acted for her. This evidence I cannot accept. This case, again, was not put to the plaintiff when he came to the witness box; and for that reason and also for the reason that every apparent transaction must be assumed to be the real transaction until the contrary is shown, I cannot accept this case.

The last point that has been argued before us is that the reversioners could not bind their reversionary interest by the mortgage transaction and that, therefore, all that can be sold in execution of the mortgage decree is the widow's interest. The question, whether the reversioners can bind their reversionary interest, is one of considerable difficulty and I do not propose to discuss that point in this case. But I look upon the transaction by the reversioners not as binding their interest in the estate but as consenting to the transaction by the widow. It is unnecessary to refer to all the cases, that have been decided on this question, but I may usefully cite a passage from the judgment of the Privy Council in the case of *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1). At page 685* the Judicial Committee, in that case, said as follows:—"The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well-settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions." The Judicial Committee went on to point out as follows:—"There is no evidence that they," the reversioners, "benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a stringent equity, to use Lord Hobhouse's expression in the course of the argument in *Jiwan Singh* v. *Misri Lal* (2), arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the

(1) 27 Ind. Cas. 674; 42 C. 876; 17 M. L. T. 115; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 240; [illegible] L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 126; [illegible] M. W. N. 511; 42 I. A. 64 (P. C.).

(2) 18 A. 146; 23 I. A. 1; 6 M. L. J. [illegible] J. 675; 8 Ind. Dec. (N. S.) 804.

*Page of 42 C.—*Ed.*

dealings they concurred in binding their interests, and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony, such as appears to have been relied upon in this case."

In this case, fortunately for the plaintiff, it is unnecessary to have recourse to ambiguous acts or dubious oral testimony, because the reversioners were actually parties to the transaction, and so far as they were able, they undoubtedly consented to the mortgage transaction. They undoubtedly benefited from the transaction as the mortgage-bond recites that the money was borrowed in order to pay off prior mortgages to which they were parties.

It is argued, however, by the Hon'ble Mr. Purnendu Narain Sinha that one of the reversioners, namely, Rama Shankar Prosad, was a minor on the date when the mortgage-bond was executed and that, therefore, there was no such concurrence of the reversioners as is essential under the law. The point has considerably pressed me, but having considered the point very carefully I am unable to agree with Mr. Sinha. No doubt Rama Shankar Prosad was a minor, but his eldest brother acted for him in that transaction. The whole principle of consent binding the reversioners is based on this, that consent is presumptive proof of legal necessity and bars further enquiry into legal necessity. Sheo Shankar and Uma Shankar, who were both of age, undoubtedly entered into the transaction and in my view the fact, that Rama Shankar was a minor on that date, would not vitiate the transaction.

But there is another difficulty in the way of the Hon'ble Mr. Purnendu Narain Sinha, and it is this:—An alienation by a Hindu widow is not void but voidable. It is voidable at the instance of the reversioners who allege and prove that there was no legal necessity for the particular transaction in question. Now, what are the facts? So far as Sheo Shankar and Uma Shankar are concerned, they were of age, when they consented to the transaction in question; and, in my opinion, they cannot now be heard to say that there was no legal necessity for the transaction. The only person who could come to Court and challenge the transaction is Rama Shankar, who was a minor on the date of transaction, but Rama Shankar is now dead. He predeceased *Musammat* Adhikari Kuer and, therefore, that difficulty does not arise now. I prefer to rest my decision so far as this question is concerned on this ground.

Another point urged, somewhat half-heartedly, by the Hon'ble Mr. Purnendu Narain Sinha is that the sons and grandsons of the mortgagee have not been made parties to the suit. In my view, there is no substance at all in this point. The only person whose name appears on the mortgage-bond is the mortgagee, Loknath Roy, and he has instituted this suit. The Hon'ble Mr. Purnendu Narain Sinha relied strongly upon the case of *Girwar Narain Mahton* v. *Musammat Mahbulunnissa* (3), in which it was held that "A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record, the suit must be dismissed in its entirety." With that view I entirely agree, but it has not been shown in this case that any person other than Loknath Roy is entitled to the money due on the mortgage. That being so, in my opinion, there is no substance in the argument.

In the result, therefore, I agree with the decision of the learned Subordinate Judge and would dismiss this appeal with costs.

I desire to point out that Mr. Nirsu Narain Sinha appeared on behalf of some of the minor respondents, but withdrew from the case as the costs of the minors have not been secured by the appellant. An application for costs should have been made on behalf of the minors in proper time. As such an application was not made in proper time, we declined to adjourn the hearing of the appeal at this stage.

ADAMI, J.—I agree.

Appeal dismissed.

(3) 36 Ind. Cas. 542; 1 P. L. J. 468.

not produce any witness who could give evidence as to identity.

Mr. Kennedy for the appellants had, when the appeal first came before this Court, classified the lands in their possession under three separate headings :

(1) 31 odd *bighas* of land in which they acquired *raiyati* interest prior to the lease of July 6th, 1905;

(2) 15 odd *bighas* of land in which they acquired *raiyati* interest during the pendency of the lease; and

(3) 12 odd *bighas* of land in which they acquired *raiyati* interest after the expiry of the lease.

The findings of the lower Court on remand show that out of the 31 *bighas* covered by the *kabalas* and sale certificates showing purchases before 1905, only 20 *bighas* 18 *kathas* 13 *dhurs* are within the plaintiff's Patti and that out of the 12 *bighas* covered by the sale certificates granted after 1911, only 2 *bighas* 6 *kathas* 10 *dhurs* fall therein. Mr. Kennedy admits that he can claim the protection of occupancy rights only with regard to the 15 *bighas* bought during the term of the lease and the 20 *bighas* 18 *kathas* 13 *dkurs* and 2 *bighas* 6 *kathas* bought before and after it respectively, in all 38 *bighas* odd, and that his client will be liable to pay damages for retaining possession of the remainder of the land in suit, amounting to 30 *bighas* or so. He points out, however, that on the 12th September 1917 the defendants appellants, having relinquished all the lands in suit pending decision of the appeal, made petition before the Executing Court that notice might be given to the decree-holders, present respondents, that possession had been given up and such notice was accordingly served. The appellants cannot, therefore, be made liable for damages subsequent to that date.

The main question in this appeal deals, then, with 38 *bighas* within the Patti, which have been purchased by the defendants from tenants who held them as occupancy *raiyats*, and we have to determine whether the defendants, by the purchase, obtained occupancy rights in the purchased land which will save them from ejectment.

The lands are divided into three categories; those purchased before, those purchased during and those purchased after the term of the lease, and each class must be considered separately.

First, as regards the 20 *bighas* 18 *kathas* 13 *dhurs* bought previous to the lease of 1905, namely, in 1894, 1893, 1889, 1891 and 1895: There appears to be no doubt that the defendant's predecessors, when they made the purchases, were *thikadars* under their then existing leases, and the question is whether under the terms of section 22 (3) of the Bengal Tenancy Act, they could, as such, acquire an occupancy right by purchase. Before 1907, sub-section (3) ran :—

"(3) A person holding land as an *ijaradar* or farmer of rents shall not, while so holding, acquire a right of occupancy in any land comprised in his *ijara* or farm."

The question then arose whether the word "acquire" was to be taken to relate only to acquisition under the provisions of the Act, or would include acquisition by purchase or other forms of transfer. It was held in *Ramrup Mahto* v. *H. Manners* (1) that the word would not include "purchase" but was confined to acquisition of the status of occupancy *raiyat* as described in the Act. The Bengal Tenancy Act was amended in 1907, and, to make it clear that any kind of acquisition of occupancy right was to be barred, the words "by purchase or otherwise" were inserted after the word "acquire" in sub-section (3) of section 22. Then, in 1911, in the case of *Raghubar Mahto* v. *H. Manners* (2) Mukerjee, J., questioned the decision in *Ramrup Mahto* v. *H. Manners* (1), and expressed the opinion that the amendment merely gave effect to what had always been the law. The fact remains that before the amendment the Court interpreted the sub-section as excluding acquisition by purchase and the Legislature, by finding it necessary to make the amendment, admitted that it was not clear that such acquisition was included. We must hold, I think, that prior to the Act of 1907 the acquisition by a *thikadar* of an occupancy right by purchase was not barred by section 22 (3) and that, therefore, the defendants acquired such a

(1) 4 C. L. J. 209.
(2) 11 Ind. Cas. 389; 13 C. L. J. 568.

right in the 20 *bighas* 18 *kathas* 13 *dhurs*.

Learned Counsel argues that the defendants by their conduct have shown that they did not claim *raiyati* rights in the land, and throughout treated the holding as belonging to the Maliks He points out that the defendants themselves looked after the survey proceedings and had these 20 *bighas* described in the Record of Rights published in 1897 as *bakasht thikadar*. It is true that the defendants are not recorded as *raiyats* of the lands, but a Settlement Officer, finding that they were *thikadars* of the Patti and that they were themselves cultivating the lands would naturally enter them *bakasht thikadar*, which simply means that they were lease lands which the *thikadar* was cultivating himself. The amendment of the Act in 1907 could not take away rights of occupancy already vested in the defendants.

There is no good evidence that these lands were the landlord's *bakasht* at the date of the lease, or that the lands were *zeraiat*. It is contended that, at the time the lease of 1905 was executed, the defendants did not set up any *kashtkari* right, and, in fact, agreed not to claim such right. There is no evidence that in any previous lease the defendants agreed not to claim the right, and whatever they may have undertaken in this respect in the lease of 1905 could not affect the occupancy right which, we have found, was acquired by purchase previous to 1907. Any such agreement in the later lease would be void under the provisions of section 178 of the Bengal Tenancy Act.

The condition in the lease as to giving up the *kasht* of any tenant purchased at auction refers only to purchases made during the term of the lease, and not to previous ones.

We next come to the acquisitions made during the term of the lease. It is not contended by the appellants that they could acquire an occupancy right by purchase after 1907. Mr. Kennedy urges, however, that though no occupancy right could be obtained, section 22 (3) does not bar the purchase of a non-occupancy right and further, that, under the conditions of the lease, the defendants can set up a right of occupancy in land purchased at auction from the tenants for which on the expiry of the lease the plaintiff has not offered to the defendants the auction purchase money paid by them. It is, I think, plain that the defendants could not acquire occupancy rights in these lands. There is the express provision in the law against it, whatever may be the terms of the contract. The question to be decided in regard to these lands is whether the purchase gave the defendants non-occupancy rights. If it did, the suit to eject the defendants from these lands is clearly barred by limitation under Schedule III to the Bengal Tenancy Act.

Mr. Kennedy relies on the cases of *Jawadul Huq* v. *Ram Das Saha* (3) and *Ram Mohan Pal* v. *Sheikh Kachu* (4), in contending that where an *ijaradar* purchases an occupancy holding, such holding does not cease to exist but only the occupancy right is terminated, and also on *Sheonandan Singh* v. *Ramhit Singh* (*Deo Saran Singh*) (5), where it was held held that an *ijaradar* who has purchased an occupancy holding acquires it as a non-occupancy holding. Both of the two first mentioned cases deal with the purchase of an occupancy right by a co owner and with section 22 (2), but they decided that it is the occupancy right and not the holding which is extinguished by the transfer: the holding is merely divested of the incidents which attach to an occupancy holding. The principle laid down in those cases would apply in a case under sub section (3) which does not bar an *ijaradar* from acquiring non-occupancy rights. On the other hand Mr. Singh cites the cases of *Raghubar Mahto* v. *H. Manners* (2) and *Manners* v. *Satroghan Das* (6). The decision of Mukerjee, J., in the former would seem to disagree with the opinion he formed in *Sheonandan Singh* v. *Ramhit Singh* (*Deo Saran Singh*) (5), cited above, but it is clear that the facts were different. In neither *Raghubar Mahto* v. *H. Manners* (2) nor *Manners* v. *Satroghan Das* (6) was the main question the effect of the purchase of an occupancy holding by the *ijaradar*. In both of them the question

(3) 24 C. 143; 1 C. W. N. 166; 12 Ind. Dec. (N. S.) 761.

(4) 32 C. 386; 9 C. W. N. 249 (F. B.); 1 C. L. J. 1.

(5) 13 Ind. Cas. 598; 15 C. L. J. 647.

(6) 30 Ind. Cas. 178; 20 C. W. N. 800.

seems to have been mainly whether the lease was a cultivating lease or the lease of a tenure and whether occupancy rights had accrued through long possession, though in the former the *ijaradar* seems to have induced the tenants to give up lands to him. In *Manners* v. *Satroghan Das* (6) Sharfuddin, J., considered the case from the point of view of merger. Now if it was contemplated that when an *ijaradar* purchases an occupancy holding the occupancy right merges in the *ijara*, the framers of the Act would surely have found it sufficient to omit the word "permanent" from sub-section (1) of section 22, which would then have the desired effect in the case of a purchase by an *ijaradar*. It is clear that sub-section (3) does not mean that the occupancy right merges; it simply means that no occupancy right passes.

In *Sheonandan Singh* v. *Ramhit Singh* (*Deo Saran Singh*) (5) Mukerjee, J., states: "Assume, therefore, for a moment that a person holding land as an *ijaradar* is not entitled, while so holding, to acquire by purchase a right of occupancy in any land comprised in his *ijara*. The result is that if an *ijaradar* purchases an occupancy holding, he acquires it as a non-occupancy holding."

In the present case, as was held in the one just cited, the defendants' character as purchasers conferred upon them the status of *raiyats*, but not of occupancy *raiyats*. It may be contrary to the intention of the framers of the Act that landlords and tenure-holders should be allowed to acquire *raiyati* rights, but until sub-section (3) is amended it cannot prevent the acquisition of non-occupancy rights.

Having found, then, that the defendants were, on the expiry of the lease, non-occupancy *raiyats* of these 15 *bighas*, we must hold that under Schedule III to the Bengal Tenancy Act, the suit to eject them from those lands is out of time.

With regard to the undertaking in the *kabuliyat* to give up the *kasht* lands purchased in execution of rent suits against the tenants on receipt of the purchase money, and not to set up a right of occupancy in such lands except where the plaintiff failed to offer to pay the purchase money, it need only be remarked that the plaintiffs up to the date of the suit had not offered payment of the purchase money. The reason they give is that there was so much *wasilat* due from the defendants that it was only necessary to set off the purchase money. That reason, however, was not a good one. They were bound to make the offer if they wanted the lands.

With regard to the last class of lands, those purchased after the expiry of the lease in execution of decrees for rent which fell due during the lease, there is, I think, no doubt that the defendants must be held to have acquired occupancy rights, for section 22 (3) relates specifically only to acquisitions of occupancy rights made while still holding the *ijara*.

We hold, therefore, that the defendants acquired occupancy rights in the lands purchased before 1905 and after 1911, and that they cannot now be ejected from the lands purchased during the lease, in which they have non occupancy rights, because the suit was instituted beyond time.

The last point to be decided is that of *wasilat* or damages. Under the terms of the *kabuliyat* the defendants' predecessors undertook to pay mesne profits at the rate of Rs. 25 a *bigha* per annum if, on the expiry of the term of the lease, they did not give up possession of the lands and if they set up any claim to a right of occupancy in respect of any lands other than lands purchased at auction from tenants for which the lessors had not offered payment according to the terms of the lease.

So far as concerns the lands in which the defendants have been found to have acquired occupancy rights before the lease was executed, it is clear that no mesne profits or damages are payable, the lease referred only to occupancy holdings purchased during its term. The defendants have a right to remain in possession of those lands. Any agreement in the lease not to set up right of occupancy in lands in which such right had accrued would be void under section 178, Bengal Tenancy Act.

We have found that, with regard to occupancy holdings purchased during the term of the lease, the suit to eject the defendants is barred by limitation, they

being in possession as non occupancy *raiyats*. The defendants, however, undertook to give up these lands on the expiry of the lease if the plaintiff offered payment of the sum paid by the defendants as auction-purchasers, and it was agreed that the rate of Rs. 25 per *bigha* should not be payable by the defendants in respect of the lands if the lessor did not make payment of the purchase price. The lessor has not offered payment up till the date of the institution of the suit, which was over three years after the expiry of the lease. The defendants contend that this offer of payment was not made within a reasonable time and that the lessor must be taken to have elected not to exercise his option.

What is a reasonable time depends on the facts in every case, but it is not necessary for us to decide the question in this case, since we have found that the defendants were up to the date of the suit in rightful possession as non occupancy *raiyats* and cannot be ejected, and offer of payment of the purchase-money had not up till then been made.

For lands in which occupancy rights have been acquired by purchase after the date of the suit mesne profits will of course not be payable since before the expiry of the lease and the date of the acquisition, such lands were in possession of occupancy *raiyats*. Thus we find that no mesne profits are payable in respect of the *raiyati* lands acquired by the defendants before, during, and after the lease, that is to say, an area of 33 *bighas* 4 *kathas* 13 *dhurs*.

For the remaining area out of the total of the 68 *bighas* 6 *kathas* 13 *dhurs*, namely, 30 *bighas* 2 *kathas*, Mr. Kennedy admits that *wasilat* will have to be paid up to the date when notice of abandonment of the lands was given to the plaintiff, namely, up to 12th September 1917, but contends that the rate of Rs. 25 per *bigha* per annum is far too high and was fixed as a penalty.

The learned Subordinate Judge has found that there was no undue influence or coercion and that the bargain to pay at this rate was not hard and unconscionable.

The plaintiff's witnesses themselves have deposed that the highest rate for land in the village is Rs. 10 per *bigha* per annum and that the usual rate is Rs. 8, so that it is clear that the rate of mesne profits stipulated for is far above the ordinary rate. The defendants contracted to hold the land for the term of the lease paying an annual rental of Rs. 672.11.6 and to deliver up the land under certain conditions on the expiry of five years. If they failed to deliver up possession or made any claim, they were to pay mesne profits to the lessor at the rate of Rs. 25 per *bigha*, that is to say, they were to pay Rs. 2,475 a year for the 99 *bighas*. The contract to pay mesne profits is a secondary one intended to secure the fulfilment of the primary contract to relinquish the land on the expiry of the lease: it may be just and reasonable that the lessor should be thus secured, but the high rate agreed on is clearly by way of a penalty and it is open to this Court to award reasonable compensation in lieu of such an excessive rate.

We are of opinion that the highest rate of rent for land in the village as shown by the plaintiff's witnesses would be a fair rate in this case and we accordingly decide that the defendants should pay at the rate of Rs. 10 per *bigha* per annum for the 30 *bighas* 2 *kathas*.

As a result the appeal will be allowed in part, and the decree of the lower Court will be modified to the extent that the plaintiff will be declared entitled to recover possession of the said 30 *bighas* 2 *kathas* of the lands mentioned in schedule II and will be allowed *wasilat* at the rate of Rs. 10 per *bigha* per annum for the 27 *bighas* of land of schedule III for 1320, and for the 30 *bighas* 2 *kathas* out of the lands mentioned in schedule II, *wasilat* at the same rate for three years from 1320 to 1322 F. S. There will be no deduction on account of purchase money paid by the defendants.

The parties will get costs in both Courts proportionate to their success.

DAS, J.—I agree.

Appeal partly allowed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 44 OF 1916.

July 3, 1919.

Present:—Mr. Justice Greaves.

RAM LAL SEN—PLAINTIFF

versus

BIDHUMUKHI DASI AND OTHERS—DEFENDANTS.

Hindu Law—Will, construction of—Bequest to wife for life with remainder to sons—Accumulation, direction for, validity of.

A direction in the Will of a Hindu testator to accumulate the surplus income of devised property with a gift of the accumulations is not fundamentally bad: it only fails if it offends some independent rule of Hindu law. [p. 376, col 2; p. 377, col. 1.]

A testator by his Will appointed his wife his executrix and trustee and "gave devised and bequeathed unto her the rest and residue" of his moveable and immoveable properties for her life and after her death to his five sons in equal shares, with directions to incur certain expenses and to accumulate the surplus income for the benefit of the sons:

Held, that the provision for accumulation of the surplus income was not bad. [p. 379, col. 1.]

Mr. *N. N. Sircar* (with him Messrs. *L. P. E. Pugh, H. C. Majumdar* and *B. C. Ghose*), for the Plaintiff.

Mr. *B. Chakraverty* (with him Mr. *C. C. Ghose*), for the Defendants Sankar Lal and Rash Behary.

Mr. *N. Mukerjee*, for the Defendant Champa Dasi.

Mr. *S. C. Bose*, for the Defendant Bipin Behary Sen.

Mr. *S. N. Banerjee*, for the Defendants, Manik, Netye and Gour.

Mr. *D. Bose*, for the Defendant Barai Dasi.

Mr. *S. K. Chukerbutty*, for the Defendant Gosto Behary Sen.

Mr. *B. K. Ghosh* (with him Mr. *H. D. Bose*), for the Defendant Sham Lal Sen.

Mr. *C. R. Das* (with him Mr. *B. L. Mitter*), for the Defendant Bidhumukhi Dasi.

JUDGMENT.—The plaintiff in this suit seeks to have the Will of one Ram Gopal Sen construed and the rights, shares and interests under the said Will of the parties to the suit ascertained and for administration of the estate of Ram Gopal Sen under the direction of the Court and for an account of the estate from the defendant Bidhumukhi Dasi from the testator's death and for partition. The plaintiff is a son of Ram Gopal Sen, the 1st defendant is his widow and the executrix of his Will, the defendant Sham Lal Sen is a son, the defendants Manick Lal Sen, Nitya Lal Sen and Gour Lal Sen are sons of a deceased son Heera Lal Sen who survived the testator and died after the institution of the suit, the defendants Sankar Lal Sen, Rash Behary Sen and Gosto Behary Sen are sons of another son of the testator named Bolai Chand Sen who survived the testator and died in the year 1895, the defendant Champa Dassi is the widow of another son Adhar Lal Sen who survived the testator and died in 1885 without leaving a son but leaving four daughters, three of whom are dead, two of them having left male issue, the defendant Bepin Behary Sen is a son of Doyal Chand Sen, a son of the testator who predeceased him, and the defendant Srimati Barai Dassi is a daughter of another son of Doyal Chand named Amrito who is dead. Srimati Barai had a son born to her last April. Amrita had a son Ganesh who died some time in or after the year 1905.

Ram Gopal Sen died on the 16th November 1880 a Hindu governed by the Bengal School of Hindu Law leaving a Will, dated the 9th October 1878, probate whereof was granted out of this Court in the year 1882 to the defendant Srimati Bidhumukhi Dasi, the executrix therein named. The heirs of Ram Gopal Sen at the time of his death were his five sons Bolai Chand, Sham Lal, Ram Lal, Adhar Lal and Heera Lal, and his two grandsons Bepin Behari and Amrita Lal.

The testator by his said Will appointed his wife, the defendant Srimati Bidhumukhi Dasi, executrix and trustee thereof and directed her to pay his debts and funeral and testamentary expenses and to expend a certain sum therein named on his first Shrad and after giving certain legacies, including a sum of Rs. 20,000 in Government 4 p. c. securities, to his wife for her life, to the end that she might spend and enjoy the interest thereof during her life, gave, devised and bequeathed the rest and residue of his estate moveable and immoveable unto his wife and her assigns for life interest to collect the rents, issues and profits thereof and to pay the ground rents, taxes and assessments payable in respect of the immoveable property and to keep the same in repair, and in the second place to expend according to her discretion a sum of not more than Rs. 3,600 a year

towards the maintenance and education of his family, consisting of his wife his five sons thereinafter named, and their wives and children and the widow and children of his deceased son Doyal Chand Sen, and in defraying other family and customary expenses, and in the next place to accumulate the surplus income for the benefit of his said five sons, they all living in commensality in his dwelling house, and he directed that in case any of his said sons should live apart from the rest of his family he should be paid a monthly sum of Rs. 25 for his maintenance. The testator then upon the death of his wife gave, devised and bequeathed his house No. 30, Sunker Halder Lane, and certain shares to his infant grandsons Amrita Lal and Bepin Behary in equal shares, subject to the charge of maintaining their mother, and provided that in the event of either of them dying without male issue his share would pass to the survivor, subject to the charge of maintaining his widow and female issue (if any) and marrying the latter, and he provided that in the event of both his grandsons dying without male issue the bequest, except the Railway shares which were to pass to the survivor's heirs, should revert to and become a part of his residue, to devolve on his said five sons and their heirs subject to the limitation thereunder provided. And he gave the rest and residue of his estate moveable and immoveable on the death of his wife to his five sons, whom he names, in equal shares and proportions, but he provided that in the event of the death of any of them without male issue his share should pass to the survivors or survivor, subject to the charge of maintaining his widow and marrying the daughter of the son so dying, should he leave any, and paying to such widow or daughter Rs. 1,000 or more, at the same rate if more than one.

The plaintiff contends that the provision for accumulation is bad not on the ground of the length of the period of accumulation but as being repugnant, and he contends that if there is no gift until the wife dies there is an intestacy as to the amounts directed to be accumulated until her death. The widow contends that the accumulation is good and that the suit is premature and that nothing is divisible until her death; alternatively she contends that she takes a life estate in the whole income, the provision for accumulation being merely discretionary, and in the further alternative she contends that she gets a life estate by implication.

If the widow's main contention, namely, that the provision for accumulation is not invalid, prevails, then no question at present arises for decision and the suit is premature as no case for an account has been made out. But it seems to me that to decide if the provision for accumulation is valid, it is necessary first to see whether under the Will the sons took immediate vested interests under the Will or if vesting is postponed until the widow's death. If the sons took vested interests at the testator's death, then one of the arguments levelled against the provision for accumulation goes, namely, that the accumulations having no owner until the widow's death the provision for accumulation is bad. The argument is based on a passage in Trevelyan's Hindu Law, 2nd Edition, page 41, where it is laid down that every part and interest in a property must have an owner, it cannot remain in suspense or abeyance without an owner, it must vest in some one.

Now the clause in the Will directing the accumulations contains no express gifts of the accumulations and I do not think that any gift can be implied from the words "for the benefit of my said five sons." The sons are entitled to be maintained out of the sum of Rs. 3,600 or if they separate, they get Rs. 25 a month from the estate, and if the words "for the benefit of my said five sons" were intended to confer an immediate gift of surplus income, it is at least unlikely that there would have been as well provision for their maintenance. Presumably, therefore, if the provision for accumulation is valid, the accumulations fall into residue and pass under the gift of the rest and residue of the estate to the five sons on the death of the widow. Did then this gift vest in the sons on the death of the testator or is vesting postponed until the widow's death? I think that the gift vested on the death of the testator. Section 47 of the Hindu Wills Act, which is section 106 of the Succession Act, provides

that where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the Will, become vested in the legatee on the testator's death and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is, from the testator's death, said to be vested in interest, and the explanation to the section states that an intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed or whereby a prior interest therein is bequeathed to some other persons or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives or from a provision that if a particular event shall happen the legacy shall go over to another person. I cannot see that in the Will before me any contrary intention appears, and the fact that there is a gift over to the surviving sons, in certain events, of a son's share (and the expression "his" share certainly looks like a vested interest) is not in my opinion a contrary intention and in fact the section so states.

That such a gift is a valid gift see section 59 of the Hindu Wills Act and it does not make the interest any less a vested interest but merely divests in certain events the estates or gift which has already vested. I think the five sons upon the death of the testator took immediate vested interests in the residue, which includes the accumulations, but I think that the estate of any son was liable to be divested upon his death without male issue during the lifetime of the widow. Counsel for Champa Dassee contended in reliance on *Poultney, In re; Poultney* v. *Poultney* (1) that "dying without male issue" meant death in the testator's lifetime, but unfortunately for his argument he has failed to notice that the decision of Joyce, J., in *Poultney, In re; Poultney* v. *Poultney* (1) was reversed on appeal see *Poultney, In re; Poultney* v. *Poultney* (2). I think that "dying without male issue" upon the true construction of the clause means death in the widow's lifetime and that Adhar's vested interest was divested upon his death in the widow's lifetime, without male issue, but of course under the terms of the Will the share of Adhar passed to the surviving sons, subject to the charge imposed on the gift of residue of maintaining Champa Dassee when the residue falls into possession and of making the payments to the widow and daughters directed by the Will. It did occur to me that a possible solution of any difficulty with regard to the accumulations might be found in holding that as under the gift of residue the accumulations pass to the sons eventually, they might upon the principle of *Saunders* v. *Vautier* (3) and like cases stop the accumulations at any time and claim the surplus income as it accrues. But two difficulties present themselves, (*i*) the gift over to the surviving sons in the event of a son dying without male issue in the lifetime of the tenant for life, (*ii*) the rights of Champa Dassee and her daughters respectively to maintenance and legacies out of Adhar's divested share of the residue, which includes the accumulations. The 1st point might be got over by the sons agreeing *inter se* to give up their rights of survivorship, but the 2nd point remains and could only be got over by Champa Dassee releasing her right of maintenance against the accumulations and by payment to her and her daughters of their legacies. But as matters stand I am of opinion that the principle of *Saunders* v. *Vautier* (3) has no application.

It remains, therefore, to consider under the circumstances of this case whether the provision for accumulation of surplus income during the lifetime of the widow is valid according to Hindu Law, bearing in mind the fact that according to the construction which I have put upon the residuary gift, the sons took immediate vested interests upon the testator's death. Now the question of the validity in a Will of a provision for accumulation of surplus income was recently discussed by the Appeal Court in *Watkins* v. *Administrator General of*

(1) (1912) 1 Ch. 245.
(2) (1912) 2 Ch. 541; 81 L. J. Ch 743; 107 L. T. 1; 56 S. J. 667.

(3) (1841) Cr. & Ph. 240; 10 L. J. Ch. 354; 54 R. R, 286.

Bengal, Suit No. 611 of 1907, Appeal No. 92 of 1913.* The case has escaped the vigilance of the reporters or perhaps I should rather say is unreported owing to their lack of vigilance. There Sir Lawrence Jenkins in delivering the judgment of the Court in unequivocal terms lays down, after discussing the cases that "A direction to accumulate with a gift of the accumu-

*The following is the judgment in Appeal No. 92 of 1913, dated March 4, 1914, decided by Sir Lawrence Jenkins, Kt., Chief Justice, and Mr. Justice Woodroffe.

JENKINS, C J.—Once more the Will of Haridass Dutt is before the Court.

The testator by this Will made provision, as he thought, for the adoption of a son or sons. He died in 1876, and in the following year an adoption ceremony was performed as contemplated by the Will. In 1881 the boy died and after the lapse of a month the testator's widow, Swarnamoyee Dassee, again purported to make an adoption, the boy this time being Amrita Lal Dutt. This boy was married in the family and throughout treated as a validly adopted son until he instituted a Suit No. 535 of 1894 against Swarnamoyee Dassee and her daughter and their sons, claiming the corpus of the estate and in any event the surplus income notwithstanding the provision for postponment of vesting and accumulation contained in the Will

By way of defence the validity of Amrita's adoption was denied and this plea was upheld by this Court on appeal and by the Privy Council. Since then the Will has been the subject of two more appeals to the Privy Council, and if the forecast of Counsel is correct, there are probably as many more appeals to that tribunal in store.

The determination of this suit turns on the true construction of clause 9 of the Will which is in these terms:—

"I direct my executors and executrix and trustees to pay out of the income and interest of my estate and effects monthly all necessary household expenses as well as for the worship of our family idol Sri Sri Radha Gobindji and to pay my wife monthly during her natural life for her sole and separate use the sum of Rupees two hundred and also the sum of Rupees fifty monthly to such adopted son, who shall live and attain his full age of 18 years, after his so attaining such age of 18 years during the lifetime of my said wife, provided he remains under her control and bears a good character, and if my said executrix and executors and trustees think fit and are satisfied with his conduct and behaviour, and for the purposes of such monthly expenditure my executrix, executors and trustees shall set apart and retain out of the interest and income of my estate a sum sufficient to meet such expenditure for six months and invest the rest and residue of such income and interest in Government securities in their joint names, but in no case shall such adopted son have or exercise any control, dominion over my estate and effects until the death of my wife, after which event I direct my said executors and trustees to make over the whole of my estate and effects both real and personal immoveable or moveable whatsoever and wheresoever and of what nature or quantity soever to such adopted son who shall survive my wife, if he shall have attained his age of 18 years during the lifetime of my wife or on his so attaining such age after her decease, to whom and his heirs I give, devise and bequeath the same. But in case none of such adopted sons survive my said wife or in case of either surviving my said wife and dying under the said age without leaving a son or sons, I desire and direct my executors after the death of my said wife or the death of such son after her but under such age of 18 years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares, to whom and their respective sons I give, devise and bequeath the same, but should either of my said daughters die without having any male issue surviving but leaving my other daughter her surviving, then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in case of the death of other daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike"

As there was and could be no adopted son, it is necessary to see what the testator's family was at his death. Besides his widow Swarnamoyee, he left two daughters Ranimoni Dasi and Premmoni Dasi, and three grandsons Radha Prasad Mullick, Kassi Prasad Mullick and Jyoti Prasad Mullick. After the testator's death two other sons were born to Premmoni Dasi, Peary Lall Mullick and Behari Lal Mullick, while Ranimoni claims to have taken Jugal Kishore in adoption in 1901.

The present suit was instituted on the 12th April 1907 by Mr Watkins, described as the administrator *pendente lite* of the property and credits of Haridas Dutt, against the Administrator-General of Bengal as executor of the last Will of Swarnamoyee and Lal Mohan Dutt and Preolal Dutt as the executors of the Will of Dwarka Nath Dutt. With these Dutt defendants we now have no further concern, for the suit has been dismissed as against them Since the institution of the suit there have been several amendments On the th May 1909 Sreemati Premmoni Dasi and her son Radha Prasad Mullick were added as plaintiffs Both Mr. Watkins and Premmoni died before the hearing and thereby Radha Prasad Mullick became and continued up to decree to be the sole plaintiff

Since the institution of the suit Ranimoni Dassi and Jugal Kishore Sen have been added as defendants as also the plaintiff's brothers Kassi Prosad Mullick, Peary Lal Mulick and Behari Lal Mullick.

The prayers to the plaint are numerous, but in effect what the plaintiff seeks to establish is that certain properties named or indicated in the plaint as well as the surplus income accrued during the widow's life form part of the trust estate: and that he and the added defendants are together entitled thereto to the widow's exclusion

This claim has been based on two alternative grounds. First, it is said that in the events which

lations is not fundamentally bad: it only fails if it offends some independent rule of Hindu Law. Thus it may infringe the rule against perpetuities, and so far as that goes it must be a question for consideration in each case whether there is such an infringement or not. Or the direction to accumulate may

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happened the daughters took vested interests in possession from the death of the testator, so that the whole income was payable to them from that date; failing that it is urged that the trust for accumulation was good, so that the daughters and their sons between them became entitled to the income and capital of the accumulated fund.

The Administrator-General on the other hand maintains that the daughters' interests did not vest in possession until the widow's death, that the trust for accumulation during her life was invalid, and that the income was not disposed of, and so went as on an intestacy to the widow as her husband's next heir.

The literal sense of the words in clause 9 of the Will makes the gift to the adopted son conditional on his surviving the widow and attaining the age of 18, and postpones the vesting of the daughters' interests until the death of the widow if there was no adopted son

This in effect is the interpretation placed on the Will by the Privy Council in *Amrito Lal Dutt* v. *Surnomoye Dasi* (1), for it was there said by their Lordships "By the ninth clause the testator provided an income for his wife and adopted son during the life of his wife and directed accumulation of the surplus income The adopted son is to take the property if he survives the widow and attains 18, otherwise it is given over to the daughters" . See page 106). Later their Lordships describe the testator as "postponing enjoyment during the widow's life and making the boy's interest in the corpus contingent on his surviving the wife and attaining 18." Had the authority to adopt been effective any other construction would obviously have led to results that could not have been intended, seeing that successive adoptions were contemplated.

Though the possibility of an adopted son was out of the question from the first, still in form the gift to the daughters and their sons was on failure of the adopted son and after the death of the widow, and that this gift was good was decided by the Privy Council in *Radha Prasad Mullick* v. *Ranee Mani Dasee* 2). It was there held that the daughters were entitled to the testator's estate in equal shares for life with a remainder over to their sons.

The decision makes no special mention of the accumulations. But whether they be claimed by the widow as heiress, or the daughters and their sons as universal legatees, they are claimed as part of the testator's estate. The gift in the Will is of the "whole of my estate both real and personal," why then should not the accumulations pass to the universal legatees?

It is contended for the Administrator-General, first, that a direction to accumulate is absolutely bad, and secondly, that if not, still the direction here never had any effective operation as it was a part of a futile scheme for providing for the adopted son and nothing more.

The Will is governed by the Hindu Wills Act which makes applicable to the Wills of Hindus certain portions of the Indian Succession Act, 1865, that is to say, sections 46, 48, 49, 50, 51, 56 and 57 to 77 both inclusive, sections 81, 82, 85, 88 to 103 (both inclusive, sections 106 to 177 (both inclusive) and sections 187.

It is noticeable that sections 104 and 105 are not made applicable: section 105 imposes a bar on bequests to religious or charitable works; section 104 is aimed against directions for accumulation. This omission was (in my opinion) deliberate.

It is no doubt provided by section 3 that nothing contained in the Act shall authorise any Hindu to create in property any interest which he could not have created before the 1st day of September 1870, but it cannot be said that every direction to accumulate comes within this ban

No case goes this length, though there is a diversity of opinion as to the extent to which accumulations can be validly directed

As far back as 1855 no less an authority than Colville, C. J., delivering the judgment of the Supreme Court, expressed the opinion that it was competent to a Hindu testator expressly to provide for the accumulations of the surplus income of his estate within the limits allowed by law and to make those accumulations subject to a limitation order as there described: *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick* 3), while in *Bissonauth Chunder* v *Sreemutty Bamasoondery Dossee* 4 Lord Romilly, delivering the opinion of the Privy Council refers to the absence from the Will of any direction to accumulate as a matter deserving of observation, a remark that would hardly have been made had it been their Lordships' opinion that the direction to accumulate was necessarily void

In *Rajendra Lall Agarwalla* v *Raj Coomari Debi* (5 Harrington, J., held that there was nothing illegal in a direction to accumulate made by a Hindu and that, if such a direction was neither so unreasonable in its conditions as to be void as against public policy nor given for the purpose of carrying out an illegal object nor in its effect inconsistent with Hindu Law, it should be given effect to

In *Nistar Chandra* v *Ratanmala Debi* (6) it was held that a direction to accumulate for the purpose of providing for the marriage expenses of the testator's son was good, while in *Jamnabai* v. *Bhanji* (7, a direction to accumulate the income

(1) 27 C. 996: 27 I. A. 128; 4 C. W. N. 540; 2 Bom. L. R. 446; 7 Sar P. C. J. 633; 14 Ind. Dec. N. s. 652.
(2) 35 C. 896; 12 C. W. N. 729 P. C.; 35 I. A. 118 4 M. L. T. 23; 18 M. L. J. 287; 5 A. L. J. 460, 10 Bom. L. R. 604; 8 C. L. J. 48.
(3) (1855) 1 Foulnois 223; 3 Ind. Dec. (o. s.) 133.
(4) 12 M. I. A. 41; 2 Sar P. C. J. 644; 20 E. R. 256
(5) 34 C. 65; 11 C. W. N. 65.
(6) 7 Ind Cas. 921; 15 C. W. W. 66; 13 C. L. J. 85.
(7) 4 Bom. L. R, 893.

be repugnant and so void, as an attempt to deprive a person of the enjoyment of that which has become his property." And later in the judgment he states "What then is the period during which an accumulation can be validly directed? On principle I think it must be for so long a time as the absolute vesting of the entire interest can be withheld" (and I take him to mean by absolute vesting vesting in

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till a boy to be adopted attained the age of 16, was upheld.

In *Benode Behari Bose* v. *Srimati Nistarini Dassi* (8) the question of accumulation arose and their Lordships expressed the opinion, not that the direction was void, but that the widow, who in the circumstances was solely entitled to the fund directed to be accumulated, could *release* the directions for accumulation and enjoy the whole income.

It is true the direction to accumulate for 99 years which came under consideration in *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb* (9) was held to be bad, but it obviously offended the rule against perpetuities. And so a direction which aims at postponing the enjoyment of a presently vested interest created by the testator's Will fails for repugnancy, and to this may be referred the decisions in *Srimati Bramamoyi Dasi* v. *Joges Chandra Dutt* (10) and *Mokoondo Lall Shaw* v. *Gonesh Chnnder Shaw* (11).

So far the cases present no great difficulty, but n *Amrito Lall Dutt* v *Surnomoni Dasi* (12), Trevelyan, J., in reference to the direction now under consideration said: "I cannot see how a direction to accumulate can be valid unless there be a present gift to support the direction to accumulate."

I do not clearly understand what the learned Judge here intended to lay down. But though he evidently considered the direction to accumulate in Haridass Dutt's Will void, even he conceded that there might in appropriate circumstances be a good direction to accumulate.

He no doubt remarks that the fact that where there is a minor accumulation can be allowed, and that an accumulation for the purpose of paying debts did not help. Lord Eldon, however, when delivering judgment in the House of Lords in *Thellusson* v. *Woodford* (13) evidently regarded the fact that there would be of necessity an accumulation during lunacy as pertinent to the question whether a direction to accumulate was good. It is worthy of notice that the other members of the Bench declined to express agreement with the views of Trevelyan, J. How then does the matter stand on principle? Under the ruling of the Privy Council "the intention of the testator was to create in favour of his daughters an estate for life with remainder over to their sons." [*Radha Prasad Mullick* v. *Rance Mani Dassee* (2).]

This gift to the daughter was of the whole of the testator's estate after the death of their mother.

(8) 32 I. A. 193 at p. 200: 15 M. L. J. 331: 7 Bom. L. R. 887; 33 C. 180; 2 C. L. J. 189; 9 C. W. N. 961.
(9) 2 B. L. R. (O. C.) 11.
(10) 8 B. L. R. 400.
(11) 1 C. 104; 1 Ind. Dec. (N. S.) 68.
(12) 25 C. 662; 2 C. W. N. 389; 13 Ind. Dec. (N. S) 435.
(13) (1805) 11 Ves. 112; 8 R. R. 104; 1 Bos & P. N. R. 357; 82 E. R. 1030.

The gift has been held to be good so far as it relates to the property of the testator at the death. Why should it be bad so far as it relates to the income of that property up to the widow's death?

A direction to accumulate with a gift of the accumulations is not fundamentally bad, it only fails if it offends some independent rule of Hindu Law. Thus it may infringe the rule against perpetuities, and so far as that goes it must be a question for consideration in each case whether there is such an infringement or not. Or the direction to accumulate may be repugnant and so void, as an attempt to deprive a person of the enjoyment of that which has become his property. But if, as the decisions I have cited imply, it was within the power of a Hindu testator to direct the accumulations of property to be added to or made part of his own property, then there would seem to be no difficulty in the way of his making a gift of it to a person who under the same gift may become entitled to the original corpus of the testator's property.

What then is the period during which an accumulation can be validly directed?

On principle, I think it must be for so long a time as the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable, or its course or its devolution can be directed and controlled by a testator.

I know of no other test, and if that be the true test, then the direction to accumulate in this Will is within its bounds and valid.

Therefore, the accumulations passed under the gift to the testator and his sons as a part of the testator's estate.

I think there is no force in the argument that the direction to adopt was inoperative as it merely was an incident of the scheme to make provision for an adopted son. It may be that the expectation that there would be an adopted son was the leading motive for the direction, but it did not on that account cease to operate merely because there could not be an adopted son.

The testator's intention was that the intermediate surplus income should go first to his adoted son and failing that to his daughters and their sons, and that it should so go in the form of accumulations.

The income according to the plaintiff's case has in fact been accumulated, and even if the accumulation had been unnecessary that could not deprive the donees of their right to it. But while I am so far in favour of the plaintiff, I do not think the decree in its present form can stand, for it delegates to the Official Referee the trial and determination of complicated questions of law and fact which should be tried and determined by a Judge of the Court,

possession), "or, for so long a time as that during which the corpus of the property can be rendered inalienable or its course or devolution can be directed and controlled by a testator." This decision of course is binding on me and I have not accordingly thought it necessary to refer to the authorities which are discussed and referred to in the judgment. It remains to apply this decision to the Will before me. Now accumulation is only directed during the lifetime of the widow, consequently there is no perpetuity as this is a period, namely, a life in being, during which the corpus can be rendered inalienable and its course and devolution directed and controlled by the testator. Nor in my opinion is the provision for accumulation repugnant having regard to the form of the residuary gift, and for the reasons which I have already stated. Consequently I hold upon the authority of the above case that the provision for accumulation of surplus income in the Will now before me is not invalid. This disposes of the suit and it is not necessary in the view I take for me to decide whether the widow took a life-estate in the whole income, as I understand that she only desired to press this in the event of the provision for accumulation being held bad. I have expressed my view with regard to Adhar Lal's share, as it was I think necessary for me to do so for the purposes of this judgment; but I do not propose to make any declaration with regard to this share as Adhar Dal's daughters and their representatives are not before the Court and accordingly no declaration which I made would be binding on them. The suit accordingly fails and must be dismissed.

Suit dismissed.

It is specially necessary that the hearing should be before a Judge in view of the difficult points of limitation that may arise.

The suit was instituted on the 12th August 1907, two days within the period prescribed by Article 98 of the Limitation Act of 1877.

The sole plaintiff was Nowell Shaw Watkins. He died before the trial and no one was substituted in his place. Radha Prasad Mulick and Premmoni were not added as plaintiffs till the 6th May 1909.

Over and above this it is suggested that Mr Watkins, was not a competent plaintiff. These matters must be borne in mind when the defence of limitation comes to be considered.

The parties before us have asked us not to deal decisively with the question of limitation at this stage, but to leave this matter to be decided when the case of both parties has been fully placed before the Court.

All, therefore, that we now do is to set aside the decree of Fletcher, J., except so far as it ordered that an entry of the death of Mr. Watkins be made in the register of this suit and that the cause title in the said register be amended by striking out therefrom the name of Mr. Watkins.

And we direct that the case be remanded to the Court of first instance to be tried according to law.

WOODROFFE, J.—I agree.

Appeal allowed:
Case remanded.

PATNA HIGH COURT.
CIVIL REVISION No. 234 OF 1919.
March 22, 1920.
Present:—Mr. Justice Jwala Prasad.
SURAJ PRASAD PANDEY—DEFENDANT—PETITIONER
versus
MR. W. W. BOUCKE—PLAINTIFF—OPPOSITE PARTY.

Acknowledgment of debt, effect of—Suit, whether can be based on acknowledgment—Account stated, what is.

An acknowledgment of a debt only enures to the benefit of the creditor for the purpose of saving limitation if it is made before the original debt is time-barred; but the basis of a suit is always the original debt. No suit can be maintained upon a mere acknowledgment of a debt. [p. 380, col. 1.]

"An account stated" is one where several cross-items are set off one against the other and the balance is struck off in favour of one of the parties In such a case the law implies a new promise by the other party to pay the balance in consideration not merely of past debts but also of the extinguishment of the old debts on each side, and hence it is not necessary that a statement of account should be made within the period of limitation for the recovery of several cross-items. [p. 380, col. 1.]

Second appeal from a decision of the Additional District Judge, Mozuffarpore, dated the 19th May 1919.

Messrs. *Parmeshwar Dayal* and *Ambica Prasad Upadhya*, for the Petitioner.

JUDGMENT.—The plaintiff's case as stated in the plaint is that the defendant used to take loans from the plaintiff from time to time and that an account of what was due from him was made up on the 8th October

1917. On that day a sum of Rs. 359-12-0 was found due from the defendant to the plaintiff. The defendant acknowledged it and affixed his signature in the account book of the plaintiff. The basis of the plaintiff's case is stated in paragraph 4 of the plaint to be the said adjustment of account on the 8th October 1913 acknowledged and signed by the defendant.

No suit can be maintained upon a mere acknowledgment of a debt. An acknowledgment only enures to the benefit of the creditor for the purpose of saving limitation under Article 19 of the Limitation Act if the acknowledgment is made before the original debt is time-barred, but the basis of a suit is always the original debt. No doubt under Article 64 of the Limitation Act a suit may be brought within three years upon accounts stated between the parties. "An account stated" is one where several cross-items are set off one against the other and the balance is struck off in favour of one of the parties. In such a case the law implies a new promise by the other party to pay the balance in consideration not merely of past debts but also of the extinguishment of the old debts on each side, and hence it is not necessary that a statement of account should be made within the period of limitation for the recovery of several cross-items, *Hargopal* v. *Abdul* (1).

But the entry in the account of the plaintiff of the 8th October 1913 is merely a statement of the balance which was on that date due to the plaintiff from the defendant and cannot possibly be said to be an "account stated" between the parties under Article 64 of the Limitation Act. Hence the entry in the plaintiff's account book, call it an adjustment of accounts, a balance or an acknowledgment of past debts, cannot in itself be the foundation of a suit in Court. Suits based upon similar entries in account books were dismissed in the following cases:—*Ganga Prasad* v. *Ram Dayal* (2), *Trihhovan Gangaram* v. *Amina* (3), *Shankar* v. *Mukta* (4), *Debi Prosad* v. *Ram Ghulam Sahu* (5) and *Ishar Das* v. *Harkishan Das* (6) (Punjab Chief Court). There is, therefore, concurrent opinion of all the High Courts on the point. The plaintiff's suit must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 9 B. H. C. R. 429.
(2) 23 A 50 ; A W. N. (1901) 150.
(3) 9 B. 616; 5 Ind. Dec. (N. S.) 343.
(4) 22 B. 513; 11 Ind. Dec. (N. S.) 923.
(5) 25 Ind. Cas 83; 19 C. L. J. 233.
(6) 35 Ind. Cas. 577; 148 P. W. R. 1916; 7 P. L. R. 1917.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No 90 OF 1919.

February 23, 1920.

Present :—Mr. Justice Piggott and Mr. Justice Walsh.

Musammat SHARIF-UN-NISSA—

—APPELLANT

versus

Qazi MASOOM ALI AND ANOTHER—

RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 18, cls. (d), (e)—Succession certificate, grant of, in respect of entire debt Partial revocation or modification, when can be ordered.

If a certificate has once been granted in respect of an entire debt, and it becomes apparent to the Court that circumstances have subsequently changed so as to bring into operation clause (*d*), or (*e*), or both, of section 18 of Act VII of 1889, it is open to the Court to pass orders having the effect of a partial revocation of the succession certificate once granted, or to modify the terms of that grant in such manner as the interests of justice may seem to require. [p. 882, col. 1.]

First appeal from the order of the Second Additional District Judge, Aligarh, dated the 2th of April 191.

The Hon'ble Mr. *Narain Prasad Asthana*, for the Appellant.

Mr *Iqbal Ahmad*, for Respondent No. 1, and Mr. *Haidar*, for Respondent No. 2.

JUDGMENT.—This is a first appeal from an order passed under the Succession Certificate Act. The first point taken is that the order complained of is not an order refusing a certificate, but is an order refusing to revoke a certificate against which no appeal is provided by section 19 of Act VII of 1889. In our opinion the order is in

effect one refusing to grant a certificate to *Musammat* Sharif-un nisa, the applicant, and we are bound to entertain the appeal. On the merits the case seems a clear one, except for one difficulty which has greatly influenced the decision in the Court below, namely, the principles laid down in the case of *Ghafoor Khan* v. *Kalandari Begam* (1) as to the granting of a succession certificate for the collection of the dower-debt of a Muhammadan widow when her husband has died without satisfying her claim in respect of the same. The essential facts of this case are quite simple. The appellant before us is the daughter of Kazi Masum Ali by his wife *Musammat* Kifayat Fatima. That lady died with her dower-debt unpaid. Her heirs under the Muhammadan Law were her husband, to the extent of a one-fourth share, a brother named Husain Ali to the extent of a one fourth share, and her daughter, the appellant, in respect of the remaining half share. Husain Ali applied for a succession certificate and the Court to which he applied, following the principles laid down in the ruling to which reference has already been made, compelled him to take out a succession certificate in respect of the entire amount of the dower-debt which was stated in his application at Rs. 25,000. On the strength of this certificate Husain Ali proceeded to institute a suit against Masum Ali, but in this suit he claimed only his own one-fourth share of the dower debt. He made no attempt to recover on behalf of and for the benefit of *Musammat* Sharif-un-nisa the half share in the debt to which that lady was entitled. We understand that Husain Ali has obtained a decree but that this decree is still under appeal in this Court. *Musammat* Sharif-un nisa thereupon applied to the Court below asking either that the certificate granted in favour of Husain Ali should be revoked and a fresh certificate made out in her name, or in the alternative that her name should be associated with that of Husain Ali in the same certificate to the extent of the half share claimed by her. The Court below has held that no adequate case is made out under the provisions of section 18 of the Succession Certificate Act (No. VII of 1889) for the revocation of the certificate granted to Husain Ali and that, on the principles laid down by the Full Bench of this Court in the ruling already referred to, it is impossible to grant a certificate in any form which would be of any use to *Musammat* Sharif un-nisa. The appeal before us is against the order of the Court below rejecting her application *in toto*. The position arrived at is, in our opinion, an impossible one and calls for rectification by this Court. As matters now stand, *Musammat* Sharif-un nisa is absolutely precluded from instituting a suit for the enforcement of what on the facts stated seems to be a perfectly just claim. We think that the Court below could have revoked the certificate granted to Husain Ali, or at least have revoked the same in part, on more than one ground. In the first place, the proceedings which took place when Husain Ali obtained his certificate were seriously defective in substance within the meaning of clause (*a*) of section 18 of Act VII of 1889. *Musammat* Sharif-un-nisa was at the time a minor and her father, whose interest in this matter was obviously opposed to hers, he being the debtor whose liability it was sought to enforce by means of the application, was allowed to accept service of notice on her behalf. We are not saying that Husain Ali himself was to blame for this; but there was this serious defect in the procedure adopted by the Court. Over and above this, the certificate granted to Husain Ali has now become practically inoperative so far as *Musammat* Sharif-un nisa's share in the debt is concerned, and the decree made in his favour by a competent Court for the recovery of a fractional share only of the dower debt renders it proper and desirable that some further order should be passed enabling *Musammat* Sharif-un-nissa to claim her legal rights. The learned District Judge would probably have taken very much the same view, but he felt himself constrained by the decision of this Court in *Ghafoor Khan* v. *Kalandari Begam* (1) to hold that he could only choose between one of two courses, namely, rejecting *Musammat* Sharif-un nisa's application, or revoking altogether the certificate in favour of Husain Ali and granting a fresh certificate to *Musammat* Sharif-un-nisa for the recovery of the entire amount of the dower-debt. The difficulties felt by the learned Judges of

(1) 9 Ind. Cas. 127; 33 A. 327; 8 A. L. J. 79.

this Court in applying the terms of the Succession Certificate Act to the case of a debt of a peculiar nature like the dower-debt of a Muhammadan widow are obvious enough from the judgment delivered in the case above referred to. Undoubtedly it is impossible in dealing with the matter under the Succession Certificate Act to treat the dower-debt as anything but a single debt due to the deceased woman, and the procedure laid down under the Act does not afford any suitable method for deciding conflicting claims as between the heirs of the deceased lady to specific shares in the debt claimed. We do not, therefore, desire to express any dissent from the principles laid down by the Full Bench of this Court, which indeed we are bound as a Divisional Bench to follow. At the same time it seems to us unnecessary to apply those principles beyond the original granting of the certificate. We are of opinion that, if a certificate has once been granted in respect of the entire debt, and it becomes apparent to the Court that circumstances have subsequently changed so as to bring into operation clause (*d*) or (*e*), or both, of section 18 of Act VII of 1889, it is open to the Court to pass orders having the effect of a partial revocation of the succession certificate once granted, or to modify the terms of that grant in such manner as the interests of justice may seem to require. It might be possible for us to treat *Musammat* Sharif-un nisa's share in the dower debt as representing the only debt now remaining to be paid to the heirs of the deceased lady; but this would involve treating the decree passed in favour of Husain Ali as equivalent to complete realisation of his share, which is not precisely the case, more particularly in view of the fact that an appeal is pending against the decree. Nor do we wish to pass any order which should throw difficulties in the way of Husain Ali's realising his claim, presuming it to be a just one. We think, however, that it is competent to us under the terms of the Act to pass the following order.

We revoke the certificate granted in favour of Husain Ali to the extent of half of the sum specified in the said certificate, namely, to the extent of Rs. 12,500, and we direct that a certificate for the realisation of this amount, as a debt alleged to be due from Masum Ali to *Musammat* Kifait Fatima, be granted in favour of the appellant *Musammat* Sharif-un-nisa. The appellant is entitled to her costs of this appeal, including fees on the higher scale.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 185 OF 1916.

November 30, 1916.

Present:—Mr. Mitra, A. J. C.

HARSALSA—PLAINTIFF—APPELLANT

versus

BAPU—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 54—Sale-deed, unregistered, of immoveable property of the value of Rs. 20, admissibility of, to prove nature of possession.

Defendant relied upon an unregistered sale-deed to prove a sale of an open site for Rs. 20. There was oral evidence of the delivery of the site in dispute:

Held, (1) that the sale-deed did not require registration under the provisions of the Registration Act, but it created no title to the site by virtue of section 54 of the Transfer of Property Act; [p. 383, col. 1.]

(2) that although inoperative as a conveyance, the sale-deed was admissible as evidence of the agreement in pursuance of which delivery of possession took place. [p. 383, col. 2.]

Second appeal by the plaintiff against the appellate decree of the District Judge, Nimar, confirming on the 23rd December 1915 the decree of the Munsif, Khandwa, decided on the 8th September 1915.

Mr. *V. R. Pandit*, for the Appellant.

Mr. *S. Ramdas*, for the Respondent.

JUDGMENT.—One Nathu and his brother were Malguzars of a village. The plaintiffs derive their title from them under two documents, one executed in 1910 and the other in 1913. The plaintiffs seek to eject the defendant from a plot in the *abadi* after the removal of building, he having purchased from one Ghansiam who, in his turn, obtained a house under a Will executed by Madho Sonar. The plaintiffs' case is that none of these people had a transferable interest in the site. The defence was that Madho Sonar purchased the site in dispute from Nathu, the then Malguzar,

under an unregistered sale-deed, dated the 25th June 1895, for a consideration of Rs. 20. Exhibit D-1. The lower Appellate Court has dismissed the suit. The District Judge has found that Exhibit D-1 was executed by Nathu, and that the site conveyed by it is identical with the plot in dispute. Both these findings have been questioned before me. I have, after careful consideration of the argument advanced by the learned Counsel for the appellants, come to the conclusion that these findings cannot be successfully impeached in second appeal. With regard to the identity of the plot, there was no plan attached to the sale-deed, and the description given is clearly of a very imperfect character, and the oral evidence on the record justifies the findings of the District Judge.

Now the document (sale-deed) being for Rs. 20 was admissible in evidence, so far as the provisions of the Registration Act are concerned, but under the Transfer of Property Act, it did not create a title. As pointed out in *Musammat Rupa Telin* v. *Bisambar Teli* (1), there is nothing to prevent the defendant proving a title by delivery of possession, as required by section 54 of the Transfer of Property Act. This has been found in favour of the defendant, but in determining the question as to the identity of the plot, the lower Appellate Court has relied upon the sale-deed to find the dimensions of the plot sold. It is urged for the appellants that this is in effect treating the unregistered document as a sale-deed. There is some force in the argument. The finding of the lower Court would have been equally justified by the oral evidence, which vaguely refers to the plot in the possession of the defendant, but having regard to the nature of the controversy raised by the plaintiff, it was difficult to avoid all reference to the boundaries and dimensions given in the sale-deed. If the document had been one for the validity of which registration was essential, as was the case in the two cases cited for the appellants, I would have agreed with this contention: *Parmanand* v. *Birkhu* (2), *Narayan Bisnoi* v. *Jaswant Singh* (3). I think the document may be regarded as an agreement to sell, on the principle laid down in the case of *Burjorji* v. *Muncherji* (4). At page 151, West, J., referring to the document in the case before him says: "It is, in terms, a conveyance, that is an instrument translative of ownership. * * I could not consider it as in its purport nothing more than an agreement to convey....But that principal purpose failing, the secondary one becomes the principal, and the document might, I think, be used to ascertain what the formal and final conveyance ought to be." The document, Exhibit D-1, fails to be operative as a conveyance. It is, however, admissible in evidence and may, therefore, be regarded as evidence of the agreement, in pursuance of which the delivery of possession took place.

It is urged that the document merely conveys a right to occupy the site and does not purport to sell the site. Such a construction cannot be adopted. It was an open site without any building on it. The instrument is described as a sale-deed and the site is sold for Rs. 20. I see nothing improbable in a Malguzar selling a small site in 1895 to a non-agriculturist for Rs. 20.

It is urged that Nathu's brother Govind Rao did not join in the conveyance, and, therefore, a good title has not been made out. The answer to this is that any right which Govind Rao may have had to object to the sale by his elder brother was barred by limitation long before the date of the suit, even prior to the purchase of the village by the plaintiffs, and it is not, therefore, open to the plaintiffs to raise any such plea.

The appeal fails and is dismissed with costs.

Appeal dismissed

(1) 8 C. P. L. R. 1.
(2) 1 Ind. Cas. 903; 5 N. L. R, 21.
(3) 1 N. L. R. 147.
(4) 5 B. 143; 3 Ind. Dec. (N. S.) 96.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 52 OF 19 9.

September 18, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

PONNUSWAMI CHETTY AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

THE VELLORE COMMERCIAL BANK, LTD., BY AGENT KUMARASWAMI AIYAR —PLAINTIFF—RESPONDENT.

Promissory note—Evidence, admissibility of, to fix date of payment—Cause of action, accrual of—Limitation Act (IX of 1908), Sch. I, Arts 69, 80.

Where a promissory note is executed for a loan, evidence is receivable to fix the date of payment. [p. 385, cols. 1 & 2.]

Defendant applied to the plaintiff Bank for a loan on one of the Bank's printed forms, and mentioned therein six months as the period for repayment; his application was accepted and he executed a promissory note in favour of the Bank Upon a suit by the Bank to recover the amount of the promissory note:

Held, (1) that the application to the Bank was admissible in evidence to fix the date of payment; [p. 385, col. 1.]

(2) that the cause of action arose on the expiry of the six months mentioned in the application, and that either Article 69 or 80 of Schedule I to the Limitation Act provided the period of limitation for bringing the suit. [p. 385, col. 2.]

Appeal against the order of the Court of the Temporary Subordinate Judge, Vellore, in Appeal Suit No. 130 of 1918, preferred against the decree of the Court of the District Munsif, Vellore, in Original Suit No. 587 of 1916.

FACTS appear from the judgment.

Mr. *A Viswanatha Aiyar*, for the Appellants.—The suit is barred. The cause of action arose on the date of the pro note. Neither the application for loan nor the endorsement thereon could be looked into to supplement what is not expressly stated in the pro note. The promissory note should itself fix the time for payment. Besides, under rule 24 of the Bank's Rules the Bank has the option of suing before the due date.

The proviso to Article 73 of the Limitation Act does not apply, as Exhibit B neither restrains nor postpones the right to sue. Article 69 will apply only when the promissory note in terms fixes the period for payment.

Mr. *N. Chandrasekhara Aiyar*, for the Respondent.—The pro-note and the loan application should be read together. The latter is admissible to supplement the terms of the pro note. Exhibit A contains a promise to pay and the contemporaneous document, Exhibit B, fixes the time for payment. The cause of action arises only on the expiry of that period. Article 69 or Article 80 governs the case.

Rule 24 of the Bank's Rules is a provision intended for the Bank's benefit and does not affect the accrual of the cause of action.

JUDGMENT.—The suit was brought upon a promissory note, Exhibit A. The question is when the cause of action arose for the suit. The defendant applied to the Bank at Vellore by Exhibit B for a loan. The application is in a printed form and be filled up the blank by inserting the words "for 6 months' *thavanai*." Thereupon the application was referred to an officer of the Bank who made an endorsement to this effect: "The applicants are responsible men. I am of opinion that Rs. 3,000 may be lent to them for six months' *thavani* at 12 annas per mensem." On the same date the promissory note was executed. In the accounts of the Bank, Exhibit C, six months' interest was deducted from the money paid to the defendant. On these facts the question is whether the cause of action arose on the date of the note or whether it arose only after the six months provided for in the application form, Exhibit B. Mr. Viswanatha Aiyar referred us to one circumstance which may be disposed of at once. He referred to rule 24 of the Rules of the Bank, which provided for the Bank anticipating the due date and suing before the six months are over. That was a provision made in the interests of the Bank and certainly has no effect upon the date upon which the cause of action starts. That provision was doubtless made to enable the Bank to bring a suit, if it found that the defendant had become an insolvent or was likely to leave the jurisdiction of the Court. In our opinion that provision could not in the least affect the starting period of limitation. The learned Vakil for the appellant argued that the exception provided for in Article 73 can have no application to this case. There is something to be said for this argument, because the article speaks of an agreement in writing restraining or postponing the right to sue.

It is doubtful whether Exhibit B really restrains or postpones the right to sue. The proper mode of looking at Exhibit B is to regard it as forming part of the same transaction as Exhibit A and as fixing the period of payment six months after the date on which the document was executed.

The first question is whether this document is receiveble in evidence. If we understand Mr. Viswanatha Aiyar's arguments rightly, he seemed to suggest that if Exhibits A and B are read together, then stamp duty will be payable as on a promissory note payable six months after date. But we regard Exhibit A as containing a promise to pay and Exhibit B, which is contemporaneous with Exhibit A, as fixing the time for payment. That such a document is receivable in evidence is clear from the judgment of Lord Dunedin in *Motabhoy Mulla Essabhoy* v. *Mulji Haridas* (1). In that case there was a promissory note for Rs. 50,000 and there was also a contemporaneous oral agreement that the document should not be sued on but that another document should be given for the amount. The suit was brought on a promissory note. The Judicial Committee, differing from the Courts below, held that this agreement, which had the effect of substituting a new contract for the promissory note, could be pleaded in defence and was receivable in evidence. The principle of the decision is applicable to the present case. It is open to defendant to plead that, notwithstanding the language of Exhibit A it was agreed between the parties that the cause of action for the money was not to commence until after six months of the date of the note. Further *Cumming* v. *Shand* (2) points out that the custom of the trade can be read into a promissory note or bill of exchange executed by a customer to the Bank. Here the printed form makes it clear that it is customary for the Bank to fix a period for payment. Therefore, the promissory note must be taken to have been given subject to that proviso. To the same effect is the ruling in *Brown* v. *North* (3).

For these reasons we are of opinion that the document, Exhibit B with the endorsement thereon, is receivable in evidence.

If they are receivable in evidence, the next question is under what article of the Limitation Act does the present suit fall. As we said at the outset, it may be open to argument whether Article 75 in terms is applicable. But we fail to see why Article 69 or Article 80 should not apply to this case. Article 69 provides for a suit upon a bill of exchange or money payable at a fixed time and the third column is "when the bill or note falls due." It was contended for the appellant that unless the promissory note itself in terms embodies this stipulation as to the period of payment, the article is not applicable. We are unable to agree with this contention. If evidence is receivable to fix the date of payment, then that would explain the contract which has been entered into and would have the effect of supplementing the contract on a matter on which it is silent and which is not in conflict with the terms of the note. Similarly, as regards Article 80, it is a general article which refers to all suits and promissory notes and the third column makes time commence when the bill or note or bond becomes payable. On our view that Exhibit B is receivable in evidence, that document makes the promissory note payable 6 months after the date of the execution of Exhibit A. For these reasons we are of opinion that the Subordinate Judge is right in holding that the cause of action arose six months after the execution of Exhibit A and not immediately after. We are supported in our view by the decision of the Full Bench in *Annamalai Chetty* v. *Velayuddu Nadar* (4), although this exact point was not decided in it.

We dismiss the appeal with costs.

M. C. P.

Appeal dismissed.

(1) 23 Ind. Cas. 223; 42 I. A. 103: 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 Bom L. R. 460; 2 L. W. 524; (1915) M W. N. 522; 39 B. 399 (P. C.).

(2) (1860) 5 H. & N. 95; 29 L. J. Ex. 129; 8 W. R. 182; 1 L. T. 300; 157 E. R. 1114; 120 R. R. 498.

(3) (1852) 8 Ex. 1 at pp. 10, 16; 22 L J. Ex. 49; 91 R. R. 318.

(4) 32 Ind. Cas 869; 39 M. 129; 3 L. W. 38; 19 M. L. T. 64; 30 M. L. J. 51; (1916) 1 M. W. N. 93.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

THIRD APPEAL No. 10 OF 1918-19.
February 11, 1920.

Present :—Mr. Ferard, S. M., and Mr. Harrison, J. M.

Musammat RAJ RANI—APPELLANT

versus

RAM KISHORE—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 17 (2)—Failure of respondent to appear—Duty of Court—U. P. Land Revenue Act (III of 1901), s. 219—Revision—Material irregularity.

The absence of the respondent on the date fixed for hearing an appeal is no justification for decreeing the appeal Under rule 17 (2) of Order XLI of the Civil Procedure Code the Court is bound to hear the appeal and record a judgment, and its failure to do so amounts to a material irregularity within the meaning of section 219 of the U. P. Land Revenue Act, involving interference by the Board of Revenue.

Third appeal from the order of the Commissioner, Jhansi Division, dated the 22nd of May 1919, in the case of correction of papers.

JUDGMENT.

FERARD, S. M.—(*January* 15, 1920.)—This is a third appeal under the Land Revenue Act, III of 1901. *Musammat* Raj Rani is appellant. Ramkishan is respondent. *Musammat* Rajrani won in the first two Courts. Ramkishan appealed to the Commissioner. The Commissioner, in a summary order with no apparent attempt to consider the merits of Ramkishan's appeal, gave him a decree simply because the respondent before him, *Musammat* Rajrani, had not appeared to reply to the appeal at the date fixed. This procedure on the Commissioner's part was too summary altogether. When an *appellant* does not appear, a Court may make a simple order dismissing the appeal under Order XLI, rule 17 (1), but when the appellant appears but the respondent does not, he has to hear the appeal under rule 17 (2) of the same Order (XLI), and he has further to write a judgment, as is apparent from the opening words of Order XLI, rule 21, and a judgment has to contain reasons for the decision on the points in dispute, under rule 31 of the same Order, which is made applicable to cases under the Land Revenue Act by rule 26 of Board's Circular 8-II.

Unless the Commissioner thinks the appellant's case a good one and gives reasons for so doing, he is not entitled to allow his appeal merely because the respondent has not turned up.

It is, however, argued that I cannot interfere in third appeal because of the specific section 201 of the Land Revenue Act. No doubt section 200 covers respondent as well as appellant and the word "order" in section 201 may be construed having in that section a wider meaning than it has in Order XLI, rule 17 (1), Civil Procedure Code, but this is immaterial in the present case. Taking the case to be that an appeal does not lie, a remedy is open by treating the case in revision under the latter portion of section 219, Land Revenue Act. The late Commissioner's order contained material irregularity and I would set it aside in revision and direct that the case be restored to his file and heard and decided on merits, opportunity being given to the appellant *Musammat* Rajrani to appear and reply as respondent before the Commissioner. Parties will pay their own costs in the present proceeding. Other costs will be determined by the Commissioner when he finally decides the appeal.

HARRISON, J. M.—(*February* 11, 1920).—I agree. Rules 17 and 21 of Order XLI are made applicable by rule 24 of the Board's Circular 8-II.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 10 OF 1916.
January 29, 1917.

Present:—Mr. Mittra, A. J. C.

NARHAR—PLAINTIFF—APPELLANT

versus

NARAIN—DEFENDANT—RESPONDENT.

Hindu Law—Joint family Purchase in name of one member—Benami *transaction*—*Real owner, whether bound by result of litigation to which* benamidar *is party—Limitation Act (IX of 1908), s. 22—Party already represented, joinder of, after expiry of limi-*

NARHAR v. NARAIN.

tation, effect of—Trusts Act (II of 1882), s. 83—Resulting trust—Purchase in name of one person with money supplied by several, effect of Person interested in litigation but not party to suit, whether bound by result.

A purchase in the name of one member of a joint Hindu family is a *benami* transaction, especially when that member is not the managing member or a representative of the family. [p. 388, col. .]

A *benamidar* is allowed to represent the real owner in suits both as plaintiff as well as defendant, and a decree obtained by a *benamidar* or against a *benamidar* is binding upon the real owner. [p. 388, col. 1.]

If a person is already represented in a suit by a party to the suit, his joinder is not the joinder of a new plaintiff or a new defendant, within the meaning of section 22 of the Limitation Act. [p. 388, col. 1.]

A resulting trust takes place where several persons jointly furnish the purchase-money and the purchase is made in the name of one of them [p. 388, col. 1.]

A person interested in a litigation is not bound to apply to have himself made a party and in default to be bound by the result of that litigation. [p. 389, col. 2.]

First appeal against the decree of the Additional District Judge, Nagpur, decided on the 30th October 1915.

Mr. *D. T. Mangalmurti*, for the Appellant.

The Hon'ble Sir *B. K. Bose* and Mr. *M. B. Kinkhede*, for the Respondent.

JUDGMENT.—One Balaji died in 1883 leaving a widow Chandrabhaga and a stepmother Kaveri. Chandrabhaga died on the 21st December 1898 as found by the lower Court, and the present suit was instituted on the 19th December 1910 by the plaintiff, who is admittedly one of the nearest reversioners of Balaji. Chandrabhaga had executed four mortgages in the name of defendant No. 1, who was the sole defendant when the suit was instituted. Upon the basis of these mortgages two suits were instituted for foreclosure by defendant No. 1 and two decrees absolute were passed in his favour and possession was taken by him in 1895. The plaintiff's case is that there was no legal necessity for the mortgages, and that the plaintiff is entitled to recover possession of half share of the property either unconditionally, or subject to payment of so much of the mortgage money as is legally binding upon the reversioner. One Amrit, who is the grandson of the plaintiff's brother, has refused to join in the suit, and the plaintiff, therefore, claims only half share. Upon an objection raised by the defendant, by an order of the Court, his father and brother who were admittedly members of a joint Hindu family, were made parties after the period of limitation had expired. The lower Court has held that the mortgagee made enquiries as to the necessity for loans and was satisfied about its existence, and the lower Court has also held that the whole suit was barred by limitation.

There are two questions which arise for decision in this case. The *first* is whether the plaintiff's suit is barred by reason of joinder of the other defendants when more than twelve years had elapsed from the date of the cause of action. The *second* is whether there is legal necessity for the various loans and which of them.

I will take up the point of limitation first. The defendant No. 2, the father of the first defendant, who is since dead, was at the time of mortgage in the Government service, and in order to evade the rule relating to the conduct of Government servants, had the mortgage taken not in his own name, as a manager of a joint Hindu family, but in the name of his son, the defendant No. 1. It was this defendant who brought the two suits without joining his co-parceners. It was he in whose name mutation took place in revenue records. He is, therefore, a "benamidar" for the joint family consisting of himself and his co-parceners. It is urged before me that a transaction of this kind is not a "benami" transaction inasmuch as it is a purchase in the name of one member of a joint and undivided family, and it is argued that a resulting trust only takes place when property is acquired by one man in the name of a perfect stranger having no interest in the property so transferred. The answer to the first argument is to be found in the passage from the judgment of Mr. Justice Mitter in *Ohunder Nath Moitro* v. *Kristo Komul Singh* (1), cited by Mayne:—"So far as the ordinary and usual course of things is concerned, the practice of making *benami* purchases in the names of female members of joint undivided Hindu families is just as much rife in this country, as that of

(1) 15 W. R. 357.

making such purchases in the names of male members." It follows that a purchase in the name of one member of a joint Hindu family is a *benami* transaction, especially when that member is not the managing member or a representative of the family. As regards the principle of resulting trust embodied in section 83 of the Indian Trusts Act, the wording of the section is consistent with the view that a resulting trust takes place when three persons jointly furnish the purchase money, and the purchase takes place in the name of one of them. I have not been shown any authority against this view. Now a *benamidar* is allowed to represent the real owner in suits both as plaintiff as well as defendant. A decree obtained by a *benamidar* or against a *benamidar* is binding upon the real owner. If then he represents the real owner, the joinder of the other defendants was unnecessary, inasmuch as the decree even without their joinder would have been binding upon them. This view is supported by the decision of the Bombay High Court in *Ravji* v. *Mahadev* (2). The joinder of the real owner, after the period of limitation had expired, was held to be not a case contemplated by section 22 of the Limitation Act. The principle, I understand, is that if a person is already represented by a party to the suit, his joinder is not the joinder of a new plaintiff or a new defendant. Acting on this principle I hold that the suit was not barred by limitation.

I now proceed to discuss whether there was any legal necessity for the various mortgages which culminated in the foreclosure decrees. The lower Court finds that the defendant No. 2 made proper enquiries from not only the father of Chandrabhaga and her Muktiar but also from two persons Madho and Chintaman who are now dead. There is no doubt in my mind that there was necessity for the loan in favour of Jairam for Rs. 1,000. This was required for the purpose of obtaining possession of the estate of Chandrabhaga's husband which was then in the hands of his step mother. But it does not follow that there was necessity for all the loans which were taken to embark in the various litigations in which Chandrabhaga had figured. After obtaining possession of her husband's estate from *Musammat* Kaveri, Chandrabhaga embarked upon a litigation for rendition of accounts and mesne profits against *Musammat* Kaveri and her agent. Rs. 599 are said to have been advanced for this purpose as recited in the mortgage-deed Exhibit D-35. There was, of course, no necessity for this litigation. It was a foolish litigation, for it does not appear that anything could have been recovered from either of the persons against whom the suit was filed. It is impossible for me to pass this item as one incurred for legal necessity or binding upon reversioners. The taxed costs of suit for possession against *Musammat* Kaveri, which I have held to be a proper litigation, amounted to Rs. 492. The whole of the amount originally borrowed from Jairam, Rs. 1,000, would be more than enough for that litigation. On the mortgage deed, Exhibit D-34, therefore, I allow Rs. 1,042 8-0 paid to Jairam. On the date when Exhibit D-34 was executed, a decree had already been passed a week previously for possession of the estate. Therefore, I can find no justification for raising another item of Rs. 600 for the purpose of litigation. The slightest enquiry would have shown that no such money was needed. I think Rs. 1,042-8 0, is all that can be claimed as binding upon the reversioners under Exhibit D-34. Now dealing with the second mortgage Rs. 101-4-0, expenses in connection with a criminal case brought by Kaveri against Chandrabhaga may be passed as properly incurred. Similarly Rs. 202-4-0 taken for costs in a suit instituted by Kaveri for maintenance may be allowed, for Kaveri was claiming Rs. 15 per month as maintenance and the Court eventually reduced the claim to Rs. 10 per month. Rs. 65 borrowed for expenses in connection with the Sradh ceremony of Chandrabhaga's father-in-law appears to be a legitimate item. In the third mortgage-bond, Exhibit D 36, the purpose for which the money was taken is not recited. I am dealing with the case of a creditor who in the previous bonds gives full details of the purposes of the loans but deliberately omits to mention the purpose in this bond. I cannot accept the defendant No. 2's statement about enquiries and allow

(2) 22 B. 672; 11 Ind Dec. (N. S.) 1030.

his claim under this bond at all. The fourth mortgage bond ostensibly for Rs. 2,500 was never given full effect to. Money was borrowed by Chandrabhaga for filing a suit for specific performance against one Ahalya for the purchase of a village for Rs. 1,800, which she according to defendant No. 2 expected to sell for Rs. 3,000, thus making a profit of Rs 1,500. This was a speculation and it is obvious that the money borrowed for such a purpose cannot be held binding upon the reversioners: as a matter of fact only Rs. 816 were advanced under this bond and items regarding Court-fees and Pleader's fees in connection with this suit must be disallowed. The only other item to make up the total of Rs. 816 is Rs. 500 said to be due on a bond not produced but defendant No. 2 as witness says is a bond in connection with the suit for rendition of accounts and mesne profits. I have already held that was not a proper suit to have embarked upon and the money advanced for it cannot be claimed for the reversioners.

The lower Court has relied upon certain loose papers supposed to contain the accounts of Chandrabhaga and produced by D. W. No. 12. They are merely copies and the original was not called for and they are not admissible in evidence. Apart from this I cannot place any reliance upon these loose sheets of paper. Balkrishna who produced them makes a significant remark that he kept these papers with him, as he anticipated a claim from the plaintiff in respect of Chandrabhaga's estate. An agent may keep for his own protection copies of accounts for a few years during which he may be sued: but it is strange that he should have kept these carefully preserved and filed them in 1914. I think these accounts filed by D. W. No. 12 must be rejected.

The suit in which the first foreclosure decree was passed was instituted for the recovery of money due under the mortgage-deeds Exhibits D 34, D 35 and D-36. A decree was passed for the total amount due under them. It is in evidence that the present plaintiff knew of the first of the three mortgages. It is argued that although the plaintiff was not made a party, he ought to have redeemed so much of the mortgage or such of the mortgages as was binding upon the reversioners. No doubt if the suit had been based solely upon a mortgage binding in its entirety on the reversioners, a foreclosure decree obtained thereupon would have been binding upon the reversioners. But in the suit instituted by the defendant No. 1 against Chandrabhaga, he joined all three mortgages and so the reversioners could not have very well been asked to redeem part of the mortgage. Not being made parties, the reversioners were not bound to redeem and the widow's inaction in the matter cannot in the least prejudice the reversionary rights. The argument before me is that as the reversioner knew of the suit he should have applied to be made a party and sought to redeem so much of the mortgage as is binding. No authority has been cited in support of the proposition that a person interested in certain litigation is bound to apply to have himself made a party and in default to be bound by the result of that litigation. It is true that when a suit is carried on on behalf of a person not made a party he may be bound by the result of that litigation, but this was not a case of that kind. Here the suit was against Chandrabhaga and not against the reversioner. I hold that there is no force in the argument that the knowledge of the plaintiff of the litigation bars his making the present claim.

The plaintiff had knowledge and was present when the money was paid by Jairam. He in fact received Rs. 18 advanced to Chandrabhaga out of the consideration money from Jairam. Under the circumstances the propriety of the loan in favour of Jairam must be presumed. On this ground I will allow the whole of Rs. 1,042-8-0 paid by the defendant to Jairam. But the consent obtained from Chintaman when he was executing a bond in favour of the defendant is also relied upon as raising a presumption. Chintaman was then separate from his brother, the present plaintiff. It was, therefore, the consent of one of two reversioners or rather ratification by him. Ordinarily a presumption in favour of the propriety of a transaction is made when it has the consent or is subsequently ratified by the next reversioner, but the circumstances of the present case entirely rebut the presumption. The recitals of the document completely prove that money was being advanced for litigation, which was useless and

unnecessary. Therefore, I am not prepared to differ from the lower Court in its view that in regard to mortgages other than the one in favour of Jairam no presumption of their propriety should be made.

A small amount in respect of proportionate costs of stamp and registration would have to be added to the above items. The learned Pleader for the respondent tells me that the amount which I have declared to be a proper charge on the estate may be taken as satisfied out of the usufruct and, therefore, there need be no further enquiry as to the profits received by the defendants. The result is that the plaintiff's suit succeeds. The decree of the lower Court is set aside and in lieu thereof a decree for possession is passed as prayed for in the plaint. The respondent will pay the costs in both the Courts.

Decree set aside.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 7 OF 1919.

August 12, 1919.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice N. R Chatterjea.

NAKUL CHANDRA BARUA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SASTI CHARAN BISWAS—PLAINTIFF—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Revenue sale—Purchaser, position of—Decree obtained by ex-proprietor, whether can be taken, advantage of—Tenants, position of.*

The purchaser of an estate at a revenue sale is not bound by the act of the ex-proprietor. He gets the estate as it stood at the time of the Permanent Settlement. But it is open to the purchaser, if he wishes, to accept a previous decision between the ex-proprietor and his tenants as binding on himself and take advantage of it. If he does so, the tenants cannot object, because the purchaser is not in any worse position than the ex-proprietor and may elect to take advantage of the decree obtained by the latter, although the decree is not *res judicata* as between the purchaser and the tenants. [p. 54, col. 1.]

Letters Patent Appeal against the decree of Mr. Justice Beachcroft, dated the 26th of November 1918, in Appeal from Appellate Decree No. 1109 of 1917, reported as 49 Ind. Cas. 959, reversing that of the District Judge Chittagong, dated the 29th of March 1917.

FACTS appear from the judgment.

Babu *Chandra Sekhar Sen*, for the Appellants.

—Defendants are appellants here. This appeal arises out of a suit for enhancement of rent on the ground of rise in the price of foodstuffs and also on the ground of the rent being lower than the prevailing rate.

In 1903 the ex-proprietor of the estate instituted a suit for ejectment or assessment of rent in the alternative. The 1st Court thought that the previous decree would be binding and decreed the suit. The lower Appellate Court found it would not be binding and dismissed the suit. Mr. Justice Beachcroft in this Hon'ble Court held that the previous suit was *res judicata* and would be binding and decreed the suit.

My first submission is that the decree in the previous suit would not be binding as between the tenant and the auction-purchaser of the estate at the revenue sale.

Sections 33—35 of the Bengal Tenancy Act show the modes prescribed by the Bengal Tenancy Act for enhancement of rent.

The rent-decree of 1903 cannot be said to be *res judicata* because the soil has undergone change since 1903.

The presumption under section 27 of the Bengal Tenancy Act would not arise in this case. Upon the findings of the Court of Appeal below no appeal lay before this Court.

[CHATTERJEA, J.—Fifteen years have not yet expired since the last enhancement in 1903.]

In section 37 the manner prescribed refers to sections 30, 31A, 31B, 32, 35 and 36 of the Bengal Tenancy Act.

Section 37 is only a part of the substantive law and limits the power of the landlord to enhance the rent. It is not a part of procedure.

Did the Legislature contemplate different procedure in case of contract and suit?

I submit it did not. If the ex-proprietor makes a contract and then the present proprietor institutes a suit, an anomalous position will arise under section 37. Therefore, section 37 is not a part of the procedure Refers to *Moonshee Buzlool Rahman* v. *Iran Dhun*

Dutt (1).

The previous suit is not *res judicata*. See *Radha Gobind Koer* v. *Rakhal Das Mukherjee* (2), *Gadadhar Bose* v. *Radha Charan Poddar* (3).

If the auction-purchaser does not derive his title from ex-proprietor, the previous decision does not affect the rights of the parties.

If these decisions are not binding, I submit that the finding that no evidence was there to assess an equitable rent is conclusive. His Lordship Mr. Justice Beachcroft is in error in deciding that point in second appeal.

Babus *Jogesh Chandra Roy* and *Charu Chandra Sen*, for the Respondents, were not called upon.

JUDGMENT.

WOODROFFE, J.—I do not decide this appeal as a question of *res judicata* for it may be said that the auction-purchaser was not a party to the previous litigation nor did he claim under the ex proprietor within the meaning of section 11 of the Code of Civil Procedure. The purchaser is not bound by the act of the ex-proprietor. He gets the estate as it stood at the time of the Permanant Settlement. But the position here is this. The matter would have been *res judicata* if the question had arisen between the ex-proprietor and the tenants and in such case the latter would be bound to pay the rent previously adjudicated, and it is open to the purchaser, if he wishes, to accept the previous decision as binding on himself and the advantage of it. If he does so, it seems to me that the tenant cannot object. The purchaser is certainly not in any worse position than the ex-proprietor and may elect to take advantage of the decree obtained by the latter. If this were not so, then at each and every sale all previous litigations might be re opened and the purchaser in such a case might be worse off than the ex proprietor from whom he had purchased. I do not decide here what would be the effect if the purchaser had not accepted the previous decision. No doubt mutuality is a test of *res judicata*, but this is not a question of *res judicata* as between the purchaser and the tenant, but it is a case in which the tenant would have been bound towards his previous landlord and in which the purchaser at the revenue sale has elected to succeed to the right in this respect of the ex-proprietor. The rights of the tenants are in no way enlarged by the revenue sale.

In my opinion, therefore, there is no ground for reversing the decision of this Court and the appeal must be dismissed with costs.

CHATTERJEA, J.—I agree.

Appeal dismissed.

(1) 8 W. R. 222.
(2) 12 C. 84; 6 Ind. Dec. (N. S.) 56.
(3) 34 C. 868.

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE MADRAS HIGH COURT.

March 18, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

ADUSUMILLI KRISTNAYYA AND OTHERS —APPELLANTS

versus

ADUSUMILLI LAKSHMIPATHI AND OTHERS - RESPONDENTS.

Hindu Law—Mitakshara—Dravada School—*Adoption by widow—Consent of nearest* sapindas, *whether necessary—Consent of more distant relatives, whether sufficient.*

Under the Mitakshara Law as administered in the Dravada country, a Hindu widow, although not authorised by her husband to adopt a son to him, may nevertheless make such an adoption with the consent of his nearest *sapindas*. [p. 392, col. 1]

The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. [p 392, col. 2.]

Save in exceptional cases, *e g*, minority, lunacy or absence in a distant country, the consent of the nearest *sapindas* must be asked and if it is not asked, it is no excuse to say that they would certainly have refused; but where a *sapinda* is clearly proved to have withheld his consent from corrupt or malicious motives, his dissent may be disregarded. [p 392, col. 2.]

The absence of consent on the part of the nearest *sapindas* cannot be made good by the authorisation of more distant relatives [p 392, col. 2.]

Veerabasavaraju Pantulu v. *Balasurya Prasada Rao*, 48 Ind Cas. 706; 45 I. A. 265; 41 M. 998; 25 M. L. T. 1; 17 A. L J. 34; 36 M. L. J. 40; 23 C. W. N. 251; 29 C. L. J 184; 9 L. W. 243; 21 Bom. L. R. 238; 1 U. P. L. R. (P. C.) 18, followed.

Consolidated appeals from a decree of the Madras High Court (Wallis, C. J., and Seshagiri Aiyar, J.), dated October 27th, 1915, reported as 32 Ind. Cas. 253, which (substantially) affirmed a decree of the Temporary Subordinate Judge, Masulipatam

ADUSUMILLI KRISHNAYYA v. ADUSUMILLI LAKSHMIPATHI.

FACTS of the case and the arguments adduced sufficiently appear from their Lordships' judgment. The case lays down no new law, having been for all practical purposes concluded by their Lordships' judgment in *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (1) delivered after these appeals were filed: but it is reported for the succinct summary which the judgment contains of the law of adoption by a Hindu widow in the Dravada country.

Mr. *De Gruyther*, K. C., and Mr. *Dube*, for the Appellants.

Mr. *Dunne*, K. C., and Mr. *Parikh*, for the Respondents.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals from a decree of the High Court of Judicature at Madras, which affirmed, with variations, a decree of the Subordinate Judge of Masulipatam. The question for determination is whether the adoption of the first appellant, Adusumilli Kristnayya, is valid under the Hindu Law as administered in the Madras Presidency.

The parties are subject to the Mitakshara Law of adoption as administered in the Dravada country: and that law, which has been considered by the Judicial Committee in several recent cases, is now free from doubt. It was decided in the *Ramnad case* [*Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2)] that under the law here referred to a Hindu widow, although not authorised by her husband to adopt a son for him, may nevertheless make such an adoption with the consent of his *sapindas*. In a later case, *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* (3), it was said that:—

"There should be such proof of assent on the part of the *sapindas* as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives in order to defeat the interest of this or that *sapinda*, but upon a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

The reference in the last mentioned case to a 'family council" gave rise to some doubt whether where there were agnatic relations closely related to the deceased, the assent of those standing in a remoter degree was either necessary or sufficient; but this doubt was resolved in the recent case of *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (1), where it was held that the absence of consent on the part of the nearest *sapindas* cannot be made good by the authorisation of distant relatives whose assent is more likely to be influenced by improper motives. This does not mean that the consent of a near *sapinda* who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either sufficient or necessary; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded. Nor does it contemplate cases where the nearest *sapinda* happens to be in a distant country, and it is impossible without great difficulty to obtain his consent or where he is a convict or suffering a term of imprisonment. The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. It must, however, be added that, save in exceptional cases such as those mentioned above, the consent of the nearest *sapindas* must be asked and if it is not asked it is no excuse to say that they would certainly have refused [*Venkamma* v. *Subramaniam* (4)]. Regard must also be had to the following observations of the Board in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (5):

"But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice

(1) 48 Ind. Cas. 706; 45 I. A. 265; 41 M. 998; 25 M. L. T. 1; 17 A. L. J. 34; 36 M. L. J. 40; 23 C. W. N. 251; 29 C. L. J. 184; 9 L. W. 243; 21 Bom. L. R. 238; 1 U P L R. (P. C.) 18.

(2) 12 M. I. A. 397; 10 W. R. P C. 17; 1 B. L. R. (P. C.) 1; 2 Suth. P. C. J. 135; 2 Sar. P C. J. 361; 20 E. R. 389; 3 Mad. Jur. 298; 1 Ind. Dec. (N. s.) 1.

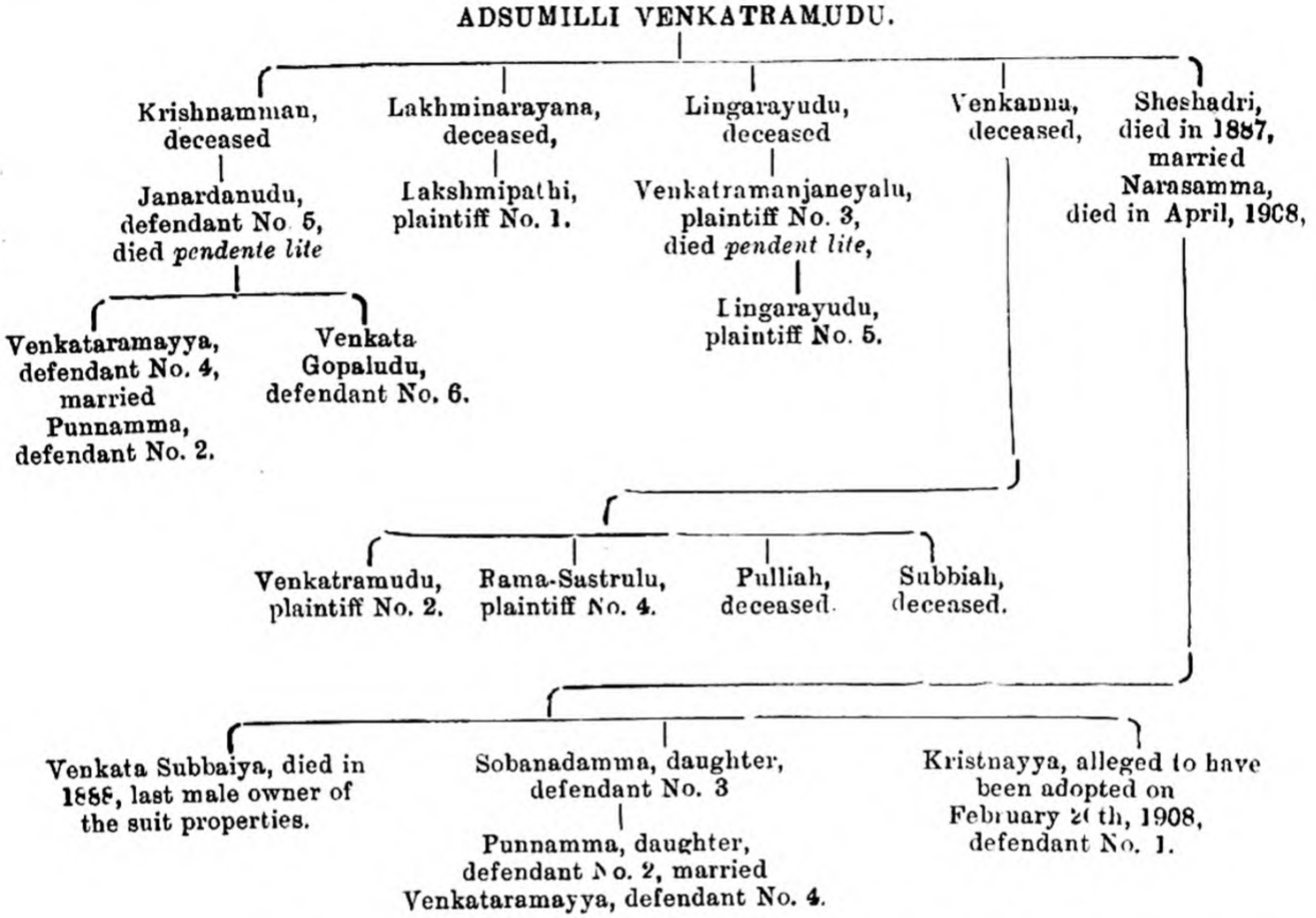
(3) 4 I. A. 1; 1 M. 274; 1 Ind Jur. 63; 16 W. R. 21; 3 Sar. P. C. J. 669; 3 Suth. P. C. J. 353; 1 Ind. Dec. (N. s.) 116 (P. C.).

(4) 34 I. A. 22 at p 26; 9 Bom. L R. 89; 30 M. 50; 4 A L. J. 110; 5 C. L. J. 143; 11 C. W. N. 345; 17 M. L. J 114; 2 M. L. T. 91.

(5) 3 I A. 254; 1 M. 69; 11 Mad Jur 188; 25 W. R. 291; 3 Sar. P. C. J. 582; 3 Suth P. C. J. 263; 1 Ind. Dec. (N. s.) 45 (P. C.).

of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

Turning now to the facts of the present case, the relationship between the parties will be explained by the following pedigree:—



Sheshadri, who was separated from his brothers, died in the year 1887 leaving a widow, Narasamma, and an only son, Venkata Subbaiya, who was then about thirteen years of age and unmarried. In the month of October 1888 this son was murdered, and his mother succeeded to the property of her husband, taking a Hindu widow's estate. Pulliah and Subbiah, two of the sons of Sheshadri's brother Venkanna, were charged with the murder, but were acquitted. They were then charged with the theft of some jewels which were on the person of the murdered boy before his death, but Pulliah died before the trial and Subbiah was ultimately acquitted on this charge also. On the 8th September 1901 Narasamma called a meeting of her husband's *gnatis* and obtained from 14 of them a deed authorising her to receive in adoption to her husband any boy she might like. At that time the nearest *sapindas* of Sheshadri were six in number, *viz.*, the fifth defendant Janardanudu, and the five plaintiffs; but of these only Janardanudu signed the deed, and the other signatories were *gnatis* of remoter degrees. Narasamma did not at once act on this authority, but upwards of six years afterwards, *viz*, on the 20th February 1908, she adopted the defendant Kristnayya, who was then of age. Before making the adoption she entered into agreements with Kristnayya and his natural father under which the greater part of the property of Sheshadri was put at her absolute disposal, and she, in fact, disposed of it in favour of the issue of her daughter. Narasamma died in April 1908 and shortly afterwards this suit was brought by the plaintiffs to set aside the adoption.

From the above statement of facts, standing alone, the obvious conclusion would be that the adoption was invalid for want of the assent of five out of the six nearest *sapindas*. But the defendants by their written statement in the case alleged that Narasamma had applied, first to Venkanna (the only brother of Seshadri who survived him), and after his death to the plaintiffs and Subbiah, for their authority to make an adoption; and that all those persons, "out of dishonest and corrupt motives" and by reason of the long-standing enmity caused by the charges of murder and theft made against Pulliah and Subbiah, and with the desire to succeed to the property of Venkata Subbaiya, had refused or neglected to grant the authority asked for. In support of this plea the defendants called evidence of four attempts to obtain the desired authority. First, it was alleged that Narasamma, through her *gumasta*, applied to Venkanna for his consent, and that he put off his reply and died shortly afterwards without giving the desired authority. Secondly, it was alleged that Narasamma personally requested the third plaintiff, Venkatramanjaneyulu to consent to an adoption and to get the other plaintiffs and Subbiah to consent, that he promised to consult them and let her know, but that he never, in fact, gave her a reply. Thirdly, it was stated that the plaintiffs and Subbiah were invited to and were present at the meeting of *gratis* on the 8th September 1901 and that on being requested to agree to an adoption they replied that "there was no hurry" and shortly afterwards left the meeting. Fourthly, it was alleged that shortly before the actual adoption in 1908 Narasamma again sent an emissary to the plaintiffs (Subbiah being then dead) and asked for their consent to an adoption, but that they refused to give it except on payment of Rs. 10,000. The evidence relating to these allegations was examined both by the Subordinate Judge and by the High Court, and both tribunals came to the conclusion that none of the alleged requests had been proved. Notwithstanding these concurrent findings, their Lordships were pressed by Counsel for the appellants to examine the evidence on this question; and as the findings of the Subordinate Judge were by no means clear and his reasons were somewhat inconsistent, they have considered the evidence which was brought to their notice by Counsel on both sides. As the result of this consideration they have come to the following conclusions:—

1. The finding of the Courts on the question of these alleged applications was mainly based upon the view that, having regard to the hostility existing between the plaintiffs and Narasamma, it was unlikely that they would have been asked for their consent: but the evidence as a whole does not appear to support this view. The first plaintiff was not on unfriendly terms with Narasamma and at one time got her lands cultivated for her; and the Subordinate Judge in one part of his judgment says that there was "no ill feeling" between them The third plaintiff was plainly on speaking terms with Narasamma and was from time to time consulted by her; and the Subordinate Judge himself says that "it is not unlikely that he was requested by Narasamma to give his consent and also ascertain the wishes of his cousins, as probably the other persons were not quite so well disposed towards Narasamma as the third plaintiff." As to the other plaintiffs there was no clear evidence; and although it is very probable that the charges made against their brothers caused an estrangement between the second and fourth plaintiffs and Narasamma, the Subordinate Judge expressed a doubt whether this feeling continued in the same intensity down to the year 1901. Upon the whole, the true inference appears to their Lordships to be that, while there was some unfriendliness between Narasamma and two of the plaintiffs, this did not extend to the other plaintiffs and was not in any case such as to prevent Narasamma from asking for their consent to an adoption. Further, in no case is there evidence of such malice on the plaintiffs' part as would prevent them from forming an honest judgment on the matter,

2. It appears probable that Venkanna was asked for his consent: but as he died without giving a reply and there is no evidence of ill feeling on his part, this circumstance is immaterial.

3. It is also not improbable that shortly before the meeting of September 1901, the third plaintiff was consulted on the question

of an adoption and was asked to ascertain the views of the other plaintiffs and Subbiah; but there is nothing to show that he did in fact ask for their consent or that his reply was delayed by reason of spite or malice. This circumstance, therefore, is also of little importance.

4. With regard to the meeting of the 8th September 1901 the evidence is conflicting. The defendants' witnesses say that the plaintiffs were present, and on being consulted said that there was no hurry about the matter and went away; but this is denied by the surviving plaintiffs. The defendants' witnesses were not believed by the Subordinate Judge, and it must be held that this allegation is not proved.

5. As to the alleged request in 1908, the defendants' evidence is conflicting and unreliable, and this allegation also breaks down.

The result of the above survey of evidence is that, in their Lordships' view, Narasamma is proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest *sapindas* is proved to have withheld his consent for any malicious or corrupt reason. It follows that the necessary assent of *sapindas* was not obtained, and the adoption was invalid.

Counsel for the appellants put forward an alternative argument, *viz*, that in view of the finding of the Courts in India that there was great hostility between the plaintiffs and Narasamma, it was unnecessary for her to ask for their consent; but this argument cannot be entertained. It is inconsistent, not only with the defendants' pleading, but with the whole of their evidence and arguments in the Courts below; and it is not open to them to make an entirely new case before this Board. In any case the argument derives no support either from the facts or from the law as above explained.

Apart from the absence of the necessary assent, other objections to the adoption were put forward on behalf of the respondents. It was said (1) that an authority given by *sapindas* to adopt "any boy at any time" is invalid [see *Suryanarayana* v. *Venkataramana* (6)]; that an authority given by *sapindas* in 1901 could not validly be executed in 1908 when several of the signatories were dead and the opinion of others might have altered; and (3) that an authority to adopt asked and given for religious motives and in order to keep up the line of succession to Seshadri was not properly exercised by the adoption of Kristnayya on the terms that he should give up to the adopting widow or to her relatives the greater part of her late husband's estates. These questions, although raised in the Courts below, were not the subject of decision there; and their Lordships accordingly refrain from expressing any opinion upon them. But it is certain that these circumstances do not detract from the obligation imposed upon the Courts in cases of this character to require a strict compliance with the conditions imposed by law.

For the above reasons their Lordships will humbly advise His Majesty that these appeals be dismissed with costs.

Appeals dismissed.

Solicitor for the Appellant:—Mr. *Douglas Grant.*

Solicitors for the Respondent:—Messrs. *Barrow, Rogers & Nevill.*

(6) 26 M. 681.

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE MADRAS HIGH COURT.

February 20, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

RAMATHAI VADIVELU MUDALIAR —APPELLANT

versus

PERIA MANICKA MUDALIAR AND OTHERS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66, object of—Court sale—Agreement by purchaser to convey property purchased, whether enforceable.

The object of section 66 of the Code of Civil Procedure is to put an end to purchases at Court auctions by one person in the name of another. [p. 398, col.]

An agreement by an auction-purchaser subsequent to the purchase to convey a portion of the property

to another is not affected by section 66 of the Civil Procedure Code and is enforceable. [p. 399, col 1]

Amrutam Venkatappa v. *Vavilala Jalayya*, 51 Ind. Cas 111; 42 M. 615; 9 L. W. 598; 26 M. L. T. 46; (1919) M. W. N. 355; 37 M. L. J. 98 (F. B.), approved.

Consolidated appeals from the decrees of the High Court, Madras, dated 10th April 1916, reversing the decrees of the Subordinate Judge, Chingleput.

FACTS.—These were suits to enforce an agreement to convey land purchased by the defendant at an execution sale. The facts are fully set out in their Lordships' judgment. The trial Court dismissed the suits on facts alone and did not deal with the issue as to whether the suits were barred by section 66 of the Code of Civil Procedure. On appeal the High Court found that the auction-purchaser was a real purchaser but that he had agreed to convey to the plaintiffs such portions of the property for which they had already paid or had under such agreement to pay the balance of the purchase-money which took the case out of the purview of that section, and granted plaintiffs decrees.

Mr. *Dube*, for the Appellant.—The agreement, if proved, and even as found by the High Court, established that appellant was a *benamidar* and was governed by section 66 of the Code of Civil Procedure. That section requires (1) a suit to be brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser. The suits were, therefore, not maintainable.

Kishan Lal v. *Goruruddhuaja Prosad Singh* (1), *Ganga Baksh* v. *Rudar Singh* (2), *Suroj Narain* v. *Ratan Lal* (3).

Mr. *Kenworthy Brown*, for the Respondents.—The purchasers at the Court auction sale were real purchasers who had agreed to convey to the plaintiffs in these suits or their predecessors in-title such portions of the property for which they had already paid or for which a balance remained to be paid under the agreement. The plaintiffs were beneficially interested in the purchase and in no way affected by section 66. *Ganga Sahai* v. *Kesri* (4).

The original agreement had been ratified on two occasions subsequent to the sale: the agreements subsequent to the sale were unaffected by the section and were enforceable. *Amrutam Venkatappa* v. *Vavilala Jalayya* (5), *Kumbalinga Pillai* v. *Arisputra Padiachi* (6).

Mr. *Dube* replied.

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals from two decrees of the High Court of Judicature at Madras reversing two decrees of the Subordinate Judge of Chingleput, and giving judgment in both suits for the plaintiffs. The following statement of the facts is founded upon the findings of the High Court, which, for reasons which will hereafter appear, their Lordships accept as correct.

One Sundarammal was the owner of certain lands in the village of Kovur and elsewhere in the Chingleput District, subject to a first mortgage for Rs. 25,000 and interest and to a second mortgage for Rs. 9,500 and interest, and had incurred other debts. In the year 1902 the second mortgagees brought a suit to enforce their mortgage, obtained a decree for the sale of the mortgaged property, and themselves purchased it at the auction at a low price. Thereupon Sundarammal, in order to get this sale set aside under section 310A of the Civil Procedure Code and to provide for her other debts, entered into an agreement with four persons named Murugappa, Kandasami, Munisami and Ponnambala, for the sale of the whole property to them at the price of Rs. 65,000, being a sum sufficient to pay off the mortgage and other debts and to provide a small balance for the vendor. These persons were friends of Sundarammal, and it was understood that they should dispose of the lands

(1) 21 A. 238; A. W. N. (1899) 42; 9 Ind. Dec. (N. S.) 861.

(2) 22 A. 434; A. W. N. (1900) 152; 9 Ind. Dec. (N. S.) 1327.

(3) 40 Ind. Cas. 988; 44 I. A. 201; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 40; 38 M. L. J. 180, 1 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 40 A. 159 (P. C.).

(4) 60 Ind. Cas. 265 42 I. A. 177 at p. 182; 19 C. W. N. 1175; 18 M. L. T. 202; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 17 Bom. L. R. 998; 37 A. 545; 22 C. L. J. 708; (1915) M. W. N. 713 (P. C.).

(5) 51 Ind. Cas. 111; 42 M. 615; 9 L. W. 598; 26 M. L. T. 46; (1919) M. W. N. 355; 37 M. L. J. 98 (F. B.).

(6) 18 M. 436; 5 M. L. J. 200; 6 Ind. Dec. (N. S.) 653.

piecemeal and, after paying out of the proceeds of sale the mortgage and other debts of Sundarammal and any money due to themselves, should pay over to her any balance which might remain. The property was accordingly conveyed to the four persons above named (who will be referred to as "the vendees") on the 10th August 1902; and on the 15th August 1902 they paid into Court a sum of Rs. 15,598, being a sum sufficient to satisfy the second mortgagees, and got the sale to those mortgagees set aside. On the 27th September 1902 the vendees divided amongst themselves about sixty acres of the land, which were taken to represent in value the amount which they had paid for redeeming the second mortgagees; and some time afterwards, as no sale could be made of the remaining lands in Kovur, the vendees made a similar division of those lands among themselves on the understanding that each of them should be responsible for his share of the debts. On this division a part of the land was reserved for Sundarammal, apparently in satisfaction of her interest in the ultimate balance to arise on realisation. Murugappa died, and his interest in the lands became vested in his widow and certain alienees from her. Meanwhile the first mortgagees, who had not been parties to the arrangements above recited, became dissatisfied; and in the year 1904 they took proceedings to enforce their mortgage, and on the 14th March 1904 obtained a decree for sale. The sale was fixed for the 3rd May 1905; and it is obvious that the persons claiming under the deed of 1902 ran the risk, unless they made some arrangement, of losing the benefit of their purchase and of the monies which they had found to satisfy the second mortgagees. They accordingly determined to bid for the property and for that purpose got together a sum of about Rs. 10,000, which they contributed in unequal shares. It was then ascertained that the appellant Vadivelu and two other persons named Vythilingam and Dharmakartha Kandasami were also proposing to bid, and it was in order to meet this difficulty that the agreement giving rise to these suits was entered into. The agreement was entered into orally between the three persons last named, that is to say, the appellant, Vythilingam and Dharmakartha Kandasami, and the four original vendees or their representatives, and was to the effect that the vendees should not bid for the property but should permit the above named three persons to buy, that if they bought the vendees should advance to them the above sum of about Rs. 10,000 to assist them in providing the deposit and completing the purchase, and that whichever of them became the purchaser of any property allotted on the first or second division to any of the original vendees (with an exception to be immediately mentioned) should convey such property to such vendee or his representative, on payment by him of such proportion of the auction price as might be found to be due from him on an adjustment of accounts. An exception was made in the case of Ponnambala, one of the four vendees, who was not anxious to get back the property allotted to him on the second division; and, so far as he was concerned, the arrangement applied only to the property passing under the first division, and it was understood that, as regards the properties allotted to him on the second division, the appellant should stand in his shoes.

The auction accordingly took place, and the appellant was declared the purchaser of Lot No. 3, comprising about 115 acres of the Kovur lands, for Rs. 21,500, other lots being purchased by Vythilingam and Dharmakartha Kandasami. The vendees duly made the contribution of Rs. 10,000 which they had promised; the balance required was raised from other sources, and sale certificates were issued to the purchasers and possession given to them. The lots purchased by Vythilingam and Dharmakartha Kandasami have been dealt with in accordance with the agreement and need not be further referred to.

In February or March 1906 there was an adjustment of accounts between the appellant and the vendees or their assignees in accordance with the arrangement above referred to. The decision of the questions which arose on the adjustment was entrusted to a *panchayat*; and it appears from the evidence that the appellant and the other persons concerned signed a written undertaking to abide by the award of the *panchayatdars*. In the course of this adjustment

a slight variation was made in the allotment which had been previously made of the lands; and this variation was accepted by all parties and embodied in the award which fixed the amount payable by each of the vendees on taking his conveyance. The appellant was then quite willing to deal with the allotted lands in the manner agreed before the auction sale and was a party both to the agreement to abide by the award of the *panchayatdars* and to the agreement to vary the allotments.

In the year 1907, the appellant having shown reluctance to carry out the arrangement, a suit (No. 6 of 1907) was brought against him by certain persons who were nominees of Munisami and Kandasami. This suit did not go to trial but was settled by a compromise, by which the appellant agreed to convey to the plaintiffs in that suit about fifty acres of the lands purchased by the appellant. At the time of this compromise the other persons representing the original vendees, that is to say, Ponnambala and the persons claiming under Murugappa, insisted upon the appellant conveying to them also their respective shares in the property; and the representative of the appellant, while pointing out that an agreement to execute such a conveyance could not be included in the *razinama* in which the compromise then in question was to be embodied, undertook that the conveyance should afterwards be made. At the same time a variation was made in the original agreement so far as the representatives of Murugappa were concerned, those persons undertaking to take over from the appellant certain further properties and to pay an additional Rs. 2,600 for them.

Notwithstanding the above mentioned transactions, the appellant afterwards refused to convey to Ponnambala and to the representatives of Murugappa the properties to which they were entitled under the arrangement; and ultimately, *viz.*, in the years 1912 and 1913, these suits were brought to enforce such a conveyance. The plaintiffs in one suit were the persons claiming under Murugappa, and the plaintiffs in the other suit were Ponnambala and persons claiming under him, the appellant being the defendant in both suits.

At the hearing of the suits two main points were raised by the appellant, *viz.*, (1) that the appellant had not in fact entered into the agreement alleged or received the contribution of Rs. 10,000; and (2) that in any case the suits were barred by section 66 of the Code of Civil Procedure. The Subordinate Judge, by whom the suits were tried, found the first issue in favour of the appellant, and accordingly it was unnecessary for him to deal with the second question. On appeal, the High Court overruled this decision and held that the appellant had received the Rs. 10,000 and had agreed to convey the properties in manner alleged by the plaintiffs. The Court also held that section 66 of the Civil Procedure Code was not a bar to the suits, and accordingly passed decrees in favour of the plaintiffs. Thereupon this appeal was brought.

Upon the issue of fact their Lordships have no hesitation in accepting the decision of the High Court. The finding of that Court is precisely in accordance with and is practically based upon a statement made by the appellant himself in the Suit No. 6 of 1907 above referred to. The appellant in the course of the trial maintained that the statement which he had himself put forward in 1907 was wholly untrue and was made for some indirect purpose; but the High Court declined to accept this explanation, which was not supported by the other facts in the case, and their Lordships entirely agree with this view.

The alternative defence is based on section 66 of the Code of Civil Procedure, which is in the following terms:—

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The question to be determined is whether the facts proved by the plaintiffs in these suits bring them within this section. This point was dealt with in the judgment of the High Court as follows:

"On the first question, from the facts which we find to have been proved in this case, it is clear that section 66 is not a bar to the plaintiffs' claim for specific perform-

ance of the contract. Their case is not that the first defendant or Vythilingam or Dharmakartha Kandasami were merely *benamidars*, but that they were to be real purchasers, but they agreed to convey to the plaintiffs in each of these suits or to their predecessors in title such portions of the property for which (as we find) they had already paid or had to pay under that agreement the balance of the purchase money. That, we think, is a sufficient answer to the plea under section 66 of the Civil Procedure Code."

It was argued by Counsel for the appellant that the agreement relied upon by the plaintiffs, even as found by the High Court, amounted in substance to an agreement that the appellant should purchase as to certain parts of the property on behalf of the respondents or of the persons whom they represent; and he was able to point to certain expressions both in the plaints and in the evidence of some of the plaintiffs' witnesses which supported that view of the transaction. If the agreement entered into before the auction stood alone, there would be considerable force in this contention. The object of section 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow. But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale. It was decided in *Amrutam Venk tappa* v. *Vavilala Jalayya* (5) that an agreement subsequent to a purchase is not affected by the section, and there can be no question as to the correctness of that decision. In the present case agreements were entered into after the sale, namely, first, at the time of the *panchayat* in 1906, and secondly, on the occasion of the compromise of the suit of 1907, by which the appellant bound himself to carry out the original contract with the respondents, with certain variations which were then agreed to and accepted by all parties. These subsequent agreements are unaffected by the section and are accordingly enforceable against the appellant.

For the above reasons their Lordships will humbly advise His Majesty that these consolidated appeals fail and should be dismissed with costs.

Solicitors for the Appellant:—Messrs. *Barrow, Rogers and Nevill.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 709 OF 1917.

August 25, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

SADASHIV RAMCHANDRA DATAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TRIMBAK KESHAV VAZE—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 443—Minor—Mother, as guardian of minor, consenting to arbitration and decree—Omission by Court to appoint guardian, effect of—Decree, whether binding on minor.

An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit, or reasonable and proper for the protection of his property, but the award would not be binding if that were not the case [p. 402, col. 1.]

Where a mother, as the natural guardian of her minor son, consented to a reference to arbitration and accepted the award on behalf of the minor and raised no objection to the passing of a decree in terms of the award, but no appointment of the mother as guardian of the minor had been made, as required by section 443 of the Code of Civil Procedure, 1882, and the subsequent result of the decree was a sale of the property in dispute for an undervalue:

Held, that the minor's interests had not been duly protected; that the omission to appoint a guardian was not a mere irregularity which could be condoned, and that the decree based on the award and the sale of the property were null and void. [p. 401, cols. 1 & 2.]

Second appeal from the decision of the Assistant Judge, Poona, in Appeals Nos. 230 and 231 of 1914, varying the decree passed by the Joint Subordinate Judge at Poona, in Civil Suit No. 298 of 1912.

Messrs. *Jayakar* and *V. V. Bhadkamkar*, for the Appellants.

Messrs. *Patwardhan* and *V. D. Limaye*, for the Respondents.

JUDGMENT.

SHAH, J.—The facts which have given rise to this second appeal are these:

The father of the present plaintiff mortgaged the house in suit on the 4th of December 1896 to defendant No. 1 for Rs. 1,000 with interest at 6 per cent.

The plaintiff's father died in 1899 leaving a son, the present plaintiff, and a widow, the plaintiff's mother. In 1901 the mortgage claim was refered to arbitration by the defendant No. 1 and the mother of the plaintiff who was then a minor. An award was made in May 1901, under which the minor represented by his mother was to pay Rs. 1,000 and Rs. 200 and odd as interest with further interest at 6 per cent. on the principal within one month and the property was to be sold in case the money was not paid within the time specified. The present defendant No. 1 applied to the Court on the 12th of June 1901 to have a decree in terms of the award, and the present plaintiff's mother filed a statement on the 13th of June 1901, in which she consented to a decree being passed in terms of the award and stated that she had no objection to the award being filed in Court. She appeared through a Pleader. A decree was accordingly passed in terms of the award on the 19th of June 1901. In execution of the decree the house was sold in November 1902 and purchased by the present defendant No. 1 for Rs. 1,700.

On the 10th of August 1912 the plaintiff after attaining majority filed the present suit to set aside the decree passed in terms of the award. The defendants contested the suit and several issues were raised representing the rival contentions between the parties.

The trial Court on a consideration of the evidence found that the plaintiff was not bound by the decree on the award, nor by the sale in execution of that decree and that he was entitled to the relief on the footing of the original mortgage of 1896. The accounts were taken under the Dekkhan Agriculturists' Relief Act as the plaintiff was an agriculturist, and a decree was passed in respect of the amount that was found due to the mortgagees on the mortgage.

The defendants appealed to the District Court of Poona, and the learned Assistant Judge has affirmed the decision of the trial Court on the main point that the plaintiff was not bound by the decree on the award, and subject to a certain variation in the amount payable to the mortgagees, has upheld the decree of the trial Court.

The defendants have appealed to this Court, and it is urged on their behalf that the decree is binding upon the present plaintiff. It is urged that it was open to the mother as the natural guardian of the plaintiff to refer the matter to an arbitration and that as neither fraud nor undue influence is proved, the award must be taken to be binding upon the parties. It is also urged that though there may have been some irregularity in the proceedings to file the award in Court in so far as no formal order was made appointing the mother as the guardian of her minor son, under the circumstances it must be taken to be a mere irregularity, which has not in any way prejudiced the interests of the minor.

It is conceded before us that apart from this objection relating to the decree on the award there is no further objection to the decree as passd by the lower Appellate Court, that is, if the plaintiff is entitled to have relief on the footing of the mortgage of 1896 without any reference to the award proceedings, the decree now under appeal is not open to any objection. The principal question, therefore, is whether the lower Courts are right in holding that the decree in terms of the award is not binding upon the minor and that it is liable to be set aside at his instance.

It has been urged in support of the view taken by the lower Courts that there was no appointment of a guardian as required by section 443 of the Code of 1882 and that all the proceedings which resulted in the decree and the sale of the property are null and void, and further that under section 462 of the Code of 1882, corresponding to Order XXXII, rule 7, of the present Code the leave of the Court for filing the award was necessary and that in the absence of such leave the decree based on the award is voidable at the instance of the minor.

The lower Appellate Court has found that in the present case there has been a serious prejudice to the minor, as he has been deprived effectively of the benefit of the provisions of the Dekkhan Agriculturists' Relief Act, as the full amount was found payable by him without taking any account under the Dekkhan Agriculturists' Relief Act, as no instal-

ments were allowed and as the time fixed for the payment of the whole sum was only one month. The lower Appellate Court has not gone into the question of the valuation of the house and has not expressed any opinion on the finding recorded by the trial Court that the house was in fact sold for nearly half the amount of its real market value.

I shall first deal with the point relating to the irregularity in the proceedings initiated by the present defendants on the award arising in consequence of no appointment of a guardian for the minor defendant having been made in those proceedings. It is clear that under section 443 of the Code then in force it was incumbent upon the Court to appoint a proper person to be the guardian for the minor defendant in those proceedings which under the provisions of the Code were to be treated as a suit. All the papers connected with those proceedings are before the Court; and it is clear from those papers—and that is the conclusion reached by the lower Appellate Court—that as required by section 443 no appointment of the mother or any other person as the guardian of the minor defendant was made. The question is as to the effect of this omission to appoint a guardian. When due regard is had to all the circumstances connected with these proceedings, it is difficult to avoid the inference that the minor's interests were not protected. The appearance of the mother as soon as the application for a decree in terms of the award was presented through a Pleader who is now stated by the mother to have been selected for her by the present defendant No. 1, and her consenting to a decree being passed in terms of the award are circumstances of some suspicion. When we have due regard to the terms of the award and the subsequent result of the decree, namely, a sale for an undervalue in favour of the defendants, the conclusion of the lower Appellate Court that the minor's interests had not been duly protected must be accepted. The inference is clear that the minor was not effectively represented in the proceedings initiated by the present defendants in 1901 and that the decree passed in those proceedings on the award and the subsequent proceedings in execution resulting in the sale of the property in favour of the defendant No. 1 must all be treated as null and void.

It is not necessary to refer to all the decisions which have been cited in the course of the argument: but I may refer to the case of *Partab Singh* v. *Bhabuti Singh* (1) as supporting the above conclusion. The appellants have relied upon the decision in *Musammat Bibi Walian* v. *Banke Behari Pershad Singh* (2), but the *ratio decidendi* seems to me to be against the appellants. Their Lordships clearly point out in that case that it is obligatory upon the Courts to comply with the provisions of section 443, and the irregularity in that case was condoned on the ground that on the particular facts, the minor was held to have been effectively represented.

In the present case the question whether the omission on the part of the Court to comply with the provisions of section 443 should be condoned on a similar ground or not, is a matter which must be decided with reference to the facts of this case. Both the Courts have taken the view on the facts against the defendants, and it seems to me that the conclusion reached by the lower Courts on this point is right.

In view of this conclusion it is not necessary to consider the further question which has been argued at some length in this appeal, as to whether the leave of the Court under section 462 was necessary to give effect to the consent of the mother that a decree might be passed in terms of the award. This question involves the consideration of the point as to whether, when the mother appeared through a Pleader on the 13th of June 1901 and gave her consent to a decree being passed in terms of the award, she acted in pursuance of any agreement between her and the defendant No. 1 or not. If the facts could reasonably give rise to the inference that there was such an agreement between the parties, no doubt the provisions of section 462 would apply and the absence of any leave of the Court for such an agreement with reference to the suit to

(1) 21 Ind. Cas. 288; 40 I. A. 182; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M. L. J. 492; 11 A. L J. 901; 16 O. C. 247; 18 C. L. J. 384; 15 Bom. L. R. 1001; 35 A. 487 (P. C.).

(2) 30 I. A. 182; 5 Bom. L. R. 822; 7 C. W N. 774; 30 C. 1021 (P. C.); 8 Sar, P. C. J. 512

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file the award in Court would entitle the minor on attaining the age of majority to avoid the decree. Whether there was such an agreement between the plaintiff's mother and the defendant No. 1 is really a question of facts. It is urged for the plaintiff that the facts justify an inference as to such an agreement between his mother and the defendant No. 1 and that the decision in *Mahadev Balkrishna Kelkar* v. *Krishnabai* (3) supports their contention. On the other hand, it is urged that apart from the agreement to refer the matter to an arbitration there is no further agreement with reference to the suit to file an award in Court, and Mr. Jayakar has relied upon the recent decision of the Full Bench in *Hanmantram Rachakisan* v. *Shivnarayan Asuram* (4) It is not necessary to pursue this point, or to discuss the cases which have been cited with reference to the applicability of section 462 to facts such as we have in this case.

The appeal, therefore, fails and the decree of the lower Appellate Court is confirmed with costs

The cross objections which are not pressed are dismissed with costs.

HAYWARD, J.—I agree An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit or reasonable and proper for the protection of his property, but the award would not be binding on him if that were not the case. The question of its binding effect could of course be decided in subsequent proceedings in which the minor was properly represented by his guardian. Such proceedings would include those taken for filing the award, because the jurisdiction to file it would depend upon the question whether or not the award had been based upon due authority given on behalf of the minor by his natural guardian. It was held that that was a question to be decided in such proceedings in decisions on section 526 of the old Civil Procedure Code, and the substance of those decisions has been incorporated in the opening words "where the Court is satisfied that the matter has been referred to arbitration" of section 21 of the Second Schedule of the present Civil Procedure Code. Where the question of the legality of the reference is not taken in such proceedings, the ordinary inference would be that it was held to have been legal, so that here, where the legality was not called in question, the point to be considered would be whether the minor was duly represented in the proceedings by his natural guardian, *i. e.* in the proceedings taken to file the award. Now a minor would not ordinarily be properly represented unless his guardian was formally appointed as such by the Court. But on the other hand where the guardian was tacitly accepted throughout the proceedings as a proper person representing the minor and where the irregularity of not formally making the appointment in writing had not affected the merits, then no doubt the minor would be held to have been duly represented by his guardian by reason of the provisions of section 578 of the old Civil Procedure Code, which is now section 99 of the present Code. So that the real question, in my opinion, has been reduced to this: whether the minor was or was not prejudiced by the irregularity of his natural guardian, his mother, not having been formally appointed by the Court. It has been definitely held that there was prejudice by the first Appeal Court, and it seems to me difficult for us to say that that finding is wrong in view of the several circumstances which were brought to light. It was thus found that the ordinary procedure for settling the dispute between the parties would have been one in which the whole history of past transactions would have been enquired into under the provisions of the Dekkhan Agriculturists' Relief Act and that in place of this ordinary procedure the special procedure was adopted of referring the matter to the sole arbitration of an arbitrator specially selected by the minor's opponents. It was *prima facie* not for the benefit of the minor to substitute this special procedure before the Special Judge chosen by his opponents, and this *prima facie* conclusion was proved to have been correct by the subsequent result. The award was for the whole amount claimed and ordered it to be paid within one month, instead of the six months which would have been the least allowed by the ordinary procedure, quite apart from the

(3) (1896) P. J. 609.

(4) 48 Ind. Cas. 238; 43 B. 258; 20 Bom. L. R. 970 (F. B.).

question whether or no instalments could not have been granted under the provisions of the Dekkhan Agriculturists' Relief Act. Then the sale that resulted was far from satisfactory. The property was sold for Rs 1,700 and was bought by the minor's opponents. The real value would appear to have been anything from Rs. 2,500 to Rs. 3,500. These latter facts were elicited at the trial, though they have not been referred to in the judgment of the first appeal Court. It seems to me that that is sufficient to justify us in holding that the irregularity of not formally deciding whether the minor's natural guardian, his mother, was or was not a proper person to represent him in the proceedings did affect the merits. It would seem to me that this circumstance tends strongly to show that the irregularity did most certainly affect the merits and prejudice the minor. If the question had been carefully considered, as it ought to have been, there is every probability that some other guardian would have been appointed such as the Nazir of the Court, who would have fully enquired into the circumstances of the arbitration. It seem to me that on this ground we ought to uphold the decree of the first Appeal Court.

It is not necessary in these circumstances to consider the other question argued before us, that is to say, whether there was an agreement between the minor's natural guardian, his mother, and the minor's opponents that the award should be filed without objection in Court. If there had been any such formal agreement, then no doubt it would have been necessary to have obtained the formal sanction of the Court. But it is not necessary here to discuss that matter further, as upon the other ground it seems to me clear that we ought to uphold the decree of the first Appeal Court and dismiss this appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 95, 126 AND 127 OF 1917.

April 15, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

IN F. A. No 95 OF 1917

Syed ABBAS *alias* ABOO SAHEB AND OTHERS—APPELLANTS

versus

MISRI LAL AND OTHERS—RESPONDENTS.

IN F. A. NOS. 126 AND 127 OF 1917.

Babu PURAN MAL AND OTHERS—APPELLANTS

versus

Babu MISRI LAL AND OTHERS—RESPONDENTS.

Mortgage—Co-mortgagees, position of—Payment to one co-mortgagee, whether discharges mortgage.

Co-mortgagees must, unless the contrary is shewn, be regarded as having a separate interest in the money advanced, although they take a joint security, and must be treated as in the position of tenants-in-common and not joint tenants Therefore, a payment of the mortgage-debt to one of two mortgagees would not amount to a discharge of the mortgagor's liability to the other mortgagee. [p. 410, cols. 1 & 2.]

Appeals from a decision of the Subordinate Judge, Patna, dated the 14th March 1917.

IN F. A. No. 95 OF 1917.

Messrs. *S. H. Imam*, *K Husnain* and *A. B. Mukherji*, for the Appellants.

Messrs. *P. K. Sen*, *Fakhruddin*, *G. Das*, *B. C. Sinha* and *S. Lal*, for the Respondents.

IN F. A. NOS. 126 AND 127 OF 1917.

Messrs. *K. Sahay* and *B. Lal*, for the Appellants.

Messrs. *P. K. Sen*, *B. C. Sinha* and *S. Lal*, for the Respondents.

JUDGMENT.

MILLER, C. J.—These appeals arise out of two suits Nos. 49 and 82 of 1915, which were tried together before the Subordinate Judge of Patna on the 14th March 1917. In the former Misri Lal and his minor son Ram Birich Lal claim to recover possession of their share of certain properties with mesne profits held under a *zarpeshgi* lease or mortgage granted by Syed Abbas, the defendant No. 1 in that suit, to Saudagar Mahton, the father of Misri Lal, and Puran Mal the defendant No. 2. The defendants Nos. 3 to 11 are members of Puran Mal's family. The defendants Nos. 12 to 21 are subsequent

ijaradars holding under the mortgagor Syed Abbas and are now in possession of the property. The remaining defendants Nos. 22 to 27 are *pro forma* defendants, being other members of the plaintiff's family.

Misri Lal the plaintiff and Puran Mal the defendant No. 2 held a *zarpeshgi* lease of the property from Syed Abbas, and the latter contends that he redeemed the mortgaged property by payment of the *zarpeshgi* money to Puran Mal, co mortgagee with the plaintiff's father, on the 29th June 1915 and subsequently granted an *ijara* to the defendants Nos. 11 to 21 who are now in possession. The plaintiff claims in the alternative against Puran Mal and his family to recover the sum of Rs. 21,800, half the *zarpeshgi* money paid to him, in the event of the Court finding that such payment was a valid discharge of the debt due to both the mortgagees. Puran Mal's case is that the money was rightly paid to him, as he alone advanced the whole sum of Rs. 43,600 to Syed Abbas and that Saudagar Mahton's name was merely added as a mortgagee owing to an arrangement between them, whereby Saudagar was to remain in actual possession and manage the property for Puran Mal taking as payment therefor a half share in the profits after providing for interest on the loan and other outgoings.

In the second suit No. 82 of 1917 Puran Mal and other members of his family sued Misri Lal and the members of his family for an account of the profits arising from the management of the mortgaged property, of which Saudagar and after his death in 1907 his son Misri Lal are said to have been in possession as agents for Puran Mal.

The two cases were tried together before the Subordinate Judge of Patna on the 14th March 1917, who found that payment to Puran Mal was not a valid discharge of Misri Lal's interest in the mortgage debt and directed that Misri Lal should recover joint possession of a half share in the property in suit together with Syed Abbas and the *ticcadars*, and awarded him mesne profits from those defendants from the date of his dispossession. He further found that Saudagar Mahto and after him Misri Lal had been in possession of the properties as mortgagees under the *zarpeshgi* lease to the extent of their half share, and not as agents for Puran Mal and accordingly dismissed Suit No. 82 in which Puran Mal claimed an account from Misri Lal of the profits realised during the currency of the mortgage.

From this decision three appeals have been preferred. Appeal No. 95 of 1917 arises out of Suit No. 49 of 1915 and is brought by Syed Abbas, who contends that the payment made to Puran Mal was a valid discharge of the debt. Appeal No. 127 arising also out of Suit No. 49 is brought by Puran Mal, who contends that the money advanced in consideration of the mortgage was advanced by him alone and that Misri Lal had no interest in the same. Appeal No. 126 arises out of Suit No. 82 and is brought by Puran Mal, claiming that he is entitled to an account from Misri Lal on the grounds already stated.

The properties in suit consist of three villages named Subanwa, Bhabhandigha and Kalyanpur, which form part of a *wakf* estate of which Syed Abbas is the *mutwalli*. It appears that in the year 1900 Saudagar Mahton held from Syed Abbas a *zarpeshgi ticca* of the villages in question at a rent of Rs. 4,500. He had also advanced a sum amounting to one year's rent to be repaid at the termination of the lease. The properties of the *wakf* estate, including the three villages in question, were hypothecated to one Baijnath Singh under a simple mortgage which took priority over Saudagar's *zarpeshgi* and which had then fallen due. The amount due to Baijnath amounted to Rs. 34,000, but Syed Abbas was unable to raise the whole of this money. Saudagar had been in possession of these villages as *ticcadar* since about the year 1890 on apparently advantageous terms and as he had an unexpired term of three years to run, it was to his interest that the mortgage to Baijnath should, if possible, be discharged. As Syed Abbas required financial assistance to raise the greater part of the money necessary to liquidate his debt to Baijnath, he approached Saudagar with a view to obtaining a loan of Rs. 46,300 for this purpose proposing to grant him a fresh *zarpeshgi* lease of the property for a period of 10 years on somewhat more favourable terms than the existing lease. Saudagar was not in a position to advance the whole of the money

required, but according to the plaintiff Misri Lal's case he was able and willing to advance half that sum if he could find any one prepared to join with him in the transaction and advance the other half. He, therefore, approached Puran Mal, a Mahajan residing at Patna, with a view to obtaining the balance required. According to Misri Lal's case Puran Mal agreed to advance half the amount at an interest of 11 annas per cent. per mensem and in conjunction with Saudagar to take a *zarpeshgi* lease of the villages for a period of 10 years at a rent of Rs. 5,300, out of which the interest on the advance amounting to Rs. 3,597 and the Government revenue and cesses, etc., amounting to Rs. 1,701-2-5 were to be deducted, leaving a trifling balance of under Rs. 2 payable to the landlord. The rents of the villages amounted to considerably more than Rs. 5,300 and the net profits were to be divided equally between the two mortgagees. Each party was to be put in possession either by himself or his agents and collect half the dues recoverable by him. Saudagar lived on the spot at Kalyanpur. His Patwari was one Naurangi Lal and according to the case of Misri Lal he was appointed to act for both parties as Patwari whilst Puran Mal appointed as his Gomashta Bishun Singh and subsequently Shakawat Hussain, and by this arrangement half the proceeds were paid over to Bishun Singh and afterwards to his successor Shakawat Hussain, the other half going to Saudagar and after his death to Misri Lal. An instrument in writing dated the 19th August 1900 was accordingly drawn up and executed by the parties to carry out the arrangement come to. By the terms of this document a *zarpeshgi* lease or mortgage was granted by Syed Abbas to Puran Mal and Saudagar Mahton for a period of 10 years. After reciting the necessity of borrowing money, it proceeds, "accordingly Babu Puran Mal and Saudagar Mahton have agreed to take lease by making an advance of the sum of Rs. 46,300 carrying interest at 11 annas per cent. per mensem for a period of 10 years" of the Mauzas in question. Provision was then made for paying off Saudagar's advance of Rs. 4,500 at the end of three years. The rent was also to remain at the old rate of Rs. 4,500 for the same period and from this the sum of Rs 3,597 was to be deducted for interest on the new loan and the balance of Rs. 903 was to be paid to the mortgagor. For the remainder of the term of 10 years the rent was to be Rs. 5,300 including Government revenue and cesses and the balance, as already stated, of something under Rs. 2 was payable as *hakhajri* to the mortgagor. The mortgagor also had the option of paying off the whole or a portion of the advance of not less than Rs. 5,000 during the currency of the term, in which case the rent would be increased by the amount of interest proportionate to the sum repaid. The whole of the *zarpeshgi* money or such portion as had not been repaid under the above option was payable at the end of Jeyth 1317 F. (June 1910 A. D.), when the lease should come to an end and the mortgagor would be entitled to get direct possession. But in the event of non payment of the whole *zarpeshgi* money by last year of the term, the lease with all its conditions was to remain in force until the whole or such part of the debt as was still due had been paid up.

There can be no doubt from the terms of this document that both Saudagar Mahton and Puran Mal are referred to as the persons advancing the money and acquiring the interest in the property. In addition to the passage already quoted the following clause appears:—

"Therefore, of our own free will and accord we" (Syed Abbas and his brother who at that time also had an interest in the property) "have given in lease as detailed below for 10 years on receipt of Rs. 43,600 in advance carrying interest at 11 annas per cent. per mensem to Babu Puran Mal * * * and to Saudagar Mahton * * * * the whole and entire 16 annas of each of the Mauzas."

Throughout the document these two are referred to as the lessees. Only one other passage in this document need be referred to. It provides that "till payment of the *zarpeshgi* money the said Mauzas shall stand mortgaged and liable." The effect of this document was to create a mortgage over the leasehold interest in the property as security for the re-payment of the advance, with the stipulation that the lease should continue in any event for 10 years on payment of the reserved rent notwithstanding the earlier discharge of the debt. The lessor could only

redeem on re-payment of the loan, otherwise the lessees' interest would continue indefinitely.

No portion of the loan was repaid during the currency of the term and Saudagar having died in 1907, his son Misri Lal succeeded him as *karta* of the family. The 10 years' term expired on the 30th Jeyth 1317 F. (June 1910 A. D.). But nothing was then done by way of repayment and the lessees remained in possession until 5 years later, when a sum of Rs. 41,770-6-9 was paid to Puran Mal on the 29th June 1915, *i. e.*, on the 2nd Asarh 1322 F. or two days after the end of Jeyth that year. The balance of the *zarpeshgi* money, amounting to Rs. 1,829-9 3, was deducted on account of certain sums said to be due from Misri Lal to Syed Abbas for rent of another Manza and other small items which Puran Mal agreed to settle in account with his co lessee. It was alleged on behalf of Syed Abbas that Misri Lal and Puran Mal went together at his request to his house some 3 or 4 days before the 30th Jeyth and that they both agreed on that occasion to these deductions, and said they would come again on the 30th Jeth and receive, the money, but that Misri Lal alone came on the 30th, Puran Mal not being present, and on that occasion the money was tendered to Misri Lal, who said that he had not the *patta* in his possession as it was with Puran Mal who would return it. This evidence was given by Raghubans Sahay, the Mukhtar-am of Syed Abbas. This witness further stated that later on in the evening of the 30th Jeyth Puran Mal did turn up, but for some reason not explained the money was not tendered to him then. The next day was a holiday and on the following day the 2nd Assarh the money was paid to Puran Mal as already stated. Between the 30th Jeyth and the 2nd Assarh Raghubans consulted his employer's Vakil, Rai Bahadur Purnendu Narain Sinha, as to how payment should be made and was advised that as the money was payable to joint mortgagees he could get a good discharge by paying it to one. The Rai Bahadur was called as a witness on behalf of Puran Mal. Syed Abbas had been his client for some years and he had been present when the *zarpeshgi* deed of the 19th August 1900 was executed and was an attesting witness thereto. He had no very clear re-collection of anything that Puran Mal told him about the document on that occasion, but he was evidently stating the facts impartially to the best of his re-collection, and he says that he was informed by Puran Mal when the deed was executed that the money was to be repaid to both Misri Lal and Puran Mal. He further says that when Raghubans asked his advice as to the manner of payment in 1915, he was told by him that Misri Lal was endeavouring to avoid payment and did not turn up at the time when payment was due which was the 30th Jeyth. The complaint was that Misri Lal was endeavouring to evade payment within the month of Jeyth. The evidence of this witness can undoubtedly be accepted as accurate but it materially differs from the story put forward by Raghubans and as far as it goes, corroborates that of Misri Lal which will be referred to presently. The evidence of Raghubans was that Misri Lal agreed to everything suggested and was willing that the deductions referred to should be made from the *zarpeshgi* money, and that he in fact turned up at the house of Syed Abbas on the 30th Jeyth and that it was Puran Mal who did not come on that occasion and that Misri Lal was quite agreeable to the money being given to Puran Mal. The account given by Misri Lal differs materially from that of Raghubans. His story is that on the 2nd Assarh a servant of Syed Abbas told him that the latter wanted to see him about paying off the *zarpeshgi*, whereupon he pointed out that as the 30th Jeyth had passed it was too late to take payment that year. Nothing else happened and he did not go to Patna or ever ask Syed Abbas or any one else to pay his share to Puran Mal or authorise the latter to receive it, nor did he agree to any deductions nor was any money ever tendered to him. The view he took of the *zarpeshgi* lease apparently was that it could only be terminated by payment at the end of Jeyth in any year and as that date had passed, the lease must continue for at least another year. If this story be accepted as it was by the learned Judge it follows that Misri Lal's interest as mortgagee was never redeemed; nor was any tender ever made to him of what was due. The learned Judge, who dealt very carefully with the evidence, arrived unhesitatingly at the conclusion that Misri Lal's story was true and that that of Raghubans and

Puran Mal and the other witnesses for the defendants could not be accepted. He was very unfavourably impressed by the evidence of Puran Mal who, he says, "hesitated, took time and did not tell us the whole truth." Puran Mal's evidence in the main supported that of Raghubans but differed from it in some important details. He confirms the latter in so far as he says that Misri Lal agreed that he should accept payment from Syed Abbas of the whole of the *zarpeshgi* money save the deductions already mentioned and that Misri Lal was quite agreeable that these deductions should be made. He differs from Raghubans as to what took place when he and Misri Lal went together to the house of Syed Abbas a few days before payment became due. Puran Mal says that Syed Abbas sent for him and when he went to the latter's house, he found Misri Lal sitting there but did not know for what business he had come. Syed Abbas did not say to Misri Lal that he would pay the *zarpeshgi* money, and there was no talk at the time as to whether the rent due to Misri Lal would be deducted. No details were discussed. All that Syed Abbas said was that he would pay the money, but when or where was not mentioned and he did not meet Syed Abbas again after that until the money was actually paid on the 2nd Assarh. These stories are, therefore, not in themselves consistent and it is highly improbable if the whole sum was due to Puran Mal and Misri Lal also owed him a sum of over Rs. 57,000, as he alleges in his plaint in Suit No. 82 in respect to these Mauzas that Puran Mal would readily agree to consent to a deduction of over Rs. 1,800 due from Misri Lal to the mortgagor on an entirely different transaction and take the chance of recovering it back from Misri Lal in addition to his existing liabilities, and I see no reason for disturbing the conclusions of fact arrived at by the learned Judge on this part of the case.

If, however, the whole of the loan was advanced by Puran Mal when the mortgage was executed, then payment to him would be a complete discharge of the debt. It remains therefore, to consider the evidence on this part of the case and to determine whether the learned Judge was justified in arriving at the conclusion that Saudagar himself advanced half the loan. I have already stated shortly the case put forward by Misri Lal as to how the advance came to be made, and up to a point there is no dispute between the parties. The case of Puran Mal, however, is that he advanced the whole of the money and allowed Saudagar and afterwards Misri Lal to remain in possession of the property as his agents to collect the rents on his behalf, taking as commission half the net profits after paying the interest due to Puran Mal and the Government revenue and other necessary outgoings. It is admitted that no written agreement was entered into between the parties at any time as evidence of this arrangement, although the *zarpeshgi* lease itself clearly indicates that the money was advanced by both the lessees and was repayable to them both. Puran Mal gives two reasons for allowing Saudagar's name to appear in the document as one of the lessees, first, that he had complete confidence in him, and, secondly, that there was a fear that the tenants might turn refractory if it were known that Puran Mal alone was the *ticcadar*. It appears, however, from Puran Mal's own evidence that his first acquaintance with Saudagar dated from 12 months before the transaction was entered into. It also appears that from the beginning the tenants knew that Puran Mal was one of the *ticcadars* and there is no suggestion that any trouble arose in consequence of this. It is almost inconceivable that a Marwari in the position of Puran Mal, who in addition had considerable Zamindari interests, would conduct his affairs in such an unbusiness-like manner and allow a comparative stranger, as Saudagar then was, to be joined with him as lessee and remain in possession of the property without some document in writting defining their relative positions. The only evidence which at all supports Puran Mal's story is the fact that the advance made to Syed Abbas in consideration of the *zarpeshgi* lease was made by a cheque drawn by Puran Mal on the Bank of Bengal on the 15th September 1900, about a month after the lease was executed. Puran Mal had previously had dealings with the Bank of Bengal and on the 5th September 1900 a new account was opened in his name with that Bank,

and between that date and the 13th September deposits amounting in all to over Rs. 59,000 were made to the credit of that account. It is Misri Lal's case that this account was opened for the express purpose of collecting the money to be advanced to Syed Abbas and that a deposit of Rs. 24,075 made on the 11th September included Rs 21,800 of Saudagar Mahton's money. Misri Lal's case is that this money was brought from Kalyan Bigha where Saudagar lived to Patna where Puran Mal lived on the back of an elephant and was taken to Puran Mal's *dukhan* on the 10th September, and on the following day deposited in the Bank together with a further sum of Puran Mal's own money making together the sum of Rs. 24,075. This story is corroborated by a number of witnesses, some of whom accompanied the elephant whilst others went by train from Kalyan Bigha to Patna City station where they transferred the money from the elephant to a *ticca gharry* and took it to Puran Mal's house. A further sum of Rs. 11,000 appears from the account to have been deposited by Puran Mal on the 13th September. There was then an amount of something over Rs. 59,000 to the credit of this account, and it is admitted that on the 15th of the same month Puran Mal drew a cheque for Rs. 59,000 in favour of Baijnath Singh, Syed Abbas's creditor. It is not disputed that this cheque included the Rs. 43,600 *zarpeshgi* money for the lease in question in this suit and a further sum payable by Syed Abbas to Baijnath in respect to another transaction in which Puran Mal was financing him. Puran Mal contended that the whole of this money was his own and that the account had been opened with the Bank of Bengal before the *zarpeshgi* was executed and that the deposits were not made for the purpose of collecting the *zarpeshgi* money and paying it by cheque. This story, however, is not borne out by Gobind Ram, the brother of Puran Mal and one of his witnesses, who says that the account was opened with the Bank of Bengal after the lease was executed for the express purpose of collecting the money, and the account itself appearing from the Bank books shews that the first deposit was made on the 5th November. Puran Mal was cross examined as to the source from which these deposits came, but was unable to give any account except that he said he got the money from Calcutta. He said, however, that he had a *jama kharach* book which would shew from what source the money was obtained at the time of depositing in the Bank, and unfortunately he was not cross-examined further as to the specific item of Rs. 24,075 deposited on the 11th September, which the plaintiff claims included his money, and the evidence of Misri Lal's witnesses was not taken until after Puran Mal had been examined. It was strongly urged before us that this lack of cross-examination upon a vital point in the case went a long way to support Puran Mal's case and that the story as to money being brought to Patna and handed over to Puran Mal on the 10th September ought not to be accepted. There is no doubt considerable force in this argument, and it would certainly have assisted Misri Lal's case had the learned Vakil appearing on his behalf put the whole story with regard to the payment of this money by his client and the subsequent deposit in the Bank to Puran Mal in cross-examination instead of confining himself to a few questions as to the source from which the deposits came. There are, however, so many improbabilities in the story presented by Puran Mal that I am not prepared to say that the learned Judge who saw the witnesses was not justified in disbelieving his evidence and accepting that of Misri Lal. No documents were produced by Puran Mal in support of this part of his story, nor had he the *jama kharach* book with him upon which he relied. This book he stated was in the possession of an arbitrator at Calcutta who at that time was sitting upon an arbitration in a partition case between Puran Mal and other members of his family, and the Court ordered a telegram to be sent to the arbitrator asking for the book to be sent. The telegram was sent the same day that Puran Mal gave his evidence, and a reply was received from the arbitrator that there must be some misconception as the account books had been taken away by Puran Mal and his brother some time in the previous year and were not in his possession. About a week later a letter was addressed to the Peshkar of the Subordinate Judge's

Court from the arbitrator, stating that although none of the account books of Puran Mal were in his possession, some of them were with Babu Kanhai Lal Mahsuddi, who was apparently another arbitrator engaged in the same case, and that he had asked the latter to forward them. The railway receipt for these books, when they were sent by Kanhai Lal, was received by the Peshkar but returned presumably with the consent of the Judge as there had been no order of the Court requesting Kanhai Lal to send them. On the 2nd March when the evidence of both parties was closed, Puran Mal petitioned the Court to appoint a Commissioner to examine these account books, but the Judge rejected the petition on the ground that he did not consider it a *bona fide* one and that every possible opportunity had been given to the petitioners to produce their documents at an earlier period. It was urged before us that Puran Mal had been unfairly treated in this matter, first, because after he had agreed to the two cases being tried together his evidence was taken first by the order of the Judge and that he did not think at that time that these documents would be necessary, and that he ought to have been given an opportunity after Misri Lal's witnesses were examined of calling rebutting evidence. I do not think that he has any grievance from the fact that he was ordered to begin and call his witnesses first. He was the plaintiff in Suit No. 82 and the trial had originally been fixed for hearing on the 9th May 1916 in that suit, by which date he was ordered to be ready with his witnesses and evidence. The case did not in fact come on for hearing until many months later. According to the procedure by which the trial of actions is governed, the parties must produce at the first hearing of the suit all the documentary evidence of every description in their possession or power on which they intend to rely and which has not already been filed in Court, and no other documentary evidence shall be received at any subsequent stage of the proceedings unless good cause be shown to the satisfaction of the Court for the non-production thereof. These rules have the salutary effect in many cases of preventing documentary evidence from being fabricated for the purposes of the case. In the present case some documents had been produced on behalf of Puran Mal which the learned Judge rejected on the ground that they were not genuine, and I see no reason for interfering with his discretion in refusing the application to have these account books examined by a Commissioner in the circumstances. Throughout the record there is no documentary evidence apart from that already mentioned to suggest that Puran Mal alone advanced the *zarpeshgi* money, and such oral evidence as there was on this point was by no means convincing and was dismissed by the learned Judge as unworthy of credence. It is also very significant that if he alone was entitled to the whole of the interest on the sum advanced, he never in fact received, it from Saudagar or after his death from Misri Lal and although his case is that they failed to pay him this money and a large debt was accumulating against them without any security for its payment, he appears to have taken no effective steps to obtain any account from them upto the moment that Misri Lal's suit was instituted. In fact although Misri Lal instituted his suit for possession on the 10th July, a few days after he was dispossessed, and made an alternative claim therein against Puran Mal for half the *zarpeshgi* money, it was not until the 2nd December that Puran Mal filed his suit for an account. Although Saudagar died in 1907 without rendering any account to Puran Mal, Misri Lal was allowed without protest to continue in possession of his half share including the interest on the *zarpeshgi* money as well as half the net profits, and still no accounts were obtained from him and in the Record of Rights finally framed and published on the 1st August 1910 the names of Puran Mal and Misri Lal were recorded in the Khewat relating to these Mauzas as interested in equal shares without any protest on behalf of Puran Mal. The only reason given by the latter for allowing this state of affairs to continue was that he had confidence in Saudagar whom he had met for the first time about a year before the *zarpeshgi* lease was executed. This confidence one would have expected to

have been seriously shaken when on his death no accounts were forthcoming, and yet we find that his son Misri Lal was allowed to continue in possession of his half share receiving half the interest and half the profits in the same way as his father had done before him It is alleged that Misri Lal rendered some accounts in the year 1909 which purported to be in the handwritting of Naurangi Lal the Patwari, but this would not explain why matters were allowed to go on some six years longer without any settlement of this account. Naurangi Lal denies that these papers are in his handwriting, and the learned Judge on comparing them with the admitted writing of Naurangi Lal rejected them as spurious, It was said that Naurangi Lal would be sent to explain these papers but it is admitted that he never came. Moreover, the papers relied on shew an entirely different state of affairs from that actually existing. These papers shew Danabandi, although admittedly the Manzas were Batai, and they further in other cases shew a higher rate of rent than that admittedly existing and differ in other respects from the existing facts, as pointed out by the learned Judge. I can see no reason whatever, after reviewing the whole of the evidence, to differ from the conclusions of fact arrived at in the trial Court.

The only question which remains is whether payment to one of two mortgagees is a discharge of the mortgagor's liability to the other. The common law rule that payment to one of two joint creditors discharges the debt due to both is subject to the equitable rule that mortgagees must, unless the contrary is shewn, be regarded as having a separate interest in the money advanced, although they take a joint security, and must be treated as in the position of tenants-in common and not joint tenants [see *Steeds* v. *Steeds* (1) and *Powell* v. *Brodhurst* (2)]. It was contended before us that this doctrine was not the law of this country and the case of *Barber Maran* v. *Ramana Goundan* (3) was relied on. It was held by the Madras High Court in that case that payment to one of two joint mortgagees was a good discharge of the debt to both, and this was followed by the majority of the Full Bench of that Court in the case of *Mannava Annopurnamma* v. *Uppala Akkayya* (4) where the question was whether one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the others. Of the three learned Judges who decided that case one of them, the Chief Justice, dissented. So far as mortgagees are concerned, the view of the Madras High Court has been repeatedly dissented from by the High Court of Calcutta [see *Husainara Begum* v. *Rahmannessa Begum* 5) and *Umes Chandra Banerjee* v. *Dinabandhu Mahanti* (6) and other cases. The Madras decision in *Barber Maran* v. *Ramana Goundan* (3) (*ubi sup.*) may be justified on the ground that the mortgagees in that case were in fact joint and took as joint tenants, but in my opinion the rulings in *Seeds* v. *Steeds* (1) and *Powell* v. *Broadhurst* (2) (*ubi sup*) are good law in this country and mortgagees will be regarded as having several interests unless the contrary be shewn, and the decisions of the Calcutta High Court correctly lay down the law on this matter. It was contended that an offer of performance had been made to Misri Lal on the 30th Jeth, but as already stated the evidence of this tender to Misri Lal cannot be accepted. Section 38 (3) of the Indian Contract Act was relied on as shewing that the legal consequence of the offer subsequently made to Pu an Mal and the acceptance by him was to put an end to the debt. It will be observed, however, that this part of the section relates to joint promisees and the presumption is that co-mortgagees are not joint. It is unnecessary, therefore, to consider further the effect of this section. I may mention that the Allahabad High Court has taken the same view as that of Calcutta, that one of two mortgagees who have advanced the mortgage

(1) (1879) 22 Q. B. D 537 at p. 540; 58 L. J. Q. B. 302; 60 L. T 318; 37 W. R 378.

(2) (1901) 2 Ch 160; 70 L. J. Ch. 587; 84 L. T. 620; 49 W. R. 632; 17 T. L. R. 501.

(3) 20 M. 461; 7 M. L. J. 269; 7 Ind Dec. (N. S.) 327.

(4) 19 Ind Cas. 12; 36 M. 544; 13 M. L. T 268 (1913 M. W N. 348; 24 M L. T 333.

(5) 8 Ind Cas 837; 38 C. 44; 13 C. L. J. 8.

(6) 29 Ind. Cas. 956; 21 C. L. J. 570.

money equally cannot give a good discharge of the entire mortgage debt without the consent of the other.

In my opinion these appeals should be dismissed with costs.

COUTTS, J.—I agree.

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 830 OF 1917.

September 9, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

AMRIT VAMAN INAMDAR—PLAINTIFF—APPELLANT

versus

HARI GOVIND KULKARNI—DEFENDANT—RESPONDENT.

Bombay Hereditary Offices Act (III of 1874), s 15—Settlement of village—Survey number, exclusion of—Burden of proof—Inams and saranjams, grant of—Presumption—Grant of royal share of revenue or of soil.

Where a *sanad* evidencing a settlement under section 1 of the Bombay Hereditary Offices Act mentions a whole village, a party who alleges that a particular survey number of that village is outside the scope of the settlement must prove his allegation. [p. 414, col.].]

In the case of *inams* and *saranjams* in the Bombay Presidency the ordinary presumption in respect of such a settlement as the foregoing is in favour of the grant being limited to the royal share of the revenue, in the absence of any words to indicate a grant of the soil, but the absence of such words would not necessarily establish that the grant is of the royal share of the revenue only [p 415, cols &]

Second appeal from the decision of the Assistant Judge, Belgaum, in Appeal No. 253 of 1914, reversing the decree passed by the First Class Subordinate Judge at Belgaum, in Suit No. 480 of 1913.

Messrs. *Jayakar* and *K. H. Kelkar*, for the Appellant.

Messrs. *Dhurandhar*, *D. R. Manerikar* and *H. G. Kulkarni*, for Respondent No. 1.

JUDGMENT.

SHAH, J.—The plaintiff in this case sued to recover possession of a part of Survey No. 45 in the village of Rajgoli Khurd with Rs. 10 as profits for one year from defendant No. 1 and his tenants. He alleged that the property was Watan property, and that the alienation thereof effected by his father in favour of defendant No. 1 was not valid beyond his lifetime under section 5 of the Bombay Hereditary Offices Act, that his father died in January 1912, and that he was entitled to the possession of the land.

The defendant No. 1 resisted the claim on the ground that under the decree on an award in Suit No. 253 of 1910 obtained by him against the plaintiff's father, he was entitled to retain possession of the land in suit until the Shake year 1852 (1930 31 A. D.), that it was not Watan property and that the plaintiff's father had authority to effect the alienation in his favour.

The trial Court found that the property was Watan property and that the plaintiff's father had no power to alienate it beyond the term of his natural life. It passed a decree in favour of the plaintiff for possession and mesne profits.

The defendant appealed to the District Court, and the learned Assistant Judge who heard the appeal found that the original grant was not a grant of the soil but merely of the royal share of the revenue of the village, and that there was nothing to show that the land in suit was not held by the original Inamdar at the time of his grant as his private property. Accordingly he allowed the appeal and dismissed the plaintiff's suit with costs.

The plaintiff has appealed to this Court, and it is urged in support of the appeal that the conclusions reached by the lower Appellate Court are erroneous. In order to appreciate the rival contentions of the parties in this appeal, it is necessary to state briefly the history of the grant of the village of Rajgoli Khurd, of which the land in suit forms a part.

The earliest document relating to the grant of this village is the order issued by the then Maratha ruler, Shambhu Chatrapati, to the Mukadam of Mouje Rajgoli Budruk and Mouje Rajgoli Khurd in the year 1734 A. D. The grant is in these terms:—

"The respected Virupakshara Yamaji of Gotra Gautama, who is the most devoted servant of the Swami (King), has been rendering service (to the Swami) with singleness of purpose and, therefore, it is necessary for the Swami to provide for his maintenance by the grant of an Inam

to him. Therefore, the Swami is now graciously pleased to grant to him as new Inam the whole of the aforesaid two villages Koolbab and Koolkanoo (*i. e.*, all taxes and assessments) but exclusive of the (Haks of) Hakdars and Inamdars. You should, therefore, acting in obedience to this order continue the said Inam to him, his sons, grandsons and so on from generation to generation."

The material words in Marathi are:—

"*Nutan inam koolbab koolkanoo kherij hakdar wa inamdar karun sadarhu donhi ganv darobasta inam dilhe ast.*"

Some years later in a letter written by Balaji Bajirao Pradhan the grant is referred to in the same terms, and there is a command that the entire *amal* of the two villages should be continued as Inam hereditarily according to the King's letter, the Marathi word for 'entire' being *darobasta*. In 1858 the Iman Commissioner examined the history of this grant and decided under Act XI of 1852 as follows :—

'It seems proper and it is ordered that the village of Mouje Rajgoli Khurd exclusive of the Hakdars and Inamdars must, under Appendix 2, section 2, of Act XI of 1852, be continued as long as the line represented by the sons, grandsons and so on born of the original acquirer Virupaksha Yamaji, the great-grandfather of the claimant Yamajipant, continues...This Faisalnama is only meant to show how long the village is to be continued as Mafi (free from the payment of revenue)."

In the reasons for the decision the village is referred to as standing at the time in the name of Yamajipant *bin* Virupakshapant Mutalik Desai as service Inam in the records of the Collector.

In 1884 the Inamdar accepted the settlement in respect of various lands including the village of Rajgoli Khurd in lieu of service on the conditions mentioned in the Sanad. The terms of the Sanad are these:—

Whereas in the Zilla of Belgaum certain lands and cash allowances are entered in the Government accounts of the year 1862-63 as held on service tenure as follows :—

Name of the Watan	Lands assessed at	Cash allowances	Total Emoluments (after deducting Mamool Joodee)
Mootalik Desai.	1,189-4-7	20-8-0	1,209-12-7

and whereas the holders thereof have agreed to pay to Government a fixed annual payment in lieu of service:—

It is hereby declared, that the said lands and cash allowances shall be continued hereditarily by the British Government, on the following conditions: that is to say, that the said holders and their heirs shall continue faithful subjects of the British Government, and shall render to the same the following fixed yearly dues:—

				Rs.	a.	p.
Mamool Joodee	...	...	...	0	0	0
in lieu of service	...	...	...	230	11	0
		Total	...	230	11	0

at 5 annas in the Rupee 9 13 0
at 3 annas in the Rupee 220 14 0
Two hundred and thirty and annas eleven only.

In consideration of fulfilment of which conditions—

1st—The said lands and cash allowances shall be continued without demand of service, and without increase of Land Tax over the above fixed amounts, and without objection or question on the part of Government as to the rights of any holders thereof, so long as any male heir to the Watan, lineal collateral, or adopted within the limits of the Watandar family, shall be in existence.

2nd—No Nuzzerana or other demand on the part of Government will be imposed on account of the succession of heirs, lineal, collateral, or adopted within limits of the Watandar family, and, permission to make such adoptions need not hereafter be obtained from Government.

3rd—When all the sharers of the Watan agree to request it, then the general privilege of adopting at any time any person (without restriction as to family) who can be legally adopted, will be granted by Government to the Watan, on the payment from that time forward in prepetuity of an annual Nuzzerana of one anna in each Rupee of the above total emoluments of the Watan.

DETAILS OF LANDS AND CASH ALLOWANCES.

Name of the Taluka	Name of the Village	Lands to continue (as Watan)			Cash allowances	Total Rupees	Mamool Joodee Rupees	
		Nos. of the Fields	Acres	Revenue Assessment				
			A. G.	Rs. a. p.	Rs. a. p.	Rs. a. p.	Rs. a. p.	
Belgaum	Those about which there is a Tharao (Settlement) Inam Committee Resolution No. 3101, dated the 30th of April 1858 A. D., in respect of the whole village Mouje Rajgoli Khurd.			738 0 7	0 0 0	738 0 7		On the gross income watan settlement judi at 3 annas in the rupee amounting to Rs. 138-6-0.

This settlement is on the lines of the Gordon Settlement; and the lands including the village of Rajgoli Khurd are assigned on certain terms in lieu of service. There is no provision in the Sanad giving to the Watandar any right to alienate the Watan beyond his lifetime, and the Watan is mentioned as the Mutalik Desai Watan. There are other documents of minor importance, which need not be referred to.

In 1910 the defendant No. 1 obtained a decree on an award against the plaintiff's father for a certain claim and the possession of the land in suit, which is referred to in the decree as Watan land, was to be retained by the defendant for a certain number of years. The terms of this decree have not been referred to in detail in the argument before us. But the decree is accepted by both the parties as effecting an alienation by the plaintiff's father for a certain number of years. The land in suit forms part of the village lands.

It is clear from these facts that the settlement effected in 1884 is referable to section 15 of the Bombay Hereditary Offices Act, and is binding upon the parties. According to that settlement the village of Rajgoli Khurd is Watan property. Under section 5 of the Act no Watandar can mortgage, charge, alienate or lease for a period beyond the term of his natural life any Watan or any part

thereof to any person who is not a Watandar of the same Watan without the sanction of Government: and this provision applies to any Watan in respect of which a service commutation settlement has been effected under section 15 of the Act, unless the right of alienating the Watan without the sanction of Government is conferred upon the Watandars by the terms of the settlement The defendant No. 1 is not a Watandar of the same Watan and no such right of alienation has been conferred by the terms of the settlement. The Sanad in this case is in the usual form adapted to the Gordon Settlement, and it is clear, on the terms of the section as also on the decisions of this Court relating to the Gordon Settlement in *Arpai Bapuji* v. *Keshav Shamrav* (1) and *Bhau* v. *Ramchandrarao* (2), that in the absence of a sanction of the Government any alienation of the Watan property beyond the term of the Watandar's natural life is inoperative. The village of Rajgoli Khurd is Watan property having regard to the definitions of 'Watan property' and 'hereditary office' in the Bombay Hereditary Offices Act. If the land in question forms part of the Watan property, the alienation thereof could not be valid after the death of the plaintiff's father.

For the plaintiff it is urged that the burden of showing that the land in suit is not a part of the Watan property is on the defendant, that he has failed to discharge that burden, that the distinction between a grant of the royal share of the revenue and a grant of the soil which is recognised in this Presidency with reference to Inams and Saranjams cannot be, and has never been, extended to Watans, and that the presumption in favour of a grant being limited to the royal share of the revenue even in the case of Inams and Saranjams cannot be made in view of the observations of their Lordships of the Privy Council in *Suryanarayana* v. *Patanna* (3). Further it is contended that on the terms of the grant in this case it ought to be held that the grant was of the soil and not merely of the royal share of the revenue of the village.

It is urged for the defendant that the plaintiff has failed to show that the land in suit forms part of the Watan property, that the Watan property here only means the royal share of the revenue and not the soil of the village of Rajgoli Khurd according to the terms of the Sanad, that even according to the terms of the original grant confirmed by the Inam Commissioner it is limited to the royal share of the revenue and does not extend to the soil, and that this distinction is well recognised in this Presidency and ought to be accepted in this case in spite of the decision in *Suryanarayan's case* (3).

In the absence of any clear proof that the occupancy right in the Survey Number in suit was vested in the plaintiff's ancestor independently of the grant and that the land in suit was outside the lands dealt with in the Settlement of 1884, I think that it must be held to be Watan property like the village itself. 'Watan property' according to the Act means moveable and immoveable property held, acquired or assigned for providing remuneration for the performance of the duty appertaining to an 'hereditary office,' which expression includes such office even where the services originally appertaining to it have ceased to be demanded. It is difficult to treat the village mentioned in the Sanad as referring to the royal share of the revenue only. The Sanad refers to the lands and where the whole village is referred to, the lands of the village are not referred to in detail by their Survey Numbers. Thus where the whole village is mentioned in a Sanad evidencing a settlement under section 15 of the Bombay Hereditary Offices Act, it is for the party alleging that a particular Survey Number of that village is outside the scope of the settlement to prove it. In the present case there is no such evidence. The lower Appellate Court observes that there is nothing on the record to show that the land in dispute was not held by the original Inamdar as his private property at the date of the first grant. But at the same time there is nothing to show that it was so held. No document is referred to before us as showing that the Survey Number in question was held at anytime otherwise than as part of the Watan pro-

(1) 15 B. 13; 8 Ind Dec (N. s.) 9.
(2) 20 B 423; 10 Ind Dec (N. s.) 845.
(3) 48 Ind. Cas. 989; 45 I A. 209 at p. 218; 41 M. 1012; 25 M. L. T 80; (1918) M. W. N 859; 23 C. W. N. 27; 9 L. W. 126. 29 C. L. J. 153; 1 U. P L. R. (P.C.) 11; 36 M. L. J. 505; 21 Bom. L. R. 547 (P. C.).

perty. This conclusion is strengthened by the fact that in the decree in the suit of 1910 it is described as Watan land. In the case of Watan property the distinction between grants of the royal share of the revenue and grants of the soil, which is admissible in the case of Inams and Saranjams, cannot be conveniently made without detriment to the statutory restriction on the Watandar's power of alienation and should not be made unless it is clearly justified by the terms of the settlement. The statutory restriction would be limited in its scope if such a distinction were made. The terms of the Sanad in the present case do not justify such a construction of the grant under the Settlement of 1884. I do not say that such a distinction can never be made in the case of Watans. It is sufficient for the purpose of this case to observe that no basis for such a distinction has been made out on the terms of the Settlement of 1884 with reference to the land in suit.

So far my conclusion is based upon the terms of the Sanad of 1884, and is independent of the terms of the grant in 1734 as confirmed in 1858 by the Inam Commissioner. It is by no means clear on the terms of the original grant of 1734 that it is limited to the royal share of the revenue. It is quite true, as contended by the defendant, that in this Presidency in the case of Inams and Saranjams the ordinary presumption, in the absence of any indication to the contrary, is in favour of the grant being limited to the royal share of the revenue and that clear words are necessary to indicate a grant of the soil: see *Krishnarav Ganesh* v. *Rangrav*(4), *Ramchandra* v. *Venkatarao* (5), *Rayya* v. *Balkrishna Gangadhar* (6). It is also true that the words ordinarily used to indicate a grant of the soil are 'water, grass, wood (trees), stones, mines and hidden treasures', as pointed out in *Ravinarayan* v. *Dadaji Bapuji* (7), *Collector of Ratnagiri* v *Antaji Lakshman* (8) and *Balvant Ramchandra* v. *Secretary of State* (9). But the absence of these words cannot be treated as necessarily establishing that the grant is of the royal share of the revenue only. There is no decision which has gone so far as to lay down that no other expression can indicate a grant of the soil.

Assuming that the nature of the settlement in 1884 must be determined with reference to the terms of the original grant as confirmed by the Inam Commissioner, it is not a matter of presumption but a question of the construction of the words actually used. It is clear from the reference to section 2, Appendix 2 (Schedule B), of Act XI of 1852 in the decision of the Inam Commissioner that the Inam was then continued according to the terms of the old grant of 1734 A. D. Thus though the word *durobasta* is not used in the decision of the Inam Commissioner, it seems to me that by implication the grant is continued on the same terms as the old grant and that in effect the expression used by the Commissioner must be taken to be the expression used in the grant of 1734 A. D. That expression is by no means clear on the question as to whether the grant was only of the royal share of the revenue or of the soil also; and apart from authority I should have found it difficult to construe it as a grant of the soil. The difficulty is increased by the consideration that the usual words (*jala*, *taru*, *truna*, *pashana*, *nidhi*, *nikshepa*) indicating a grant of the soil are not used. I find it, however, difficult to distinguish the grant in the present case from the grant which was construed by this Court in *Vasudev Pandit* v. *Collector of Puna* (10). I think that we ought to follow this decision and hold that the grant in this case was a grant of the soil and not merely of the royal share of the revenue. The present case cannot be reasonably distinguished on the ground that the word *durobasta* is not used by the Inam Commissioner in his decision.

I do not say that the use of the word *durobasta* would necessarily indicate a grant of the soil. In the case of *Vaman Janardan Joshi* v. *Collector of Thana* (11) the grant was held to be limited to the royal share of the revenue. In that case, however, there was a clause to the effect that "the village should be continued to him as an Inam grant and the revenue of the said village,

(4) 4 B H. C. R. (A. C. J.) 1.
(5) 6 B. 598 at pp. 600, 603; 3 Ind. Dec. (N. S.) 864.
(6) 29 B. 415; 7 Bom. L. R. 439.
(7) 1 B 523; 1 Ind Dec N S 345.
(8) 12 B. 534 at p 544; 6 Ind Dec N. S.) 840.
(9) 29 B. 450 at p. 486; 7 Bom. L. R. 497.
(10) 10 B H. C. R. 471.
(11) 6 B. H. C. R. (A C. J.) 191.

including that of Kasba Chauk should be entered in the Taluka account to the debit of the Jcshi, on account of Inam." In the present case we have no such clause. It is not easy to reconcile all the observations in this case with the decision in *Vasudev's case* (10). But there is no necessary conflict between the two decisions. On the best consideration that I can give to the question, I think that on the terms used in the grant of 1734 and confirmed by the Inam Commissioner in 1858, the grant is of the soil as in *Vasudev's case* (10).

In this view of the matter, it is not necessary to consider the effect of the observations of their Lordships of the Privy Council in *Suryanarayana's case* (3), relied upon by the plaintiff as to the presumption made in this Presidency in favour of a grant being of the royal share of the revenue in the absence of any indication that the grant is of the soil, in the case of Inams and Saranjams. In a somewhat similar case their Lordships have referred to these observations and have pointed out that each case must be considered on its own facts and that in order to ascertain the effect of the grant resort must be had to the terms of the grant itself and to the whole circumstances so far as they could be ascertained: see *Upadrashta Venkata Sastrulu* v. *Diti Seetharamudu* (12). Both these cases were cases of ancient Agrahara grants: and the considerations applicable to Agrahara grants are naturally different from those applicable to secular grants for service. The question whether these decisions of the Privy Council require that no presumption that a grant is of the royal share of the revenue can be made where there is nothing to indicate that the grant is of the soil, is one of great practical importance: and it will have to be decided hereafter, when it arises. As the point is argued, I do not consider it inappropriate to point out the difficulties in the way of interpreting the observations of their Lordships of the Privy Council in the manner suggested by the plaintiff without expressing any opinion on the point. The presumption is made in this Presidency in favour of a limited grant of the royal share of the revenue in the absence of any words to indicate a grant of the soil, not because the Courts have felt any doubt as to the power of the rulers to make a complete grant of the land, but because the grants by the Crown must be construed strictly so that nothing more may be deemed to have been conveyed than what appears clearly from the words of the grant, and because suitable words are generally used when a complete grant of the soil is intended. This presumption may be only another form of stating the rule that the Crown grants should be construed according to their tenor as stated in section 2 of the Crown Grants Act XV of 1895. The history of the Inams in this Presidency and the words in the preamble of Act XI of 1852, showing that the Act was passed with a view to try and determine without delay the claims against Government on account of Inams and other estates wholly or partially exempt from the payment of land revenue, may go to indicate that the grant might be merely of the royal share of the revenue and of nothing more. The meaning of the word "resumption" under that Act, as explained by the Government in 1854 and accepted by this Court in *Vishnu Trimbak* v. *Tatia* (13) and in many other later decisions both as to Inams and Saranjams, may also show that there are many grants merely of the royal share of the revenue. The observations of their Lordships of the Privy Council in the above cases may not be irreconcilable with the decisions of this Court, in which it is pointed out that in the absence of any words indicating a grant of the soil, a grant by the Crown must be taken to be a grant of the royal share of the revenue only.

I would allow the appeal, reverse the decree of the lower Appellate Court and restore that of the trial Court with costs here and in the lower Appellate Court on the defendant No. 1.

I would make the same order in Second Appeal No. 929 of 1917.

HAYWARD, J.— I agree. It is simply a question of interpreting the deeds of grant, which include two from the time of the

(12) 51 Ind. Cas. 304; 46 I. A. 123 at p. 128; 21 Bom. L. R. 925; 17 A. L. J. 725; 37 M. L. J. 42; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 43 M. 166 (P. C.).

(13) 1 B. H. C. R. 22.

Maratha rulers and the Sanad under the Gordon Settlement from the British Government. There is, in my opinion, no sufficient ground for holding the grant to have been merely a grant of the royal share of the revenue and not a grant of the soil. It is similar to the case of *Vasudev Pandit* v. *Collector of Puna* (10). It is, of course, necessary in interpreting such grants to remember what words were in ordinary use at the time for distinguishing between grants of the royal share of the revenue only and for grants of the soil, but it has also to be remembered that this was a grant for service or a Watan grant and not an ordinary Inam or Saranjam grant. There is no authority excluding from consideration these matters. It was merely held that there was not *a priori* presumption that grants were limited to the royal share of the revenue and were not of the soil in the case of *Suryanarayana* v. *Patanna* (3) by their Lordships of the Privy Council.

Appeal allowed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 675 TO 680 AND 682 TO 687 AND 802 OF 1919.

March 22, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

Maharani JANKI KUER OF BETTIAH THROUH HER MANAGER MR. J. T. WHITTY, I. C. S.—PLAINTIFF—APPELLANT

versus

SAUDAGAR RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy tenant, whether entitled to cut and appropriate trees—Custom—Burden of proof—Record of Rights, entry in—Presumption of correctness—Evidence before Court—Duty of Court.

The general rule is that an occupancy tenant has the right to cut the trees standing on his holding but the landlord has the right to appropriate them. If the tenant claims any right to appropriate the trees, he must prove a custom or usage to that effect. [p. 418, col. 1.]

An entry in a Record of Rights is entitled to the benefit of the presumption attached to it, but where the Court has before it the evidence upon which the record was prepared and where the plaintiff denies the correctness of the record, the Court is bound to come to a finding whether that evidence is sufficient to justify the entry. [p 418, col. 2.]

Appeals from the decisions of the Special Judges, Mozaffarpur, dated the 5th February 1919 and 22nd April 1919.

Messrs. *Kenndy*, *Fakhruddin* and *Jadubans Sahay*, for the Appellant.

Mr. *Bhagawan Prasad*, for the Respondents.

JUDGMENT.

MULLICK, J.—These thirteen second appeals arise out of thirteen suits instituted before the Assistant Settlement Officer of Champaran under section 106, Bengal Tenancy Act. It appears that 27 such suits were originally instituted. Twelve were decided by one judgment and 15 by another judgment, dated the 5th of April 1918.

The suits out of which these present second appeals arise belong to this latter batch. The plaintiff in all these suits was the proprietress of the Bettiah estate.

An entry having been made in the Record of Rights published under section 103A, Bengal Tenancy Act, that the tenants were entitled to appropriate the trees standing upon their occupancy holdings, the proprietress instituted suits before the Assistant Settlement Officer for a declaration that the entry was incorrect.

The Assistant Settlement Officer and on appeal the Special Judge both held that the proprietress had no title in the trees and maintained the entry.

It appears that the plaints in the suits were amended some months after they were filed. In the original plaints the landlord seemed to have recognised a custom by which the defendants were entitled to appropriate half the trees, but in the amended plaints she appears to have withdrawn from that position and to have pleaded that she was entitled to appropriate all the trees but that as she had in fact for many years only realised half the value of the trees, the entry should be amended by limiting her right to that extent.

The Assistant Settlement Officer framed the following issues.—

1. Is the plaintiff entitled to half share of the timber and trees standing on the present survey plots ?

2. What relief, if any, is the plaintiff entitled to ?

The ordinary law is that the tenant has the right to cut but the landlord the right to appropriate. If the tenant claims any right of appropriation, he must prove a custom or usage to that effect and, therefore, it was open to the officer who prepared the Record of Rights to enquire whether the tenants had discharged the onus which the law had placed upon them. But as section 103B, Bengal Tenancy Act, provides that the Record of Rights is presumed to be correct until the contrary is proved by evidence, the Assistant Settlement Officer was in my opinion right in placing the onus upon the plaintiff to show that she had the right to a half share.

From his judgment, however, it is not clear whether he appreciated the real position of the parties. He seems to have been under the impression that before the Revenue Officer the onus of proving a custom was upon the plaintiff. He also seems to think that in the proceedings before him it was for the plaintiff to show that there was a custom entitling her to appropriate the half share. He had before him the evidence upon which the Record of Rights was based, but he comes to no finding that this evidence was sufficient to prove a valid custom or usage in law. He relies entirely upon the weakness of the plaintiff's evidence as to realisation, in coming to the finding that the Record of Rights has not been rebutted.

In Second Appeal No. 802, the Special Judge, Mr. Boyce, appears to have adopted the same procedure and to have thrown the burden of proving the custom upon the plaintiff. He concludes his judgment by the observation that isolated instances of the collection of the price of timber are not sufficient to prove the custom set up by her.

Mr. Adami, the learned Judge who heard the remaining cases, has stated the legal position correctly and has come to the conclusion that while the plaintiff has failed to show before the Assistant Settlement Officer that there was no custom which would justify the entry, the defendants have proved that there was a custom and that the plaintiff had abandoned her rights. The learned Judge, however, does not discuss the evidence which he considers sufficient to prove the custom set up by the defendants and in my opinion there has been no proper trial of that issue.

The Record of Rights no doubt was entitled to the benefit of the presumption attached to it, but where, as in these cases, the Court had before it the evidence upon which the record was prepared and where the plaintiff denied the correctness of the record, the Court was bound, in my opinion, to come to a finding whether that evidence was sufficient to justify the entry. This view is in accordance with the decisions of their Lordships of the Calcutta High Court in *Sheonandan Persad Sukul* v. *Bacha Kaut* (1) and *Bagha Mowar* v. *Ram Lakhan Misser* (2).

The learned Special Judge Mr. Adami has held that a decision in a case under section 103 and a judgment in a case under section 106, Bengal Tenancy Act, regarding certain other tenants in the same village were inadmissible in the present suits, but in my opinion that view is incorrect. This decision and judgment would be relevant under section 13 of the Indian Evidence Act.

As in my opinion there has not been an adequate and satisfactory treatment of the issue on custom in the judgments of either of the two learned Special Judges, I think their judgments and decrees should be set aside and the cases remanded for re-hearing. The Special Judge now exercising jurisdiction in the matter must come to a clear and definite finding whether the defendants have proved a valid custom entitling them to a half share in the trees. For this purpose they will be entitled to adduce before him such additional evidence as they think necessary, while the landlord will be entitled to adduce rebutting evidence in reply. If the defendants decline to adduce further evidence, the learned Judge will dispose of the case upon the evidence already on the record.

The decisions in *Palakdhari Rai* v. *Manners* (3), *Dalglish* v. *Guzuffer Hussain* (4), *Sariatullah Sarkar* v. *Pran Nath*

(1) 4 Ind. Cas. 54; 9 C. L. J. 284.
(2) 41 Ind. Cas. 804; 27 C. L. J. 107.
(3) 28 C. 179; 12 Ind. Dec. (N. S.) 119.
(4) 28 C. 427; 12 Ind. Dec. (N. S.) 284.

Nandi (5) may be of some assistance to the Court in coming to a proper finding.

The appeals are, therefore, decreed and the cases are remanded to the lower Court for disposal in accordance with the directions herein given.

As there has been some carelessness on the part of the plaintiff in drawing up the plaint, neither party will be allowed costs in this Court.

SULTAN AHMED, J.—I agree.

Cases remanded.

(5) 26 C. 184; 13 Ind. Dec. (N. S.) 723.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 818 OF 1917.

October 14, 1919.

Present :—Mr. Justice Shah and Mr. Justice Hayward.

WAMAN BALVANT KASHIKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Babu HARSHET SHETE AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 9—Right of worship, nature of—Suit to enforce rights of worship and carrying processions, whether of civil nature.

The ordinary right of a citizen to worship, according to his own belief, any deity and in such manner as his belief requires him to do so long as he does not prevent others from carrying on similar worship according to their own belief, is a right of a civil nature and any interference with that right is a matter in respect of which relief would, in a proper case, be granted by a Civil Court. [p 421, col. 2.]

The right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. The right to carry on the worship of any deity in any manner that a person pleases, subject to similar conditions, is also a right inherent in every person. [p. 421, col. 2.]

Appeal from the decision of the Assistant Judge, Ratnagiri, in Appeal No. 478 of 1915, confirming the decree passed by the Second Class Subordinate Judge at Chiplun, in Civil Suit No. 160 of 1914.

Mr. *K. H. Kelkar*, for the Appellant.

Messrs. *Jaiyakar* and *S. S. Patkar*, for Respondents Nos. 1 and 3.

JUDGMENT.

SHAH, J.—The question in this second appeal is, whether the plaintiffs' claim is cognizable by Civil Courts.

The plaintiffs allege that their ancestors set up a new Bahiri temple at Chiplun for worship and devotional sports many years ago, that the present defendants' ancestors, who worshipped the same deity installed as the old Bahiri, filed Suit No. 28 of 1844 in the Court of the Munsif of Chiplun against the worshippers of the newly installed deity, and that in that suit they in effect sought to restrain the then defendants (plaintiffs' predecessors) from carrying on the worship of the new Bahiri in the same manner as the worship of the old Bahiri. A decree was passed in the suit and ultimately upheld by the Sudder Diwani Adawlut in Special Appeal No. 4631 in the year 1852, under which the then defendants were restrained from performing certain ceremonies as being appurtenant to the village deity, but were allowed to perform them on their passing an agreement to the Collector that they would not perform the particular ceremonies as village ceremonies but would perform them for sports and out of devotion. They further allege that in 1911 the District Magistrate passed an order under section 44 of the Bombay District Police Act at the instance of the present defendants restricting the plaintiffs in their worship to the four rites mentioned in the said decree and referred to in the prayer clause as items Nos. 1, 9, 11 and 13. They allege that they have been subsequently prohibited by an order made in October 1911 to use a *dhol* on the said occasions. They claim in this suit a declaration that they have a right to do certain acts of worship in connection with the new Bahiri and for an injunction restraining the defendants from obstructing them in the performance of the worship in that manner. They also claim damages to the extent of Rs. 5. The acts referred to in the plaint in the prayer clause are these:—

"1. *Palkhi* procession in the month of Falgun.

2. Performance of *tamasha* on the other

before the god and *tamasha* procession along with the *palkhi* in the town.

3. Moving about in the town playing *dhulwad* (playing with mud, etc.,) and along with *nishans* and *zendes* (banners) on the first day of the latter half of Falgun.

4. Moving about in town playing *shenwad* (playing with cowdung) along with *nishans* and *zendes* (banners) on the 2nd day of the latter half of Falgun.

5. Procession of *rang* (colours) through the town and the throwing of colours on each other's body on the 5th day of the latter half of Falgun

6. Taking of the *palkhi* to Chetavali in Chaitra.

7. *Pal kiraka* procession in Jeshta and Ashad and on occasions a *kiraka* procession of and killing of a goat.

8. To do *jagar* in Shrawan and on the full-moon day in Shrawan taking of a cocoanut in procession from the temple to the Bunder (harbour) for offering to the water-deity.

9. Tying *povtis* (cotton thread) round the wrist of the god in Shrawan.

10. Taking of the *palkhi* in procession to Uktad in Bhadrapad.

11. Setting up (*ghat*) in the temple in Ashwin.

12. Making out *palkhi* on *Dasra* day for the worship of Shami tree.

13. Waiving lamp about the idol in *Diwali*.

14. Raising of the banner and the god going to hunting on the full moon day in Paush and the lowering of the banner and the return of the god on the full moon day in Magh.

15. And other acts required to be done occasionally, and to use the *dhol* on those occasions."

The defendants contend that the claim is not cognizable by the Civil Courts and that on merits the plaintiffs have no such rights. The plaintiffs gave a *purshis* to the effect that the right of performing the ceremonies mentioned in the plaint was not vested in the deity, but it was their right to perform the said ceremonies before the deity for sports and out of devotion.

Both the lower Courts have disallowed the plaintiffs' claim on the preliminary ground that the suit is not cognizable by the Civil Courts.

In the appeal before us we are not concerned with the merits of the plaintiffs' claim, nor with the extent and form of the relief, which the plaintiffs may be ultimately found to be entitled to. The only question that we have to consider is whether the claim is cognizable by the Civil Courts.

It will be convenient to state the terms of the decree in the suit of 1844 and of the order of the District Magistrate. In the suit of 1844 the Court had made the following order:—

"By doing ceremonies of *manasthiti* such as taking out *palkhis*, preparing *povtis*, etc, at the new temple in course of time it will not be possible to distinguish ceremonies of *manasthiti* from the other; and plaintiff will thereby suffer. Therefore, the ceremonies of *manasthiti* performed at the new temple, *i. e.*,

1. Taking out *palkhi* in Shimga,
2. Preparing *povtis* in Shrawan,
3. Setting up *ghat* in Ashwin, and
4. Waiving lamp in *diwali*

should not be performed by the defendants. But if the defendants pass a Muchalka (recognizance) or Karar to Government that they will perform them not as village ceremonies (*ganvkichi manasthiti*) but will perform them for sport and out of devotion (*khelada-khal bhaktichi*), there is no reason to forbid them to do so. They should follow their own devotion. Performing ceremonies of *manasthiti* at the new temple is not approved by Government. If defendants don't pass a Karar, they should not perform the ceremonies specified in the plaint.

The stone set up as idol by defendants is installed according to rites as stated by defendants' witnesses. There is, therefore, no reason to remove them. They will be treated like the several ones which some people set up out of devotion."

The District Magistrate passed a considered order under section 44 of the Bombay District Police Act (Bom. Act IV of 1890), in which he directed in paragraph 16 (2) that—

"The new Bahiri people should perform only the four ceremonies mentioned in paragraph 13 above after passing the Karar to Government that they would perform them for sport and out of devotion and not as of *manasthiti*; they shall not perform at all the other ceremonies referred to in

paragraph 14 above neither out of sport nor out of devotion nor as of *manasthiti* and shall not be allowed to pass any Karar concerning those other ceremonies."

The ceremonies referred to in paragraphs 13 and 14 of the order are the ceremonies which are now referred to in the plaint.

The question is whether the present claim of the plaintiffs is of a civil nature. There is no question in this suit as to the right to property or to an office and the explanation to section 9 of the Code has no application. It is not suggested in this case that the cognisance of this suit is either expressly or impliedly barred. In fact section 44 of the Bombay District Police Act expressly provides that any order made by the District Magistrate under sub-section 1 shall be subject to a decree, injunction or order made by a Court having jurisdiction. The question, therefore, simply is whether the suit as framed is of a civil nature within the meaning of section 9 of the Code. Almost all the prayers in the plaint relate to some processions to be carried in the town of Chiplun on some occasions accompanied with some ceremonies in connection with the new Bahiri. The plaintiffs claim the right to worship the deity in any manner they please and to use the public streets for the purpose of processions connected with the worship of the deity as detailed in the plaint and to use the *dhol* on these occasions, and they make it clear that they do not claim to carry on any worship in connection with the new Bahiri as if it was the worship of the village deity (Gram Devata). The order of the District Magistrate makes it clear that they are prohibited altogether from performing any of these ceremonies, except the four which are mentioned in the decree in the suit of 1844, even for sport or out of devotion. The pleadings in the present case and the terms of the order of the District Magistrate make it quite clear that the real dispute between the parties is as to whether the plaintiffs are entitled to carry on the worship of the new Bahiri as they please so long as they do not perform it as of *manasthiti*, or whether the defendants have the exclusive right to perform those ceremonies with reference to the village deity and to prevent other persons from performing similar worship in connection with another deity of the same name. The prayers in the suit also involve the claim to use the public streets for the purpose of certain religious processions as detailed in the plaint. The question in this case is, not whether the defendants shall be required to perform any ceremony or that the plaintiffs shall be required to do so, but whether the ordinary right of a citizen to worship, according to his own belief, any deity and in such manner as his belief requires him to do, so long as he does not prevent others from carrying on similar worship according to their own belief, is a right of a civil nature. After giving the best consideration to this point it seems to me that in substance the plaintiffs' suit is of a civil nature, and if they have a right to worship the new deity in any manner they please, any interference with that right is a matter with reference to which they can get relief in a Civil Court provided they are found entitled to that relief.

It has been held in several cases that the right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. Further the right to carry on the worship of any deity in any manner that a person pleases subject to similar conditions is also a right inherent in every person, and it is an important right. I do not think that the lower Courts are right in holding that the suit is not of a civil nature. In the present case the question does not relate to any religious rites or ceremonies, but to the right of the plaintiffs to be protected in the performance of the worship of their deity in any manner they please, subject to the conditions which I have already stated with reference to the right to use the public streets and to their right to prevent the defendants from interfering with the performance of the worship in their own way.

This conclusion in the present case appears to me to be consistent with the view which the Sadder Diwani Adawlut took in the

suit of 1841 which came up to that Court. It was held by the learned Judges then that the suit was cognizable by a Civil Court under Regulation II of 1827, section 21, as it then stood, having regard to the nature of that suit and the relief claimed by the plaintiffs in that suit. The present suit seems to me to be of a similar nature. The present plaintiffs seek to be protected in the performance of their worship of the deity. I do not express any opinion as to the effect of the decree in that suit on the merits of the present claim. The District Magistrate has referred to this decree in his order, and it is a point in dispute between the parties as to whether the effect of the decree is in favour of the plaintiffs or the defendants in the present case. That is a matter which the Court dealing with the suit on the merits will have to consider and to decide. I refer to that suit at present only for the purpose of showing that it was held to be of a civil nature.

Several cases have been cited in the argument at the Bar; but I do not consider it necessary to discuss them. The nature of the present suit must be determined with reference to the allegations and the pleadings in the present case. The observations in the reported cases which have been relied upon on either side must be read with reference to and in the light of the nature of the particular suit in which they are made. I do not think that any decision referred to in the argument conflicts in any way with the view which I take of this case.

I would, therefore, allow this appeal, set aside the decrees of the lower Courts and remand the suit to the trial Court for disposal according to law.

All costs to be costs in the suit.

HAYWARD, J.— I agree. The cause of action is, in my opinion, of a civil nature, in so far as it relates to the conduct of the defendants tending to prevent the exercise of the ordinary rights of freedom of worship of the other side, whether in private or in public. It would seem, broadly speaking, that every citizen has a right to worship as he pleases so long as he does not thereby trench upon the rights of office or property of other persons. He has, broadly speaking, similarly a right to go in procession so long as he does not interfere with the rights of others to the unrestricted use of the public roads and streets. But the exercise of these rights is always subject to such orders as might be necessary to prevent disorder or riot by the Magistrates under section 44 of the Bombay District Police Act or section 144 of the Criminal Procedure Code.

Appeal allowed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 66 OF 1920.

February 5, 1920.

Present :—Mr. Justice Das and Mr. Justice Adami.

UGRA MOHAN CHAUDHURI—PLAINTIFF [—APPELLANT

versus

LACHHMI PRASAD CHAUDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (iv) (c), (v)—Suit for declaration of title and possession—Court-fee payable.

Where a challenge is directly thrown on the plaintiff's title as the adopted son of a certain person and the plaintiff comes into Court in order to meet that challenge and claims a declaration of his title as an adopted son and also seeks to recover possession of his adoptive father's property, the suit falls within section 7 (iv) (c), of the Court Fees Act and not within clause (v) of the section. [p. 424, col. 1.]

Appeal from a decision of the Subordinate Judge, Bhagulpore, in Trial Suit No. 125 of 1918, dated the 13th August 1919.

Messrs. *S. M. Mullick, Rajendra Prasad* and *Sambhu Saran*, for the Appellants.

Messrs, *Lal Mohan Ganguly* and *Nitai Ch. Ghosh*, for the Respondents.

FACTS —The plaintiff brought this suit for possession of an estate on the ground that he had been validly adopted by the widow of the last male owner under authority from the latter. He valued the suit at 5 lacs for purposes of jurisdiction and at Rs. 82,500 for purposes of Court-fee, as if it were a suit for possession, valuing the immoveable property at ten times the Government revenue for the purpose of Court-fee. The plaintiff prayed for the following reliefs:

"(1) For adjudication that the plaintiff is entitled to the properties set forth in schedule A below as the adopted son and heir of Shib Nag Chandi Nath Chaudhry and that the defendants 1st, 3rd, 4th parties have wrongfully kept him out of possession thereof.

"(2) For a decree for possession of the said properties in favour of the plaintiff against the said defendants 1st, 3rd and 4th parties, and for putting him in possession of the properties mentioned in part I of the said schedule A by ousting these defendants or any person claiming under them. and of the properties mentioned in part II of the said schedule by ordering the defendant 1st party to deliver them to the plaintiff or in default the value.

"(3) For a decree for Rs. 60,000 or such other sums as the Court may find just and proper on account of mesne profits of the properties set forth in part I of the schedule A from the Fasli year 1321 till the date of the suit as well as future mesne profits from the date of the suit till the date of the plaintiff's possession with interest against the defendants 1st, 3rd and 4th parties.

"(4) For costs of the suit with interest against the defendants."

The defendants denied that the plaintiff was the adopted son of Shib Nag Chandi Nath Choudhry and asserted that even if he was adopted, his adoption was invalid. The plaintiff's suit was dismissed. The plaintiff, therefore, appealed to the High Court. He valued his appeal as he had valued his suit both for the purposes of jurisdiction and for the Court fees. The Stamp Reporter objected to the Court-fees paid on the plaint as well as on the memo. of appeal, being of opinion that the suit was one for a declaratory decree with consequential relief and as such the plaintiff ought to have paid Court-fees *ad valorem* on 5 lacs, the jurisdictional value, both on the plaint and on the memo. of appeal under section 7 (IV) (*c*) of the Court Fees Act. He submitted the matter to the Taxing Officer, who agreeing with the reports of the Stamp Reporter observed as follows: —

"It is clear that by the 1st relief a declaration was asked for of plaintiff's title as the adopted son. This adoption was denied by the defendants and this was the main issue in the suit. The burden of proving adoption lies on the person who asserts the adoption, and without the declaration of title it would be impossible for the plaintiff to recover possession; and that this was recognized is clear from the reliefs claimed.

The learned Vakil for the appellants contended that it was only so when a document had to be got rid of that a declaration is required. But I think his argument is based on the fact that the rulings reported as *Lagan Burt Kuer* v. *Khakhan Singh* (1) and *Dhakeswar Prasad Singh* v. *Jioo Choudhry* (2) happened to refer to cases in which a document stood in the way of the plaintiff. What stands in the plaintiff's way in the present case is the fact that unless he can prove not only his adoption but the validity of his adoption, he cannot have any claim to recover possession. Had he left out the prayer regarding his adoption or had the defendants admitted the adoption, I should have held that in the former case we must be guided by the plaint, and in the latter case also the prayer for adjudication of the adoption was a surplusage. As it is the prayer is there; and so far from being a surplusage, it is the very foundation of the plaintiff's case, and it is hotly contested by the defendants. I, therefore, hold that this is a suit for a declaratory decree with consequential relief and that *ad valorem* Court-fees must be paid on the value of the suit. The proper Court-fee both on the plaint and on the memo. of appeal is Rs. 3,000. Rs. 1,350 having been paid on both, there is a deficit on each of Rs. 1,650, *i. e.*, a total deficit of Rs. 3,300. One month's time is allowed within which to pay."

The deficit Court-fee on the memo. of appeal to the High Court was paid within time, but the deficit of Rs. 1,650 due from the appellant on his plaint in the Court of 1st instance was not paid. The case was, therefore, placed before a Division Bench constituted of the Hon'ble Mr. Justice Das and the Hon'ble Mr.

(1) 43 Ind. Cas. 962; 3 P. L. J. 92.
(2) 43 Ind. Cas. 355; 3 P. L. J. 448.

JAMSEDJI v. HUSSEINBHAI AHMEDBHAI.

Justice Foster for proper orders. The learned Judges on 29th January 1920 passed the following

ORDER.—This is a Court-fee matter.

The question involved is of considerable importance and in our view should be decided by a larger Bench. The point is this. Whether a suit for declaration of title as adopted son and for possession is a suit that comes within section 7, clause (IV), sub-clause (*c*) of the Court Fees Act, or within section 7, clause (V) of that Act. The learned Registrar has taken the view that it comes under section 7, clause (IV), sub-clause (*c*) of the Court Fees Act. Mr. Sushil Madhab Mullick on behalf of the appellant has argued that this view is erroneous inasmuch as every suit for possession must necessarily involve adjudication of the title of the plaintiff. He says that in every suit for possession the plaintiff must prove his title, and that consequently he must necessarily ask for declaration of his title. In my view the question depends on whether the suit is a suit that comes within section 42 of the Specific Relief Act. If it is a suit that comes within section 42 of the Specific Relief Act, then it must come under section 7, clause (IV), sub-clause (*c*) of the Court Fees Act.

It is true that every suit for possession does not involve a question of title in the sense that the plaintiff in an ejectment suit must prove his title. But that is not the case here. Where, however, a challenge is directly thrown on the title of the plaintiff, and the plaintiff comes to Court in order to meet that challenge, it is a suit clearly under section 42 of the Specific Relief Act, and it would accordingly, in my view, come under section 7, clause (IV), sub-clause (*c*) of the Court Fees Act. In this case it appears to me that there was undoubtedly a challenge thrown on the plaintiff's title. He came to Court to meet that challenge. He asked for a declaration that he was the adopted son of somebody and for consequential relief, that is, for possession. It is not the same thing as an ordinary suit for possession where the question of title incidentally arises. In my view the learned Registrar has taken an entirely correct view of the matter, but as the question is always coming before us in one garb or another, we think that it ought to be finally settled by a larger Bench. Place the record before the learned Chief Justice for necessary orders.

On 4th February 1920 the learned Chief Justice (Sir Dawson Miller, Kt.) declined to refer the matter to a Full Bench and passed the following

ORDER.—In my opinion this decision is correct. There is no other decision in conflict with the above and I do not think it is necessary to refer it to a Full Bench.

The case was again placed before the Division Bench consisting of Mr. Justice Das and Mr. Justice Adami, which on the 5th February 1920 passed the following

FINAL ORDER.—This matter now comes before us for decision. My learned brother Mr. Justice Foster and myself expressed our view in the order which we passed on the 29th January last. We thought that the matter was of general importance and should be settled by the decision of a larger Bench. We directed that the papers should be placed before the learned Chief Justice for the necessary orders. The learned Chief Justice does not think that there is any necessity to refer the matter to a Full Bench. My learned brother Mr. Justice Adami agrees with the view which I have already expressed in the case. Therefore, the order must be that the decision of the learned Registrar is right and that the appellant must pay the additional Court-fees on the plaint in the lower Court. We give him three weeks time to do so.

Order accordingly.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 587 OF 1918.

October 11, 1919.

Present:—Mr Justice Pratt.

JAMSEDJI F. SHROFF—PLAINTIFF

versus

HUSSEINBHAI AHMEDBHAI—DEFENDANT.

Receiver, suit against—Leave of Court not obtained before institution of suit—Leave obtained subsequently, whether cures defect.

Where a suit is filed against a Receiver without first obtaining the leave of the Court which appointed him, the defect can be cured by leave subsequently granted. [p. 425, col. 2.]

JAMSETJI v. HUSEINBHAI AHMEDHBI.

Mr. *Kanga*, for the Plaintiff.

Mr. *Desai*, for the Defendants.

JUDGMENT.—The summons was issued on an application by the plaintiff for leave to continue the suit against the defendants who are Receivers of the estate of Ahmedbhai Habibbhai. The plaintiff claims to have been employed as a broker by the Receivers and sues for his brokerage. It is clear, therefore, that there is a question to be tried and the case is one in which the Court would grant leave as a matter of course: *Lane* v. *Capsey* (1) and *Braja Bhusan Trigunait* v. *Sris Chandra Tewari* (2).

The only difficulty arises from the fact that *per incuriam* the suit was filed without the previous sanction of the Court. It was held in *Pramotha Nath Gangooly* v. *Khetra Nath Banerjee* (3) that leave of the Court is a condition precedent to the right to sue and that that omission cannot be rectified by subsequent application. The judgment in that case is not supported by any reasons and was not followed in *Rustomjee Dhunjibhai Sethna* v. *Frederic Gaebele* (4). The various statutory provisions which require the consent of the Court or some other authority as a condition on which a suit may be maintained are collected in the case of *Chandulal Khushalji* v. *Awad* (5). The consideration of those and subsequent authorities shows that the words in the Statute have to be examined in each case in order to ascertain whether the provision is a bar to the Court dealing with the actior, or is a bar to the original institution of the suit. In the former case the suit may continue on leave subsequently granted: for instance, the leave of the Collector in a suit to which sections 4 and 6 of the Pensions Act XXIII of 1871 are applicable: *Nawab Muhammad Azmat Ali Khan* v. *Musammat Lalli Begum* (6), or leave under Order I, rule 8 (1), Civil Procedure Code: *Fernandez* v. *Rodrigues* (7), or leave under section 20, Civil Procedure Code: *Narayan Shankar* v. *Secretary of State* (8). But in the latter case, that is, when the bar is to the original institution of the suit, leave subsequently granted is of no avail: for instance, the consent of the Advocate-General under section 92, Civil Procedure Code: *Tricumdass Mulji* v *Khimji Vullabhdass* (9), or the leave of the Court under section 17 of the Presidency Towns Insolvency Act: *Dwarkadas Tejbhandar, In re* (10).

In the case of a suit against a Receiver there is no statutory provision requiring the leave of the Court. But the same principle would apply, and the defect can be cured by leave subsequently granted if there is no bar to the institution of the suit, that is to the jurisdiction of the Court to admit the plaint.

The necessity for leave to sue the Receiver rests upon two considerations: (1) that such a suit is incompatible with the dignity and authority of the Court; (2) that it might interfere with the duty of the Court to maintain the Receiver's possession. Neither of these considerations affects the jurisdiction of the Court. They are matters which the Court can deal with after the suit is filed: and the Court could order the suit to be stayed until it was satisfied that there was no encroachment upon its authority, nor want of attempt to interfere with the Receiver's possession.

Therefore, it seems clear that leave may be granted after the filing of the suit, and Mr. Desai with his customary fairness does not dispute this proposition.

Accordingly, I make the summons absolute but direct that plaintiff pay the costs of the summons. Counsel certified.

Summons made absolute.

(1) (1891) 3 Ch. D. 411; 61 L. J. Ch. 55; 65 L T. 375; 40 W. R. 87.

(2) 47 Ind. Cas. 719; 4 P. L. J. 20; (1918) Pat. 337.

(3) 32 C. 270; 9 C. W. N. 247.

(4) 51 Ind. Cas. 486; 46 C. 352; 23 C. W. N. 496.

(5) 21 B. 351; 11 Ind. Dec. (N. S.) 237.

(6) 9 I. A. 8; 8 C. 422; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882; 4 Ind. Dec. (N. S.) 269.

(7) 21 B. 784; 11 Ind. Dec. (N. S.) 528.

(8) 30 B. 570; 8 Bom. L. R. 543.

(9) 16 B. 626; 8 Ind. Dec. (N. S.) 896.

(10) 31 Ind. Cas. 948; 17 Bom. L. R. 925; 40 B. 235.

ADHIKARI KUER v. LOKENATH RAI.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 195 OF 1917.

March 3, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

Musammat ADHIKARI KUER—DEFENDANT—APPELLANT

versus

LOKENATH RAI—PLAINTIFF AND SHEO SHANKAR PROSAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, alienation by—Consent of reversioner, effect of—Necessity, proof of.

The consent of the immediate reversioner to an alienation made by a Hindu widow is presumptive proof of legal necessity and bars further enquiry into legal necessity. The consenting reversioner cannot subsequently say that there was no legal necessity. [p. 428, col. 1.]

Appeal from a decision of the Subordinate Judge, Arrah.

The Hon'ble Mr. *Purnendu Narain Sinha*, Messrs. *Naresh Chandra Sinha* and *Netai Ch. Ghosh*, for the Appellant.

Messrs. *Kulwant Sahai* and *Shambhu Saran*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of a suit instituted by the respondent Loknath Roy against the appellant and the *pro forma* respondents to enforce a mortgage bond executed by *Musammat* Adhikari Kuer and by Sheo Shankar, Uma Shankar and Rama Shankar on the 9th of August 1907. There is no dispute that *Musammat* Adhikari Kuer was in possession of the estate in her right as a Hindu widow and that Sheo Shankar, Uma Shankar and Rama Shankar, as her daughter's sons, were on that date the immediate reversioners. It appears that Rama Shankar was on that date a minor but that his name was actually signed by his eldest brother Sheo Shankar.

The learned Subordinate Judge has given a full mortgage decree to the plaintiff.

The first question which has been argued on behalf of the appellant is that there were certain part payments made by *Musammat* Adhikari Kuer and that those part payments are not shown in the account annexed to the plaint. The appellant's allegation is that she paid Rs. 200 to the plaintiff on the 30th of Bhado 1316 and Rs. 408 on the 30th of Aghan 1319. She relies upon two receipts alleged to have been granted by the plaintiff to her. It is noteworthy that these payments are not endorsed on the mortgage-bond.

Now, in order to determine this question it is necessary to examine whether the case of the defendant was at all put to the plaintiff. The plaintiff came to the witness-box and stated as distinctly as he could that the defendant had not paid anything to him on account of his dues. That was a clear statement that nothing had been paid to him by the defendant. There was absolutely no cross-examination on this point at all. The Hon'ble Mr. Purnendu Narain Sinha, on behalf of the appellant, relies on the fact that the defendant raised the question of part payments specifically in her written statement and that, therefore, it was for the plaintiff to deny that allegation in the witness-box. I do not agree with this contention at all. The plaintiff came to the witness-box to prove his case and it was for the defendants, if they had a specific case on the point, to put that specific case to the plaintiff. It is, in my opinion, not fair to rely upon receipts alleged to have been executed by Loknath without giving Loknath an opportunity to deny his signatures on those receipts.

In the next place the evidence as regards the payments is, in my opinion, not sufficient. I will take the second receipt. That receipt is alleged to have been granted on the 30th of Aghan 1319. Now, it is the defendant's case that on the 5th of Fagun 1317 the defendant executed a Mukhtarnama in favour of the plaintiff's son, appointing him her agent for the purpose of collecting rents, issues and profits. Therefore, on the date, when she is alleged to have paid Rs. 408 to the plaintiff, she was not in possession of the estate at all. The Mukhtarnama has been read to us by the Hon'ble Mr. Purnendu Narain Sinha and it appears that the lady appointed Ram Nihora, the son of the plaintiff, as her Manager on a salary to make collections on her behalf, to pay Government revenue and other public demands out of such collections and to pay her Rs. 30 a month for her expenses and at the end of each year to account to her for such collections and to make over to her the balance in hand. Now one of the witnesses for the defendants was asked from where defendant No. 1 got Rs. 408, which she made over to the

plaintiff in part payment of what was due from her to the plaintiff. This witness is Kailas Bihari, who is a servant of the defendant and undoubtedly looks after her interest. His answer was 'I cannot say.' The defendant herself, in her evidence, says that arrears were due to her from the tenants and that these arrears were being realized by her servant Jankey Lal and that she made the payments to the plaintiff out of these collections. It seems to me that this is an impossible story. The Mukhtarnama shows that Ram Nihora was there to make collections on her behalf. The Mukhtarnama makes no distinction whatever between rents as they fell due and arrears of rent. Therefore, if the Mukhtarnama was at all acted upon, these collections would undoubtedly have been made by Ram Nihora and not by Jankey Lal. Now, if the second receipt goes, then, in my view, it must throw suspicion on the whole story of part payments. In my view, these circumstances, coupled with the fact that the receipts were not shown to the plaintiff when he came to the witness-box to give his evidence, make it impossible for us to accept the story of part-payments.

The next point argued by the Hon'ble Mr. Purnendu Narain Sinha is that the defendant appointed the plaintiff her agent to collect rents on her behalf and that, therefore, the plaintiff cannot claim an account of the money due to him from the defendant on the foot of the mortgage-bond, without accounting to her for the monies that came into his hands by virtue of the Mukhtarnama. The principle is well established that he who claims an account must also render account, if he is at all accountable. But in this case the Mukhtarnama is not in favour of the plaintiff, but in favour of the plaintiff's son. The evidence of the defendant, no doubt, is that though the name of Ram Nihora was used in the transaction, it was the plaintiff who actually acted for her. This evidence I cannot accept. This case, again, was not put to the plaintiff when he came to the witness box; and for that reason and also for the reason that every apparent transaction must be assumed to be the real transaction until the contrary is shown, I cannot accept this case.

The last point that has been argued before us is that the reversioners could not bind their reversionary interest by the mortgage transaction and that, therefore, all that can be sold in execution of the mortgage decree is the widow's interest. The question, whether the reversioners can bind their reversionary interest, is one of considerable difficulty and I do not propose to discuss that point in this case. But I look upon the transaction by the reversioners not as binding their interest in the estate but as consenting to the transaction by the widow. It is unnecessary to refer to all the cases, that have been decided on this question, but I may usefully cite a passage from the judgment of the Privy Council in the case of *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1). At page 285* the Judicial Committee, in that case, said as follows:—"The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well-settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions." The Judicial Committee went on to point out as follows:—"There is no evidence that they," the reversioners, "benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a stringent equity, to use Lord Hobhouse's expression in the course of the argument in *Jiwan Singh* v. *Misri Lal* (2), arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the

(1) 27 Ind. Cas. 674; 42 C. 876; 17 M. L. T. 116; 19 C. W. N. 370; 13 A. L. J. 223; 2 L. W. 249; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; [illegible] M. W. N. 511; 42 I. A. 64 (P. C.).

(2) 18 A. 146; 23 I. A. 1; 6 M. L. J. 47; 3 Sar. P. J. 675; 8 Ind. Dec. (N. S.) 804.

*Page of 42 C.—*Ed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 411 OF 1918.

October 21, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

SAKHARAM MANCHAND GUJAR—PLAINTIFF—APPELLANT

versus

KEVAL PADAMSI GUJAR—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 20—Part-payment of principal—Writing, what must contain—Extension of limitation.

If the fact that a payment is made by a debtor to a creditor appears in the handwriting of the person making the payment, and if it appears on the evidence in the case that the payment was in part satisfaction of the principal of a debt, the requirements of section 20 of the Limitation Act would be satisfied. [p. 430, cols. 1 & 2; p. 431, col. 2]

Appeal from the decision of the First Class Subordinate Judge, Satara, in Appeal No. 426 of 1916, confirming the decree passed by the Subordinate Judge at Rabimatpur, in Civil Suit No. 209 of 1915.

Messrs. *Patvardhan* and *M. V. Bhat*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

SHAH, J.—The plaintiff in this case sued to recover the price of certain goods sold to the defendant on the 10th of September 1912 with interest up to date of suit; and deducting therefrom the amount received he claimed in all Rs. 1,197 at the date of the suit. The suit was filed on the 14th of October 1915. It was filed more than three years after the date on which the goods in question were supplied. But the plaintiff relied upon part-payments in respect of the debt made in two sums in July 1913, one of Rs. 193-8-0 forming part of the cash payment of Rs. 500 and the other of Rs. 235 by a Hundi received from the defendant, and upon the fact of the payments appearing in a letter written by the debtor on the 2nd of July 1913.

In the trial Court the defendant denied the claim on the merits and pleaded limitation. It was, however, found that the goods in question were sold by the plaintiff to the defendant and that the price of the goods was Rs. 1,350 with certain incidental charges in respect of the transaction. The trial Court, however, found that the part-payments in question did not satisfy the requirements of section 20 of the Indian Limitation Act and that the claim was time-barred. Accordingly the plaintiff's suit was dismissed. The plaintiff appealed to the District Court, and the First Class Subordinate Judge with Appellate Powers upheld the plea of limitation and dismissed the appeal.

In the appeal to this Court by the plaintiff the same question of limitation has been raised. It is urged on behalf of the appellant that the requirements of section 20 of the Indian Limitation Act are satisfied in this case, that the two payments appear in the handwriting of the defendant and that they were made in respect of an account under circumstances under which the inference must necessarily arise that they were made in part-payment of the debt in question. On the other hand on behalf of the respondent it is urged that the requirements of section 20 of the Indian Limitation Act have not been satisfied, as the writing in question does not show in terms that the payments were in respect of the debt in question, and that the payments were intended to be only part-payments, even if they were otherwise referable to the debt in question. It is contended that the debtor may have intended to make the payments in full satisfaction of the claim, that at least there is an ambiguity on the point and that an ambiguous writing of that character cannot serve the purpose of the plaintiff.

It is necessary at the outset to state that the account between the plaintiff and the defendant at the date of these two payments showed only a balance of about Rs. 301 apart from the debt in suit. There is no dispute in the present case about the correctness of this account. Over and above this balance at the date there was the debt of about Rs. 1,350 relating to the transaction in question. Thus the total amount due at the date of the two payments was a little over Rs. 1,650. When on the 4th and 5th of July 1913 the debtor paid two sums of Rs. 500 and Rs. 235, he necessarily paid a part of the debt in question. There is no other account between the parties and there is no other debt due by the defendant to the plaintiff than that appearing in the account When he made these two payments, the defendant wrote a letter to the plaintiff as follows: "The reason for writing the letter is that your letter is

received. I have sent currency notes of Rs. 500 and a Hundi for Rs. 235, in all Rs. 735. Credit them." It is true that this letter does not in terms contain any reference to the debt in question, nor does it state in terms that the sums were to be treated as part-payments of the debt in question. But the letter itself refers to a letter received by the defendant from the plaintiff. The letter which would be in the possession of the defendant has not been produced, and there is no evidence of the contents of that letter. The account shows that the debt in question was ascertained sometime before the payments. The state of the accounts and the terms of the letter clearly show that the defendant was either aware or made aware at the time of these payments of the existing state of the accounts which would include the debt in question, and further that he made the payments not intending that they were to be treated as payments in full satisfaction of the amount then due, but in the ordinary course intending thereby satisfaction of the amount due on the account to the extent of the payments.

The question is whether, on these facts, the payments made satisfy the requirements of section 20 of the Indian Limitation Act. That section provides that where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor, a fresh period of limitation shall be computed from the time when the payment was made, subject to the proviso that in the case of part-payment of the principal of the debt the fact of the payment appears in the handwriting of the person making the same. In the present case there can be no doubt about the fact of a part of the debt having been paid by the debtor on the state of the accounts. There is no doubt also that the fact of the payment appears in the handwriting of the person making the same. It is urged, however, that the proviso is not satisfied, as the fact that the payment was made in part satisfaction of the debt in question does not appear in the handwriting of the person making it. I do not think that the proviso requires that to be done in terms. It seems to me on the words of the proviso that if the fact of the payment appears in the handwriting of the person making the same and if it appears on the evidence in the case that the payment was in part satisfaction of the principal of a debt, the requirements of the section would be satisfied. The argument urged on behalf of the respondent requires the reading of words in the proviso, which are not there. The words in the proviso refer to the fact of payment and not to the fact of the payment being a part-payment of the principal. It is not without significance that the words 'as such' used with reference to the payment of interest are not used with reference to the part-payment of the principal. The view I take is consistent with the decision in *Jada Ankamma* v. *Rama Sastrulu* (1) and the observations in *Kedar Nath Mitter* v. *Dinobandhu Shaha* (2). In the present case the lower Appellate Court seems to me to have proceeded upon an erroneous view as to the meaning of the proviso. The decision in *Ranchordas* v. *Pestonji* (3) relied upon by the lower Appellate Court does not seem to me to conflict with the view which I take of the proviso; on the contrary some of the observations in the judgment seem to support that view. All that is necessary, in my opinion, for the creditor to prove in such a case is that the fact of the payment appears in the handwriting of the person making the same and further that the payment is really in part satisfaction of the principal of a debt. If these two facts are established, the creditor is entitled to have the benefit of the saving provisions of section 20 on the question of limitation. In the present case both the facts are proved. The payments appear in the letter, written by the debtor: and the same letter taken along with the undisputed facts as to the state of the accounts between the parties, clearly shows that the payments were in part satisfaction of the debt in question.

I would, therefore, allow this appeal, set aside the decree of the lower Appellate Court, and allow the plaintiff's claim for Rs. 1,197 with interest at 6 per cent., from the date of the suit to the date of payment with costs throughout on the defendant.

(1) 6 M. 281; 2 Ind. Dec. (N. S.) 475.
(2) 31 Ind. Cas. 626; 42 C. 1043 at p. 1048; 19 C. W. N. 724.
(3) 9 Bom. L. R. 1329.

PASUPATI MUKHERJEE *In the goods of.*

HAYWARD, J.—I agree. The account in the books of the plaintiff showed that there was a sum of about Rs. 300 due besides the debt of Rs. 1,350 sought in this litigation to be recovered from the defendant. The defendant made two payments, one of Rs. 500 and the other of Rs. 235 in response to a letter received by him, but which he has not produced. The first payment was sufficient to wipe off the Rs. 300 odd due and to leave besides a balance of some Rs. 200, which together with the other payment of Rs. 235 would be available against the debt of Rs. 1,350 odd demanded in this litigation from the defendant. It seems to me that the inference naturally to be drawn from these facts would be that this balance of Rs. 435 was intended as a part-payment of the principal sum of Rs. 1,350 odd, which must have been included in the demand which was no doubt made in the letter which has not been produced by the defendant. This inference would seem to me to be justified on the principles laid down in the cases of *Evans* v. *Davies* (4) and *Friend* v. *Young* (5). It was, however, held at the trial that that would not be enough and that it would be necessary to show not only that such part-payment was noted in the handwriting of the defendant, but also that the principal sum towards which it was paid should also be noted in the handwriting of the defendant under the proviso to section 20 of the Indian Limitation Act. It seems to me, however, that that was an error. It was not required by the express words of the proviso that anything but the payment should be noted in the handwriting of the person making it. It was not expressly provided that the principal debt to which the payment was made should also be noted in the handwriting of the person making it and that was pointed out by Sir Lawrence Jenkins in the case of *Kedar Nath Mitter* v. *Dinabandhu Shaha* (2). There a cheque drawn in favour of the payee was the document which noted the part-payment and there would not be in such a document any mention of a principal debt towards which the payment was made. It would appear to me, therefore, that it was sufficient to prove that the payment was noted in the handwriting of the defendant and it was not necessary to prove besides anything more than that the payment was intended to be a part payment of the principal sum demanded from the defendant. It was not necessary, that is to say, to have a description of the principal debt also noted in the handwriting of the defendant. The demand, therefore, for the balance due upon this debt of Rs. 1,350 odd was, in my opinion, saved from the bar of limitation by the provisions of section 20 of the Indian Limitation Act.

There ought, therefore, in my opinion, to be a decree in favour of the payee as proposed for Rs. 1,197 principal with interest at 6 per cent. from the date of suit till payment with costs from the defendant in all Courts.

Appeal allowed.

(4) (1836) 4 Ad. & E. 840; 2 H. & W. 15; 6 L. J. K. B. 268; 111 E R. 1030.

(5) (1897) 2 Ch. D. 421 at p. 436; 78 L. T. 222; 46 W. R. 189.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

August 21, 1919.

Present:—Mr. Justice Rankin.

In the goods of PASUPATI MUKHERJEE, DECEASED.

Administrator Generals Act (III of 1913), s. 11, applicability of, where Administrator-General appointed executor.

The fact that the Administrator-General is appointed to be the executor of a Will, is no bar to his obtaining, under section 11 of the Administrator-General's Act, an order to take possession of the assets before applying for Probate of the Will. [p. 432, col. 1.]

Mr. *B. L. Mitter*, for the Petitioner Administrator-General.

Messrs. *O. R. Das* and *I. B. Sen*, for the Respondent.

JUDGMENT.—In this case I think there is power on the facts of the present case to make the order which is asked for under section 11 of Act III of 1913. This estate consists of shares, some of which, though by no means necessarily all of which, may want looking after in the sense that their value may be going up and down, also in

PASUPATE MUKHERJEE, *In the goods of.*

the sense that dividends require to be collected, and further in the sense that bonus shares may require to be applied for and obtained in order that the most may be made of the deceased's estate. It is not disputed that the suggestion that the Administrator-General should have the estate under section 11, would be anything except a convenient and cheap method to make sure that this property should not come to any harm; but on behalf of the respondents to this motion, Mr. Sen has argued before me that in view of the fact that the applicant here alleges that there is a Will and a valid Will, of which he had been appointed executor, and notwithstanding the fact that the execution of the Will is disputed and the validity, even if it were duly executed, is also disputed, section 11 does not apply. Now it seems to me that there being no difficulty with regard to the condition as regards this testator having left estate within the local limits of the jurisdiction of this Court; and the applicant not alleging that there is no person immediately available who is legally entitled to the succession of this estate, I have to look at the second condition mentioned in the second part of section 11:—"Such Court is satisfied that danger is to be apprehended of misappropriation, deterioration, or waste of such assets before it can be determined who may be legally entitled to the succession thereto." Mr. Sen has argued that if it is even alleged by the party applicant that there is a valid Will, that prevents him, and I rather gather that he thinks it prevents anybody else, having recourse to that section. I do not think so. I do not see why the word "succession" should be read as meaning "intestate succession." I think that the executor, as in this particular instance, is the universal successor to his testator. It seems to me that it would be a very extraordinary thing if such a very common case were left out of the benefit of section 11, it being a well-known fact that the commonest case, when difficulties of this kind arise, is a case where one person propounds a Will and the other person says that there is no Will at all. Another way of looking at the matter is this:—When you have two parties, one of whom affirms that there is a Will and the other that there is no Will, it seems to me perfectly clear that at all events on an application of the latter party, the powers of section 11 would apply. I think that although, as a matter of fact, where a party is going to propound a Will, it will in general be the better course for him to make an application for probate and get an administrator *pendente lite*, nevertheless when the Administrator-General does apply, and one party intends to contend that there is a valid Will and the other party contends that there is no valid Will, he comes within that section. Sections 12 and 13 are explained by Mr. Sen as applying only to cases where a person comes forward and unexpectedly propounds a Will. I think there is no reason in sections 12 and 13 which requires a condition of unexpectedness at all. I think the words "before it can be determined who may be legally entitled to succession thereto" include what is perhaps the commonest case of all, namely, a contest between two people, one of whom propounds a Will and the other of whom alleges that there was an intestacy. That being so, I think the application is within the powers of section 11. There is no reason why the power should not be exercised in view of the fact that nobody can suggest a better or more businesslike course.

I should like to say, however, that the express directions in the Will with regard to the selling of these shares should be carefully observed and applied by the Administrator-General. I do not propose to give the Administrator General any special directions in the matter, but I do want to point out to him that his petition is just a little recklessly expressed and might lead persons, who are a little timorous, to suppose that he was going to sell these shares wholesale and convert them into cash. It is not intended that he should do anything of the sort. He has a discretion in the matter, but he must exercise that discretion wisely and carefully and not on large and general principles. The application is allowed. Both parties will get their costs out of the estate. Mr. Mitter will get his costs as between attorney and client.

Application allowed.

In re MULCHAND.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 2 OF 1918.

February 12, 1919.

Present:—Mr. Kennedy, A. J. C., and Mr. Raymond, A. J. C.

In re MULCHAND BHOPATRAI—APPLICANT.

Civil Procedure Code (Act V of 1908), s. 115—Legal Practitioners Act (XVIII of 1879), ss 36, 39—Proceedings under Legal Practitioners Act—Revision—High Court, interference by—Enquiry, nature of.

A High Court has no power under section 115, Civil Procedure Code, to interfere with an order under section 36 of the Legal Practitioners Act. [p. 43, col. 2: p. 434, col. 1.]

The enquiry under section 39 of the Legal Practitioners Act is of the nature of a departmental enquiry, and it is enough if it is conducted in such a way that the officer enquiring acts with substantial justice and gives the person against whom proceedings are being taken an opportunity to show cause. [p. 433, col. 2.]

In the matter of an application by Mulchand Bhopatrai for revision of the order of the Joint Judge, Hyderabad, declaring him a tout.

Mr. *F J Deverteuil*, for the Applicant.

Mr. *T. G. Elphinston*, Government Pleader, for the Crown.

JUDGMENT.

KENNEDY, A. J. C.—This applicant was declared a tout by the Joint Judge of Hyderabad in an enquiry held by him under the Legal Practitioners Act, XVIII of 1879. He comes here in revision under section 115 of the Civil Procedure Code. I am of opinion that we have no power to interfere under that section with the order under section 36 of the Legal Practitioners Act. But I propose in this particular case to give reason why, even if we had full power, we should not interfere.

It is only under the third clause of section 115, Civil Procedure Code, that we should have any power to modify the order before us. The Counsel for the applicant has abandoned his contention that the Joint Judge had no jurisdiction to hold the enquiry. Under that third clause the Court will not interfere, where the trial Court has come to a conclusion to which the revisional Court might have come. Had it been trying the case originally, a Court has every jurisdiction to decide wrongly on the evidence before it. It is only in case where there was some flagrant injustice in the procedure for accumulating evidence, or where the decision was entirely unsupported by evidence, that this Court would be justified in interfering. In the latter case the original Court would not be acting as a judge at all but as a diviner. The Counsel for the applicant says he is unable to urge that the evidence on the record, if believed, is not such on which a Court might conscientiously base an opinion that this applicant was a tout. We do not, therefore, go into the evidence to ascertain whether we on that evidence would have decided in the same way as the Joint Judge has done.

The Counsel for the applicant lays much stress on the refusal of the Joint Judge to summon certain witnesses which the applicant wished to summon there.

It is clear from section 39, Legal Practitioners Act, that the enquiry prescribed is not an enquiry of the nature of a criminal trial and indeed such an enquiry would be by no means fitted for arriving at the truth. The enquiry is far more of the nature of a departmental enquiry and it is enough if it is conducted in such a way that the officer enquiring acts with a substantial justice and gives the person against whom proceedings are being taken an opportunity to show cause.

The complaint of the applicant is that certain witnesses were not summoned. I am of the opinion that there was no obligation on the Joint Judge to summon these particular witnesses, and I do not agree with the ruling of the Punjab Chief Court that the enquiring officer is bound to summon all witnesses called by the person against whom proceedings are being taken.

It is desirable that proceedings of this kind should be disposed of as promptly as possible and as is consistent with justice, and that outsiders should not be exposed to harrasment and vexatious summoning. The enquiring officer, no doubt, is under a serious responsibility in refusing to summon evidence, but in the present case the discretion appears to have been properly exercised. These witnesses were merely to character and to state that the applicant

was a clever Munshi and to say that they had never heard that the applicant was a tout. They were all junior Pleaders. Eight witnesses of standing were summoned who might have given precisely the same evidence, but only one was examined. What was the opinion of the Bar in general as to this applicant clearly appeared from other evidence in the papers. I think then that the refusal of the Joint Judge to summon these five witnesses was proper. I, therefore, have no jurisdiction to interfere.

RAYMOND, A. J. C.—The Legal Practitioners Act, XVIII of 1879, makes no provision for appeals or applications in revision in respect of an order made under section 36 of that Act. In *Madho Ram, In the matter of the petition of* (1) it was held that orders under section 36 of Act XVIII of 1879 do not fall within the powers of civil revision conferred by section 622, Civil Procedure Code, and that the High Court could only interfere by virtue of the powers of superintendence conferred upon it by section 15 of the High Courts Act, 24 and 25 Vict., Chap. 104. This decision has been followed in *Kedar Nath, In re* (2). In *Man Singh* v. *Emperor* (3) the Punjab Chief Court held that an order under section 36 of Act XVIII of 1879 cannot be revised either under section 622, Civil Procedure Code, or section 439 of the Criminal Procedure Code.

Section 115 of the Code of 1908 under which the present application is made corresponds to section 622 of the Civil Procedure Code of 1882, and hence in view of the above rulings with the reasoning of which I am in concurrence, this application appears to be unentertainable, and must be dismissed.

Even if we had jurisdiction to interfere, I should have declined to do so for reasons given by my learned brother.

Application dismissed.

(1) 21 A. 181; A. W. N. (1899), 15; 9 Ind. Dec. (N. S.) 825

(2) 1 Ind. Cas. 143; 31 A. 59; 6 A. L. J. 22; A. W. N. (1908) 278; 9 Cr. L. J. 59.

(3) 3 Ind. Cas. 977; 10 Cr. L. J. 442; 115 P. L. R. 1909; 28 P. W. R. 1909 Cr.; 11 P. R. 1909 Cr.

MADRAS HIGH COURT

CRIMINAL REVISION CASE No. 458 OF 1919.

CRIMINAL REVISION PETITION No. 391 OF 1919.

November 20, 1919.

Present:—Mr. Justice Krishnan.

PACKIRIYA PILLAY—ACCUSED—PETITIONER

versus

MUTHUKRISHNA IYER—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 426—Mischief—Intention to cause wrongful loss, finding as to, necessity of

In order to sustain a conviction under section 426 of the Penal Code, it is essentially necessary to find that the accused had the intention of causing wrongful loss to the complainant, or that he had knowledge that he was likely to cause such loss. A mere finding that wrongful loss was caused is not sufficient [p. 435, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional 1st Class Magistrate, Negapatam, in Criminal Appeal No. 32 of 1919, preferred against the order of the 2nd Class Magistrate, Tiruvallur, in Calendar Case No. 14 of 1919.

FACTS appear from the judgment.

Dr. *S. Swaminadham*, (with him Mr. *T. S. Anantharama Iyer*), for the Petitioner.—The conviction is bad in law. There was a *bona fide* dispute between the parties with regard to the ownership of the durg. The Court has not found that the accused acted *mala fide*. To constitute the offence it is not enough merely to show that wrongful loss was, as a matter of fact, caused to the complainant. It must also be proved that the accused intended to cause the loss or knew that the loss would be caused.

Mr. *C. Narasimhachari*, for the Public Prosecutor, and Mr. *T. Subramanya Ayyar*, for the Complainant.—The wrongful loss has been caused and there are circumstances to show that it was not a *bona fide* dispute between the parties, though there is no express finding.

ORDER.—I think the conviction of the accused for mischief cannot be supported. There is no finding by the lower Court that the accused had any intention to

cause any wrongful loss or that he had any knowledge that he was likely to cause such loss. Such a finding is essential for a conviction under section 426, Indian Penal Code. There seems to have been a *bona fide* dispute as to the ownership of the dung in question, the accused claiming it as his own. In such circumstances it is difficult to hold that the intent or knowledge required is proved, unless the claim is found to be put forward *mala fide* without any foundation for it—merely as a defence. That does not seem to be the case here. The mere finding that wrongful loss was caused to the complainant by the accused's act is not sufficient to bring it within the scope of section 426, Indian Penal Code.

The conviction and sentence of the accused are set aside and the fine and Court fees, if paid, are directed to be refunded.

M. C. P.

Conviction quashed.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 144 OF 1920.

April 8, 1920.

Present :—Justice Sir P. C. Banerjee, Kt.

RAHIM BAKHSH AND ANOTHER—APPLICANTS

versus

EMPEROR THROUGH MRS. URQUHART—OPPOSITE PARTY

Penal Code Act XLV of 1860, s 504- Intentional insult—Offence, what constitutes—Discourtesy and bad manners, whether amount to insult.

In order to constitute an offence under section 504 of the Penal Code, it is necessary that the insult should have been intentionally caused and thereby provocation given with the intention or knowledge that such provocation is likely to cause the person provoked to break the peace or to commit any other offence Mere discourtesy and bad manners do not amount to a criminal offence for which a person can be criminally punished [P 434, col. 1]

Criminal reference submitted by the Sessions Judge, Jhansi, dated the 5th of February 1920.

Mr. *G. P. Boys* and Dr. *S. M. Sulaiman*, for Applicant No. 1.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—Rahim Bakhsh and Habib Bakhsh have been convicted under section 504, Indian Penal Code. The former was sentenced to one week's simple imprisonment and the latter to a fine of Rs. 50. They applied in revision to the learned Sessions Judge. He has referred the case to this Court with the recommendation that the conviction of Habib Bakhsh should be set aside and the sentence on Rahim Bakhsh be reduced to a fine of Rs. 300. Rahim Bakhsh has also filed an application for revision in this Court and it is contended on his behalf that the conviction, under section 504, is not justified by law. It appears that Rahim Bakhsh carries on a furniture shop in Jhansi Cantonments. Captain Urquhart, the husband of the complainant, went to him for the hire of the furniture, and some articles were marked on a list which was apparently shown to the accused, Rahim Bakhsh. The following morning a cart was sent to Rahim Bakhsh for the furniture but he sent it back with the intimation, if the statement of Mahboob be true, that he would supply the articles after an hour. When the cart went again to Rahim Bakhsh, he asked the messenger to request his mistress to come and select the furniture. Thereupon Mrs. Urquhart accompanied by Mrs Thomson went to the shop of Rahim Bakhsh. He was at the time seated in a chair with his feet up and did not stand up when the ladies arrived. Mrs. Urquhart in her deposition says that she asked Rahim Bakhsh why he did not send her the furniture. Rahim Bakhsh remained seated in his chair and said, "How can I give you what I have not got?" He was asked to stand up but he did not move and waved the list of the furniture and said. "Why are you offended? I shall not give you any furniture." She says that she got very angry and at the persuasion of Mrs. Thomson left the shop. The facts as proved by the evidence and as found by the Court of first instance are that the man remained seated in his chair when the ladies spoke to him; that he did not get up when he was asked

to do so, and that he finally refused to give her any furniture.

Probably his tone was unsatisfactory and it may be that he was regarded as behaving in a rude and insolent manner to Mrs. Urquhart. That could not be sufficient within the meaning of section 504 to constitute intentional insult. Under that section it is necessary that the insult should have been intentionally caused and thereby provocation should be given with the intention or knowledge that such provocation was likely to cause the person provoked to break the public peace or to commit any other offence. It is clear in this case that the accused never intended that the provocation which he might have given to the complainant would lead the complainant to commit a breach of the peace or any other offence, and it cannot be said that he had the knowledge that a lady in the position of the complainant was likely to commit a breach of the peace or any other offence as a result of the provocation he might have caused. His conduct in not getting up from his chair was certainly most discourteous to the lady, but the discourtesy and bad manners did not amount to a criminal offence for which he could be criminally punished. As regards the second accused all he did was to say to the complainant that he would not give her any furniture and that she might get it elsewhere. This certainly did not bring him within the purview of section 504. In my opinion neither of the accused was guilty of the offence punishable under the aforesaid section and neither of them should have been convicted. I set aside the conviction and sentence in the case of both the accused. The fine imposed on the second accused, if paid, should be refunded.

Conviction set aside.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 715 OF 1919.

October 29, 1919.

Present:—Mr. Pratt, J. C.

KAUNG KI—APPELLANT

versus

EMPEROR RESPONDENT.

Burma Excise Act (V of 1917), ss. 41 (c), 63 (1) (a)—Offence under s. 41 (c)—Sanction for prosecution by Collector, form of.

A mere order by the Collector sanctioning the prosecution of a person under section 41 (c) of the Burma Excise Act on the report of the District Superintendent of Police is not a sufficient compliance with the provisions of section 63 (1) (a) of the Act The Collector must authorise some particular Excise Officer to make the report or complaint.

Mr *A. C. Mukerjee*, for the Appellant.

Mr. *H. M Lutter*, for the Crown.

JUDGMENT.—Kaung Ki was convicted by the Headquarters Magistrate, Shwebo, of an offence under section 41 (*c*) of the Excise Act.

Section 63 (1) (*a*) of the Act expressly provides that no Magistrate shall take cognisance of an offence punishable under section 41 except on the complaint or report of the Collector or of an Excise Officer authorised by him in this behalf.

In the present instance the Collector, on a report from the District Superintendent of Police, sanctioned the prosecution of the applicant but did not pass an order authorising any particular Excise Officer to make a report or complaint

A report was then made to the Magistrate by a Sub Inspector of Police

The provisions of the law must be construed strictly, and in the present instance I must hold that the requirements of section 63 (1) (*a*) have not been satisfied.

If the Collector did not wish to make a report or complaint himself, it was for him to authorise some particular Excise Officer to make the report or complaint.

A mere order sanctioning the prosecution on the report of the District Superintendent of Police is not sufficient.

For this reason the conviction cannot be maintained and must be set aside.

It is not necessary to go into the facts

of the case under the circumstances, but I would point out that there is no evidence that any particular employee of the licensee sold the brandy.

Appeal allowed.

PATNA HIGH COURT.
CRIMINAL REVISION No. 348 OF 1919.
October 15, 1919.
Present :—Mr. Justice Das.
PIR ALI KASAB AND OTHERS—
PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Security for breach of peace Jurisdiction of Magistrate, essential condition of—"Wrongful act," meaning of—Penal Code Act XLV of 1860., s. 295—Killing of dedicated bull—Offence.

An essential condition of the jurisdiction of a Magistrate to act under section 107, Criminal Procedure Code, is that he should have some tangible evidence that some definite wrongful act is contemplated, which act, if committed, is likely to cause a breach of the peace. [p. 439, col.].

The words "wrongful act" in section 107 mean an act forbidden by the Penal Statutes of India, or declared to be penal or wrongful by such Statutes. [p. 439, col.].

The killing of a dedicated bull for the sake of the meat and the value of the skin is not an offence under section 295 of the Penal Code. [p. 439, col.].

Criminal revision against the order of the Officiating District Magistrate of Gaya, dated the 10th September 1919, affirming the order, dated the 5th August 1919, of the Sub Divisional Officer, Jahanabad.

FACTS appear from the order of the Deputy Magistrate, which was as follows:—

"Proceedings in this case have been drawn up on the report of the Inspector of Police, Jahanabad, dated 2nd July 1919. The accused have been called upon to show cause why they should not be bound down to keep the peace, on the ground that they have seriously offended the religious feelings and sentiments of the Hindu public by killing a dedicated bull and are likely to commit similar acts, which are calculated to wound the religious feelings of the Hindu community and to cause serious breach of the public peace and tranquillity.

The facts which have abundantly been proved in the case are these:—On the evening of the 5th June last the accused Nos. 6 and 9 enticed a bull to the house of accused No. 1. The ostensible object was to utilise the bull in covering a cow. A *pahar* (three hours) after nightfall one or two of the immediate neighbours of Pir Ali heard something which roused their suspicion that the bull had been or was about to be killed. Information was given to the Dafadar who came to the place, and he and others peeped into the Angan of Pir Ali and saw the first eight accused flaying or assisting in the flaying of a bull. They talked among themselves: 'Make haste. They have come to know of it' The Dafadar deputed a Chowkidar to watch in the fields to the south of Pir Ali's house, while he sent another Chowkidar to inform the Arwal Police. Shortly after accused Nos. 1, 2, 7 and 8 were seen hastening towards the south. The Chowkidar who was watching challenged them. Thereupon accused No. 7, who was carrying a basket, threw it down and he and his companions ran away. In the basket were found the head and the hide of the slaughtered bull. Inside the houses of the accused Nos. 1 and 2 were found lumps of meat and marks of blood. The Chowkidar lodged information at the Thana at 1 o'clock on the morning of the 6th June. The bull was a dedicated one and had been dedicated by one Paras Singh. The hide and the head were shown to him and he identified them as having belonged to the bull that had been dedicated by him.

These facts have been proved by the evidence of both Hindus and Muhammadans and cannot be challanged. Well-to do Hindus consider it a meritorious act to dedicate bulls on the occasion of the Sradh of their deceased relations and such bulls are worshipped by the Hindus as Deotas (gods). To kill or even to ill-treat such animals grievously offends their religious feelings. In the present case the evidence shows that as soon as the news of the killing of the bull spread, lots of Hindus began to assume and assumed a threatening attitude, and but for the timely inter-

PIR ALI v. EMPEROR.

vention of the Dafadar and the Sub Inspector who came later, there would have been serious riots. To appreciate the gravity of the situation one has only to remember the Bakrid disturbances in Sahabad and Arwal in October 1917.

It may be urged that the accused cannot be bound down for doing something for which they cannot be prosecuted. This contention may or may not be tenable. The accused must, however, be bound down inasmuch as their future conduct is very likely to provoke a disturbance of the public peace. The evidence goes to show that as soon as the accused came to know that they were not going to be criminally prosecuted for killing the bull, they went to the local mosque with musical instruments playing and shouting that they would henceforth kill cows and bulls in open streets and lanes and that the Sala Hindus could do nothing. This fact will convince every one that the accused are not content with killing the bull of Paras Singh, but are determined to kill other bulls and cows, not secretly as they did the bull of Paras Singh, but openly and publicly in utter defiance and disregard of the feelings and sentiments of the Hindus. What the consequence of such acts will cannot be open to doubt. There will surely be a recrudescence of the disturbances of 1917. This must be prevented and the only way to prevent it is to bind the accused down.

All the accused have been proved by evidence to be liable. Accused Nos. 6, 8 and 9 are proved to have enticed the bull to the house of Pir Ali; accused Nos. 1 to 8, both inclusive, are proved to have flayed or assisted in the flaying of the bull; accused Nos. 1, 2, 7 and 8 are proved to have tried to escape with the hide and head of the bull; they are all proved to have uttered the threat that henceforth they would kill bulls and cows in public streets. None of them is, therefore, deserving of being discharged. I must, however, make exception in the case of Yatim Mulahzada. He is a boy of 12 and is not likely to occasion mischief if the others are restrained. I may mention here that accused Nos. 1, 2, and 7 are full brothers, accused No. 8 is the son of accused No. 2 and accused Nos. 3, 4 and 5 are sons of accused No. 1.

For the above reasons I discharge accused No. 9 under section 119, Criminal Procedure Code I am satisfied that it is extremely necessary in order to maintain public peace that the accused Nos. 1 to 8, both inclusive, should be bound down and I accordingly under section 118, Criminal Procedure Code, order that they each execute a bond of Rs. 200 with two sesurities of Rs. 200 each to keep the peace for one year and that in default of furnishing such security they undergo simple imprisonment for one year each."

Messrs. *Akbari* and *Khurshed Husain*, for the Petitioners.

The Government Pleader, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the Sub Divisional Magistrate of Jahanabad directing the petitioners under section 118, Criminal Procedure Code, to each execute a bond of Rs. 200 with two sureties to keep the peace for one year. Proceedings were taken under the provisions of section 107, Criminal Procedure Code.

It appears that the petitioners enticed a dedicated bull to the house of one of them and slaughtered it secretly and at night for the sake of the meat and the value of the skin. Some of the neighbours discovered the purpose of the petitioners and the Police took up the matter. A case under section 295 and section 429 was started against the petitioners, but they were ultimately discharged on the 7th July last. Meanwhile the Police recommended initiation of proceedings under section 107 of the Code, and the petitioners, having been discharged on the 7th July, were arrested on the morning of 8th July.

The Police report, upon which proceedings were initiated stated that the action of the Muhammadan butchers had created a sensation among the Hindus of the locality and wounded their feelings, and, as it was expected that the petitioners as butchers would not give up their habit but would commit such mischief at any moment which might disturb public tranquillity, they ought to be bound down under section 107 of the Code. Upon this report the learned Magistrate, acting under section 112 of the Code, called upon the

petitioners to show cause why they should not be bound down to keep the peace on the grounds that they have seriously offended the religious feelings and the sentiments of the Hindu public by killing a dedicated bull and are likely to commit similar acts, which are calculated to wound the religious feelings of the Hindu community and to cause serious breaches of the public peace and tranquillity.

The first question that arises for my consideration is, what was the justification of the learned Magistrate to take proceedings under section 107 of the Code? The learned Assistant Government Advocate suggests that the Magistrate was informed that the petitioners were likely to do a wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. It is, in my view, an essential condition of the jurisdiction of the Magistrate to act under section 107 of the Code that he should have some tangible evidence that some definite wrongful act is contemplated which act, if committed, is likely to cause a breach of the peace. Now, is there a suggestion, either in the Police report or in the notice issued by the learned Magistrate, that a definite wrongful act was contemplated by the petitioners? In my judgment, there is none. In the case of *Romesh Chunder Sanyal* v. *Hiru Mondal* (1) it was ruled that where a dedicated bull was killed by certain Muhammadans for the sake of the meat and the value of the skin, there was no offence under section 295, Indian Penal Code. The Allahabad High Court went elaborately into the question in the case of *Shahbaz Khan* v *Umrao Puri* (2). The learned Judges expressed their opinion as follows: 'In view of these authorities it appears to us indisputable that under certain limitations the slaughtering of kine by Muhammadans is not illegal. It is the legal right of every person to make such use of his own property as he may think fit, provided that in doing so he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others."

(1) 17 C. 852; 5 Ind. Dec. N. S. 1112.

(2) 30 A. 181; A. W. N. (1905) 64; 5 A. L. J. 147; 7 Cr. L. J. 881.

The Assistant Government Advocate has contended that a wrongful act does not necessarily mean an act forbidden by the Penal Statutes. According to him it means an act not correct or justifiable in fact or morals, in other words, an improper act. I cannot assent to this argument. Once we concede this proposition, there would be no end to the difficulties of our Criminal Courts, difficulties in having to distinguish between right and wrong from the moral standpoint. An act which may seem wrongful not to one individual, to one sect, to one community, may be a highly meritorious act in the estimation of another individual, another sect, another community. Who is to set this standard of right and wrong for our Criminal Courts? If the words "wrongful act" are interpreted as suggested by the learned Assistant Government Advocate, the consequence would be that they would stand absolutely without limit of any kind. In my view, words which are clearly wide in their meaning must be qualified in some way and ought to receive some limitation. That limitation, in my judgment, is to be found in the Penal Statutes of India. The case relied upon by the Assistant Government Advocate, the case of *Emperor* v. *Murli Singh* (3), does not help him at all. In that case it was held that persons who performed religious ceremonies in a place not set apart for the purpose and where no such ceremonies had been performed before, and who did so with the deliberate intention of triumphing over, insulting and wounding the religious feelings of their neighbours, committed a wrongful act within the meaning of section 107 of the Code. Clearly such acts are forbidden by the Indian Penal Code. I hold that the words "wrongful act" in section 107 of the Code mean an act forbidden by the Penal Statutes of India or declared to be penal or wrongful by such Statutes.

If I am right in the view which I take of the section, then clearly there was no jurisdiction in the Magistrate to act under section 107 of the Code. To adopt the words of Richards and Tudball, JJ., in the case of *Mohammad Yakub* v *Emperor* (4), 'To justify an order under

(3) 13 Ind. Cas. 912; 33 A. 775; 13 Cr. L. J. 170.

(4) 6 Ind. Cas. 454; 32 A. 571; 7 A. L. J. 649; 11 Cr. L. J. 865.

section 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some wrongful act that may probably occasion a breach of the peace. In our judgment there was no reason to believe that any of the applicants were about to do any of these things." This was a case where cows were sacrificed quietly and secretly in a mosque and a private house, and the Allahabad High Court set aside the order under section 107 against the petitioners.

I hold that the proceedings against the petitioners were not warranted by law and that consequently the order must be set aside.

I ought to mention that some arguments were advanced by the learned Assistant Government Advocate on the evidence adduced in the case, namely, that the petitioners went to the local mosque with musical instruments playing and shouting that they would henceforth kill cows and bulls in open streets and lanes so that the Hindus could do nothing. I have grave doubts whether this evidence was admissible, inasmuch as the Magistrate clearly did not act on any information of this definite contemplated act on the part of the petitioners. It was argued, however, that this was evidence of conduct in support of the allegations on which proceedings were initiated. I am of opinion that if there was anything in the allegations themselves on which proceedings could be initiated, evidence of subsequent conduct would be admissible in support of those allegations. But if on those allegations the learned Magistrate had no jurisdiction to act, evidence of subsequent conduct is not admissible in order to confer a jurisdiction when there was none originally. I have come to the conclusion that, in this case, the Magistrate had no tangible evidence that some definite wrongful act was contemplated which act, if commited, might cause a breach of the peace. That being so, he had no jurisdiction to act under section 107 of the Code at all.

I allow this application, set aside the order complained against and direct that the bail bonds be discharged.

Application allowed.

PRIVY COUNCIL.

APPEAL FROM THE MARTIAL LAW COMMISSIONERS AT LAHORE.

February 20, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

BUGGA AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Martial Law Ordinance (IV of 1919), applicability of—Ordinance, whether confined to persons taken in the act of committing an offence specified in Regulation X of 1804—Government of India Act, 1915, 5 and 6 Geo. V, c. 61, ss. 65 (2), (3), 72—Government of India (Amendment) Act, 1916, 6 and 7 Geo. V, c. 37, s. 2 (2)—Restrictions on powers of Indian Legislature—Right to be tried by ordinary Courts, whether can be taken away—Laws affecting allegiance—"Repugnancy" between Indian Statutes and Acts of Parliament, how far invalidates Indian Statutes.

The Martial Law (Further Extension) Ordinance, 1919 (Ordinance No. IV of 1919) is not confined in its application to persons taken in the act of committing one of the offences specified in Regulation X of 1804, or to the persons and offences described in Martial Law Ordinance I of 1919, but extends to all offences committed on or after March 30th, 1919. [p. 447, col. 2]

Section 65, sub-section (2) of the Government of India Act, 1915, does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends: it refers only to laws which directly affect the allegiance of the subject, as by a transfer or qualification of the allegiance or a modification of the obligation thereby imposed. [p. 456 col. .]

Observations of Phear, J., in *Ameer Khan, In the matter of*, 6 B. L. R. 391 and 459 at p. 477, approved

It was argued that Ordinance IV of 1919 contravenes section 65 (3) of the Government of India Act, 1915, which prevents the Indian Government from empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe, the Ordinance containing no exception in favour of such subjects:

Held, that the Ordinance may properly be described as repugnant to the Act so far as British-born subjects are concerned, but that it is void only to the extent of that repugnancy, *i. e.*, in the case of His Majesty's subjects born in Europe. [p. 446, col.).]

Appeal by special leave from a judgment of a Commission appointed under the Martial Law Ordinances of 1919 and sitting at Lahore.

FACTS.—All material facts of the case are set out in their Lordships' judgment, which reproduces the Ordinance under considera-

tion. The sole question on this appeal was as to the jurisdiction of the Tribunal, *i.e.*, whether it was competent to try the appellants for the offences of which they were convicted.

Sir *John Simon*, *K. C.* (with him Sir *R. Auckland*, *K. C.*, Messrs. *Dube* and *Palat* and, for the Appellants.—The Commission had no power to try appellants. None of them were taken in the act, or till after April 12, 1919. There may have been a very proper case for investigation, but Ordinance IV of 1919 did not apply. Ordinance I of 1919 was passed with retrospective effect under date April 14, 1919. An order of the Governor-General in Council of the 13th April, proclaiming Martial Law, had suspended the functions of the ordinary Criminal Courts in the cases of persons taken in the act of committing the offences enumerated in the Bengal State Offences Regulation 1804, which had been extended to the Punjab by Act IV of 1872: it provided that such persons were to be tried by Courts-Martial. Next day Ordinance I of 1919 was passed. The present accused were not persons covered by that Ordinance, nor do the offences charged against them fall within it. But after they had been arrested Ordinance IV of 1919 was enacted, and the question is what is meant by the words "any offence" in that Ordinance. There are two views possible. The narrower, and as we submit the correct construction, is that the Ordinance merely puts back the date of Ordinance I from April 13 to March 30. The virtue of this construction is that the Ordinance would be valid.

(SIR LAWRENCE JENKINS referred to the preamble, "offences other than those specified.")

The wider construction is that (subject of course to general or special orders of the Local Government) the Commission may try any person for any offence: as was put by a member of the Board when leave to appeal was granted, they might try a small boy for stealing apples If this be the true construction, we submit that the Ordinance is completely *ultra vires*: that it is an invalid piece of subordinate legislation. The legislative powers of the Government of India are derived from section 65 of the Government of India Act, 1915, and are subject to the limitations imposed by that section. Subordinate legislation is bad *in toto* if by its terms it exceeds its authority. Comyns, in his Digest under "By law," says (Chapter 7), "a By law, void in part, is void for the whole:" also, that "a By-law, being intire, if it be unreasonable in any particulars, shall be void for the whole." The test is whether the legislation as a whole is good, subject to this, that if there is a separable part which is good, it may stand.

Rex v. *Company of Fishermen of Faversham* (1).

Here the Legislature have purported, contrary to section 65 (3) of the Government of India Act, 1915, to empower a new Court to sentence people to death.

[LORD MOULTON: Does not that exception refer only to European British subjects?]

[The Attorney General, for the Respondent, referred to the Government of India Amending Act, 1916, section 2.]

The provisions as to the validity of Indian laws are contained in section 84: this section 2 of the later Act adds some words at the end of section 84. I submit they do not apply, This is a question of legislative power: you have two conflicting powers: I submit the Ordinance is not repugnant to the Act, but simply waste paper, invalid. Section 52 of the Act of 1916 has no greater force than the corresponding provisions of the Colonial Laws Validity Act, 1865 (sections 2, 3): it was enacted only because the Colonial Laws Act did not apply to India.

Further the whole Ordinance was invalid because it conflicted with section 65 (2) of the Government of India Act, 1915. The Governor General of India in Council was not competent to alter the constitution at law on which the allegiance of the subject depends. It was difficult to conceive of anything more fundamental than that the person charged with an offence should have the opportunity of being tried by the ordinary course of law:

(1799) 8 T. R. 352 at p. 356; 4 R. R. 692; 101 E. R. 1429.

the principle was recognised as far back as Magna Charta. This was not the case of people taken in open rebellion and tried during such rebellion; they were arrested as well as tried when the state of rebellion was over and the ordinary Courts of law were sitting and the Governor General in Council was not competent to deprive them of their constitutional right to be tried by those Courts.

Sir *R. Auckland* followed.

The Attorney General (with him the Solicitor General, Sir *Erle Richards, K. C.*, and Mr. *Kenworthy Brown*), for the Respondent:—The Commission had power to try the accused for the offences with which they were charged. Ordinance IV of 1919 enacted that such a Commission should have jurisdiction to try any person for any offence committed after March 30, 1919: there was nothing in it to limit it to the classes of offences which fall under the earlier Ordinance. The preamble, with the words "offences other than those specified," is inconsistent with any such limitation. Ordinance IV of 1919 may be void in the case of European British subjects, but that does not make it void in the case of others with regard to whom there is no repugnancy: this is the very case which section 2 of the Amending Act was designed to meet. The Commission were acting within their jurisdiction and there was ample evidence to support their findings.

Sir *Erle Richards* followed.

Sir *John Simon* replied.

JUDGMENT.

VISCOUNT CAVE.—This is an appeal by special leave from the judgment, dated the 2nd June 1919, of a Commission appointed under the Martial Law Ordinances of 1919 and sitting at Lahore. By that judgment twenty of the twenty-one appellants were convicted of offences under section 121 of the Indian Penal Code, that is to say, of waging or attempting to wage war against the King or abetting the waging of such war, and were sentenced to death and forfeiture of property; but it is understood that as to some of them the death sentence has since been commuted. The remaining appellant, Ghulam Hassan, son of Makham, was convicted of an offence under section 412 of the same Code, that is to say, of receiving stolen property from dacoits, and was sentenced to rigorous imprisonment for seven years. The question raised on the appeal is as to the competency of the Commission to try the appellants for those offences.

The facts may be stated as follows: At the end of March and during the first days of April 1919 there was serious unrest in certain parts of the province of the Punjab and this unrest culminated on the 10th April in the outbreak of open rebellion at Amritsar in that province and elsewhere, and the offences of which the appellants have been found guilty were committed at Amritsar on that date. The occurrences of the 10th April are stated in the judgment of the Commissioners as follows:—

"On April 10th, 1919, about noon, after the arrest of Kitchlew and Satyapal, disorder broke out in Amritsar, in the course of which an attempt was made to invade the Civil Station by a mob which had to be turned back by fire from troops and police. Shortly after this a mob attacked the National Bank situated in the City, brutally murdered Mr. Stewart, manager, and Mr. Scott, assistant manager, sacked and burnt the bank, and looted the godown, which contained cloth and other goods to the value of several lakhs of rupees. The Chartered and Alliance Banks were subsequently sacked. A Mission Hall, Church and the Religious Books Society's Depot were also attacked and burnt by the mob. There was no reason why these institutions should have been singled out by the mob or their leaders except that, as the evidence shows, they were out to destroy the visible manifestations of British connection with the country."

It was proved that the appellants, with the possible exception of Ghulam Hassan, were members of the mob and took an active part in the attack on the National Bank, and there was evidence that some of them took part in the actual murder of the manager and assistant manager. Bugga and Ratan Chand appear to have been the ringleaders. Ghulam Hassan was found in possession of property looted from the Bank. Bugga was arrested on the 12th April and the other appellants on subsequent dates. None of them were taken in arms or in the act of committing the offences with which they were charged.

On the 13th April the Governor-General

in Council, acting under the Bengal State Offences Regulation X of 1804 (which was extended to the Punjab by the Punjab Laws Act, 1872), made an order whereby, after reciting that he was satisfied that a state of open rebellion against the authority of the Government existed in the districts of Lahore and Amritsar, he suspended the functions of the ordinary Criminal Courts within those districts as regards the trial of persons of the classes referred to in the Regulation taken in arms in open hostility to the British Government or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding and abetting the enemies of the British Government within those districts, and established Martial Law within those districts; and by the same order he directed the immediate trial by Courts Martial of all such persons. Similar orders were subsequently made in respect of the districts of Gujranwala and Gujrat.

On the 14th April the Governor-General, acting under section 72 of the Government of India Act, 1915, made and promulgated the Martial Law Ordinance No. I of 1919 whereby it was provided that every trial in the districts of Lahore and Amritsar held under the Bengal State Offences Regulation, 1804, should, instead of being held by a Court-Martial, be held by a Commission consisting of three persons appointed in this behalf by the Local Government. It was provided that at least two members of every such Commission should be persons who had served as Sessions Judges or had such others legal qualification as therein mentioned. It was also provided that a Commission should have the powers of a general Court-Martial under the Indian Army Act, 1911, and should follow so far as might be the procedure prescribed by that Act, but power was reserved to the Local Government to direct that the Commission should follow the procedure of a summary general Court Martial. The finding and sentence of a Commission not to be subject to confirmation by the military authorities. Section 7 of the Ordinance was as follows:—

"7. Save as provided by section 6, the provisions of this Ordinance shall apply to all persons referred to in the said Regulation who are charged with any of the offences therein described, committed on or after the 13th April 1919."

By subsequent Ordinances the provisions of the above mentioned Ordinance No. I of 1919 were extended to Gujranwala and Gujrat, and power was given to impose a minor punishment in lieu of the death sentence.

In pursuance of the above mentioned Ordinance No. I of 1919, the Local Government of the Punjab duly appointed a Commission, consisting of Lieutenant Colonel A. A. Irvine, C. I. E., District and Sessions Judge; F. W. Kennaway, Esq., I. C. S., District and Sessions Judge; and I. C. Lall, Esq.

From the above statement it is clear that the appellants could not, if no further step had been taken, have been brought before the Commission for trial. They had not been taken in the act of committing any of the offences referred to in Regulation X of 1804, and the offences with which they were charged were committed before the 13th April 1919, the date mentioned in section 7 of the Ordinance. But on the 21st April, 1919, the Governor General, acting under section 72 of the Government of India Act, 1915, made a further Ordinance (referred to as Ordinance No. IV of 1919) in the following terms:

"GOVERNMENT OF INDIA.

"LEGISLATIVE DEPARTMENT.

"NOTIFICATION.

"*Simla, the 21st April*, 1919.

"*An Ordinance further to extend the application of the Martial Law Ordinance*, 1919.

"WHEREAS an emergency has arisen which renders it necessary to provide that Commissions appointed under the Martial Law Ordinance, 1919, shall have power to try persons and offences other than those specified in the said Ordinance:

"Now, therefore, in exercise of the power conferred by section 72 of the Government of India Act, 1915, the Governor-General is pleased to make and promulgate the following Ordinance:—

"Ordinance No. IV of 1919.

"*Short Title.*

"1. This Ordinance may be called the

Martial Law (Further Extension) Ordinance, 1919.

"*Commissions under Martial Law Ordinance*, 1919, *to try such cases as the Local Government may direct.*

"2. Notwithstanding anything contained in the Martial Law Ordinance, 1919, the Local Government may, by general or special order, direct that any Commission appointed under the said Ordinance shall try any person charged with any offence committed on or after the 30th March, 1919, and thereupon the provisions of the said Ordinance shall apply to such trials accordingly, and a commission may pass in respect of any such offence any sentence authorised by law.

"CHELMSFORD,

"*Viceroy and Governor-General.*

"H. M. SMITH,

"*Offg. Secretary to the Government of India*"

On the 22nd April the Governor-General in Council made a further order under Regulation X of 1804, whereby after reciting that he was satisfied that a state of open rebellion existed in the districts of Lahore, Amritsar, Gujranwala and Gujrat, he suspended the functions of the ordinary Criminal Courts in those districts in so far as trials held before Commissions in accordance with the provisions of Martial Law Ordinance No. IV of 1919 were concerned.

The Local Government of the Punjab was instructed by the Government of India that the Commissions appointed under Ordinance No. IV were to be used only for the trial of offences arising out of the recent disturbances.

The appellants having been charged with offences under various sections of the Penal Code, including sections 121, 302 and 412, as having been committed on the 10th April, the Local Government, acting under Ordinance No. IV of 1919, directed that they should be tried by the Court of Commissioners appointed under Ordinance No. I sitting at Lahore with the powers of a summary general Court-Martial, and convened the Commissioners for that purpose. The trial accordingly took place on the 29th May and the following days, and judgment was pronounced on the 2nd June. The Commissioners, while convicting the appellants (other than Ghulam Hassan) of an offence under section 121, added that certain of the accused could also be convicted under section 302, *i. e.*, for murder, but that they saw no necessity to discriminate, especially as in circumstances like those before them there was only one possible penalty for the offence or offences committed. Thereupon special leave was obtained from the Board to present this appeal.

Before the hearing of the appeal it was suggested by Counsel for the appellants that Ordinance No. IV of 1919 was capable of being construed as intended only to extend the operation of Ordinance No. 1 to offences committed before the 13th April, but not earlier than the 30th March, and accordingly that this Ordinance (like Ordinance No. 1) applied only to persons taken in the act of committing one of the offences specified in Regulation X of 1804. In their Lordships' opinion the Ordinance cannot be so construed. It is introduced by a recital that an emergency has arisen which renders it necessary to provide that Commissions appointed under the earlier Ordinance shall have power to try persons and offences other than those specified in that Ordinance, and it empowers a Commission to try any person charged with any offence committed after the specified date, and to pass in respect of such offence any sentence authorised by law. It would be difficult to find words indicating more clearly that the operation of the Ordinance is not to be confined to the persons and offences described in the earlier Ordinance.

It was then argued that, if Ordinance No. IV applied (subject to the direction of the Local Government) to any persons and to any offence known to the law, it was invalid by reason of the provisions of section 65, sub sections (2) and (3) of the Government of India Act, 1915; and this contention, upon which the argument for the appellants mainly rested, must now be examined.

Section 65, sub section (2), when read with section 72, prevents the Governor General from making—

"any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may

depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India."

It was contended that the Ordinance under consideration, by depriving British subjects in India of the right to be tried in the ordinary course by the established Courts of Law, affected the unwritten laws or constitution whereon the allegiance of His Majesty's subjects in India depends, and was accordingly invalidated by the sub-section last referred to; and reference was made to *Calvin's case* (2) and to the maxim "*protectio trahit sub ectionem, et subjectio protectionem.*" It is not easy to understand how the substitution for the ordinary Indian Courts—which are themselves of statutory origin—of another tribunal of a judicial character, can be said to affect in any way the unwritten laws or constitution of the country; but, apart from this observation, the argument appears to rest upon a misconception as to the meaning and effect of the sub section. The sub-section does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends. It refers only to laws which directly affect the allegiance of the subject to the Crown, as by a transfer or qualification of the allegiance or a modification of the obligations thereby imposed. In the case of *Ameer Khan, In the matter of* (3), the meaning of a similar provision in the Act of 1833 (3 and 4 Wm. IV, c. 85, section 43) was discussed at length, and Mr. Justice Phear stated his opinion as follows:—

"But I think it right to say that in my judgment the words, 'whereon may depend, etc.,' do not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribe the nature of the allegiance, *viz*, of the relations between the Crown on the one hand and the inhabitants of particular provinces, or particular classes of the community, on the other; and obviously such laws and principles as these are not touched by the local Acts which are impeached before us."

Since that judgment was pronounced the provision so interpreted has been re-enacted substantially in the same terms in the Acts of 1861 and 1915; and many Statutes and Ordinances have been passed in India which were similar in effect to the regulation then under consideration If their Lordships were to adopt the argument now pressed upon them, they would be casting doubt upon a long course of legislation and judicial decision which must be presumed to have been known to and in the view of the Imperial Parliament when the Act of 1915 was passed. [See *Queen* v. *Burah* (4).] Reference may also be made to the recent case of *Annie Besant* v. *Advocate General of Madras* (5), where a like argument was rejected by the Board. This argument, therefore, cannot prevail.

Turning now to section 65, sub section (3), of the Act of 1915, that sub section is as follows:—

"The Governor General in Legislative Council has no power, without the previous approval of the Secretary of State in Council, to make any law empowering any Court, other than a High Court, to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects, or abolishing any High Court."

Upon this enactment it was argued that Ordinance No. IV, if it subjects any person whatever to be tried for his life by a Commission in lieu of the ordinary Courts of Law or Courts-Martial, is an infringement of the provision which prevents the Governor-General in Council from empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe, and accordingly that the Ordinance is void not only as to persons falling within sub-section (3) but altogether. The answer to this contention is to be found in section 2 of the Government of India (Amendment) Act, 1916, which provides that there shall be inserted at the end of section 84 of the Act of 1915 the following words:—

(2) (1608) 7 Co. Rep. 5.

(3) 6 B. L. R. 392 and 459 at p. 477.

(4) (1878) 3 A. C. 889 at p. 907.

(5) 52 Ind Cas 209; 45 I A 178; 37 M. L. J. 199; 20 Cr L. J. 593; 17 A. L J. 925; 23 C. W. N 986; 21 Bom L. R. 867; (1919) M. W. N. 555; 10 L. W 45; 26 M. L. T. 408; 1 U. P L R. (P. C.) 74; (1919) 35 T. L. R. 500; 20 Cr. L. J. 593; 43 M. 148 (P. C.).

'A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void."

It appears to their Lordships that if the Ordinance in question in this case contravenes section 65 (3) of the Act of 1915, it may properly be described as "repugnant" to that section so far as British born subjects are concerned, and if so it is void to the extent of that repugnancy, but not otherwise. This argument, therefore, also fails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. There will be no order as to costs.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. *Barrow, Rogers & Nevill.*

Solicitor for the Respondents.—*The Solicitor, India Office.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 253 OF 1919.

July 18, 1919.

Present:—Mr. Justice Bevan Petman.

GOKAL CHAND AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 133, scope of—Lawful trade, whether can be prohibited—Manner of carrying on trade, whether can be restricted—Order proceeding on grounds not covered by notice, legality of.

Section 133 of the Criminal Procedure Code relates to an existing state of affairs and not to the possibility of future results [p. 447, col. 2]

Clause (3) of section 133 deals only with occupations or trades which are in themselves injurious to health or physical comfort and has nothing to do with trades which in themselves are innocuous, but in the course of which the manager, or plier, of them commits a public nuisance [p. 447, col. 2.]

The provisions of Chapter X of the Criminal Procedure Code should be worked so as not to become themselves a nuisance to the community at large, and although every man is bound so to use his own property that it may not work legal damage or harm to his neighbour, yet no one has a right to intertere with a free and full enjoyment by another of his property except on clear and absolute proof that such use is producing such legal damage or harm and, therefore, a lawful and necessary trade such as the manufacture of bricks should not be interfered with unless it is proved that it is injurious to the health, or physical comfort, of the community. [p. 447, col. 2.]

An order under section 133 of the Criminal Procedure Code which proceeds on grounds not covered by the notice issued to the accused is illegal. [p. 447, col. 2]

Revision from the order of the Honorary Magistrate, 1st Class, Naushera Nargli, District Amritsar, dated the 4th February 1919.

Bakshi *Tek Chand* and Mr. *Har Gopal*, for the Petitioners.

Mr. *Mul Chand*, Public Prosecutor, for the Respondent.

JUDGMENT.—This and the connected Criminal Revision No. 337 of 1919 can be dealt with together. On the complaint of the Principal of the Khalsa College situate in the suburbs of Amritsar, a notice was issued by a Magistrate under section 133, Criminal Procedure Code, to the petitioners in the following terms:—"Whereas the letter received from the Principal of the Khalsa College and the correspondence of the District Magistrate show that you have dug out pits around the Khalsa College for the preparation of bricks, that this is likely to be injurious to the health of the residents of the Khalsa College, and that it is apprehended that the stagnation of foul water in the pits will affect their health, you are directed to appear in the Court and show cause why proceedings under section 133 of the Criminal Procedure Code should not be taken against you, because the above act of yours is a public nuisance to the residents of the Khalsa College."

In reply to this notice the petitioners put in the following written statement: "The land belongs to Zamindars who sold only the earth to us on payment of the price thereof. It is not our duty to fill in the pits."

This was apparently regarded as a complete reply to the notice with regard to the existing pits, and consequently another notice was issued in the following terms:—"You have dug pits by excavating land around the Khalsa College. The water stagnates in them and causes a bad smell. This is a nuisance to the residents of the Khalsa College. In future you should not dig pits around the

Khalsa College. If you do not refrain from doing so you will be dealt with according to law." The defence of the petitioners to this second notice was the same as that raised to the first.

In spite of the very limited terms of the notice, which relates to the *smell* caused by stagnating water and similar results if further pits are dug, I find that the proceedings were continued on totally different lines. Only one witness was produced on behalf of the complainant, and his evidence relates to the likelihood of the health of the residents of the Khalsa College suffering from smoke from the kilns and to malaria due to the breeding of mosquitoes in stagnant water in pits within half a mile of the College It will be seen that this evidence is not relevant to the notice issued to the petitioners. The petitioners, however, raised no objection and proceeded to meet the new case in so far as the stagnant pools were concerned.

The Magistrate, disregarding the only issue raised by his notice and the evidence for the complainant, which was limited to half a mile, and the evidence of the petitioners, held that the pits excavated by the petitioners in the course of making bricks are filled with water in the rainy season and become a centre of malaria and other fevers, and that the working of the kilns gives out clouds of smoke which are very injurious to the health and life of the students and other residents of the Khalsa College, and directed the petitioners not to excavate in future any fresh or new pits within a radius of a mile of the College.

Whatever sympathy every one has with the Principal of an important College in his laudable efforts to do everything possible in the interests of the students of that College, the law must be observed and the rights of others must be regarded and safeguarded. It was under these circumstances that I gave two opportunities for the matter to be amicably settled, especially in view of the offer of the petitioners to so conduct their business as to leave no pits and to arrange that no water should accumulate and stagnate. These offers have been rejected and I am informed that the Principal desires a judicial decision.

The order of the Magistrate cannot be maintained. It is erroneous for many reasons. Not only does the order proceed on grounds not covered by the notice issued and, therefore, fatal to its validity, but there is obviously no justification for the order directing no pits to be dug within a radius of a mile when, according to the evidence of the witness for the complainant and of Colonel Smith, Civil Surgeon of Amritsar, a witness for the petitioners, a radius of half a mile was sufficient to obviate any danger from mosquitoes. The Magistrate justifies the radius of a mile on a certificate given by the Civil Surgeon, wherein he states that he would like to see the brick kilns a mile away, but the certificate relates to smoke from a certain kiln, and therein it is stated that smoke half a mile away could not be injurious to health. The Civil Surgeon was examined as a witness and was not questioned with regard to his certificate. The certificate itself was not under the circumstances evidence in the case. It could only have been used to corroborate or contradict the witness, and in the latter case only when his attention was drawn to it. This was not done. In fact, he was not cross examined at all.

There is no evidence on the record that as a matter of fact the residents of the College have suffered from malaria fever, still less that the cause was due to the pits made by the petitioners. On the other hand, there is ample evidence that there are a number of pits belonging to the College itself and to others far closer to the College buildings, including the boarding houses, in which water accumulates and which have not been filled up. There is also a pond in the College grounds into which all the water used to wash clothes flows and accumulates. It is somewhat extraordinary in view of the complaints made that the pits in the premises of the College have not been filled up. more especially as a witness for the petitioners, who was not even cross examined and whose evidence stands uncontradicted and unchallenged, states that malaria bearing mosquitoes cannot be bred in exposed pits where there is no vegetation and no shade as in the case of the pits of the petitioners, whilst they are likely to be produced in

the College pits which have vegetation and shade. This opinion the witness fortifies by a report of Major Gill, an expert in malaria.

It is, therefore, clear that on the present record it has not been proved that the water in the pits dug by the petitioners has caused, or can cause, malaria, or any injury to health.

The notice on which action was taken did not relate to existing pits, and the order now sought to be revised forbids the digging of pits in the future. It is obvious, however, that the mere digging of pits cannot, ordinarily, be injurious to health. The objection apparently is to the collection and stagnation of water. It is conceivable that earth can be dug for the manufacture of bricks and the collection of stagnant water avoided by various means, and, therefore, the order if justified by the evidence, which in my opinion it is not, should have been directed against the stagnant water and not the digging of pits. Consequently the offer of the petitioners in this Court would have apparently met all objections, however unproved or unfounded, and it would have been for them to carry out any agreement come to. This offer the Principal has not seen fit to accept

The notice to the petitioners did not state that their trade or occupation of manufacturing bricks was injurious to health so as to bring the case within the terms of section 133 of the Criminal Procedure Code, nor has this been alleged. At most it could be contended, on the present record, that their mode of carrying out their trade, or occupation, may be in some respects objectionable. This, however, is not sufficient to bring the case within section 133. As pointed out in *Moti Shah* v. *Crown* (1), "the Magistrate could not, we think, interfere under section 133, Criminal Procedure Code, to suppress a lawful and unobjectionable trade, merely upon the ground that it was being so worked as to be injurious to the health of the neighbourhood." In the present case there is no evidence that the manufacture of bricks is itself injurious to health or that the petitioners were so working that the health of anyone was being injured.

In *Mrs. Foreiro* v. *Empress* (2) it was held that section 133 (3) deals only with occupations or trades which are in themselves injurious to health or physical comfort and has nothing to do with trades which in themselves are innocuous but in the course of which the manager, or plier, of them commits a public nuisance. In *Shadi* v. *Empress* (3) it was held that the provisions of Chapter X of the Criminal Procedure Code should be worked so as not to become themselves a nuisance to the community at large, and that although every man is bound so to use his own property that it may not work *legal* damage or harm to his neighbour, yet no one has a right to interfere with a free and full enjoyment by another of his property except on clear and absolute proof that such use is producing such legal damage or harm and, therefore, a lawful and necessary trade such as tanning should not be interfered with unless it is proved that it is injurious to the health, or physical comfort, of the community. There is no such proof in the present case.

It is also clear that section 133 relates to an existing state of affairs and not to the possibility of future results.

The powers given under section 133 are of an exceptional nature. The rights involved in the present case are important, and the case was essentially one in which, if the residents of the College considered themselves aggrieved, they should have taken action in the Civil Courts to abate the alleged nuisance, and this can still be done. The fact that the College was built many years ago in its present position in order to have open country all round and plenty of fresh and pure air is beside the point and no ground for ignoring the legal right of others. It was open to the College authorities to acquire the surrounding country or make agreements, for a consideration, restricting its use. Brick-kilns have existed in the locality for very many years.

For the reasons stated above I accept the revision and set aside the orders of the Magistrate.

Revision accepted.

(1) 39 P. R. 1889 Cr.
(2) 47 P. R. 1888 Cr.
(3) 17 P. R, 1888 Cr.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 234 OF 1918.

December 1, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Pratt.

NAGINDAS BHUKHANDAS—APPELLANT

versus

GHELABHAI GULABDAS—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 43, 46, 47—Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Sentence under s. 43, Provincial Insolvency Act—Appeal—Appellate Court, power of, to suspend sentence.

On an appeal from a sentence of imprisonment under section 43 of the Provincial Insolvency Act, the High Court has power under Order XLI, rule 5 of the Civil Procedure Code, read with clause (2) of section 47 of the Provincial Insolvency Act, to suspend the sentence until the appeal is disposed of.

Appeal from the decision of the District Judge, Surat, in Miscellaneous Insolvency Application No. 14 of 1915.

The appellant having applied, pending the disposal of the appeal, for stay of the sentence passed by the lower Court, their Lordships made the following

ORDER.

HEATON, J.—We are dealing with an interlocutory matter that arises out of an appeal filed under clause 2 of section 46 of the Provincial Insolvency Act, III of 1907. The appellant was sentenced to three months' simple imprisonment. He has appealed.

There is no doubt that the appeal lies and not unnaturally he wants the sentence of imprisonment suspended until the appeal is disposed of. Otherwise he stands a very good chance of serving out the entire term of imprisonment before the appeal is heard. It has, however, been objected—and this is the only point that seems to me really to need attention—that we have no power to suspend the imprisonment or release a person on bail. That argument, however, I think, is mistaken. Clause 2 of section 47 of the Provincial Insolvency Act tells us that in dealing with this appeal we are to follow the provisions of the Civil Procedure Code. At least that is the effect of what that clause says. Now under the Civil Procedure Code we have power to stay proceedings under an order appealed from. That, I think, is quite plain from rule 5 of Order XLI of the Civil Procedure Code, and all we are asked to do is to stay proceedings under the order appealed from. We do this by making an order which will secure the release of the appellant from jail on such terms as may be provided. We leave the terms to be settled by the District Judge, who will direct what security should be taken from sureties to secure the surrender of the appellant, should he hereafter be called upon to surrender.

The District Judge will make out an order to the jailor directing the release of the appellant when security to his satisfaction has been furnished.

Costs of this matter will be costs in the appeal.

PRATT, J.—I concur. In regard to the argument that Order XLI, rule 5, does not apply because there is no decree to be executed, it seems to me that the provisions in that rule which provide for stay of proceedings under an order are applicable. For instance an order of arrest before judgment under Order XXXVIII, rule 4, would be appealable under section 104 (*h*) of the Civil Procedure Code and it could not be contended that the Court of Appeal in such a case would not have the power to stay further proceedings either by suspension of the sentence or directing the release of the appellant on his giving the bail. That this provision of the Civil Procedure Code would be applicable was apparently the view expressed by Bayley, Acting C. J., in *Hormarji Ardesir Hormarji, In the matter of* (1).

Order accordingly.

(1) 17 B. 334 at p. 340; 9 Ind. Dec. (N. S.) 217.

MADRAS HIGH COURT.

CIVIL APPEAL No. 182 OF 1919.

January 21, 1920.

Present:—Sir Abdur Rahim, KT., Offg. Chief Justice, and Mr. Justice Phillips.

JAKKAMREDDI SESHADRI REDDY AND OTHERS—DEFENDANTS—APPELLANTS

versus

SIR S. SUBRAMANIA IYER, K. C. I. E. AND OTHERS—PLAINTIFFS NOS. 1 AND 3 TO 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, suit under—Plaintiff not having interest—Joinder of other plaintiffs with requisite interest—Suit, whether maintainable.

A suit under section 92 of the Civil Procedure Code was instituted by a person who was found to have no interest such as that required by the section. Two other persons who had the requisite interest obtained the sanction of the Collector and were added as plaintiffs. It was objected that the suit as laid was not maintainable:

Held, that the suit had been properly instituted and was maintainable.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Original Suit No. 61 of 1917 (Original Suit No. 47 of 1917 of the District Court).

Mr. *K. N. Kumaraswami Aiyar*, for the Appellants.

Messrs. *T. V. Venkatarama Aiyar* and *P. R. Ganapathi Aiyar*, for the Respondents.

JUDGMENT.—One of the plaintiffs in this suit, which was instituted under section 92, Civil Procedure Code, was found to have no interest such as that required by this section. Thereupon two other men who had the requisite interest applied to the Collector and obtained sanction to institute this very suit. They were then added as third and fourth plaintiffs. Objection was, however, taken by the defendants to the effect that the suit was bad as laid and must be dismissed and that the requirements of section 92 were not satisfied by adding the 3rd and 4th plaintiffs in the same suit. The learned Subordinate Judge heard the objection, discussed it and came to the conclusion that the suit was not properly instituted and dismissed it. There is a ruling of this Court in *Ramayyangar* v. *Krishnayyangar* (1), which could cover the present case, but, it was argued that

(1) 10 M. 185; 3 Ind. Dec. (N. S.) 881.

in the old Code no such clause as that in the sub paragraph 2 of section 92 occurred in section 539 and that the latter paragraph makes a difference. We find, however, that the ruling in *Ramayyangar* v. *Krishnayyangar* (1) has been followed in some very recent cases of this Court decided under the new Code. One of them is a decision of Oldfield and Bakewell, JJ., in Appeals Nos. 310 and 373 of 1918 and the other is the judgment of Spencer and Krishnan, JJ., in Civil Revision Petitions Nos. 892 and 893 of 1919 [*Ambalavana Pandara Sannadhi* v. *Advocate-General of Madras* (2)]. On the other hand there is a ruling of the Bombay High Court in *Darves Haji Mahamad* v. *Jainudin* (3) contrary to the view taken in these cases. And the Allahabad High Court seems to have taken the same view of the law as the Bombay High Court. But the matter being purely one of procedure, we think, we ought to follow the rulings of this Court. The judgment of the Subordinate Judge is set aside and the case will be remanded to him for disposal on the merits, the memorandum of objections being allowed.

Costs of the memorandum of objections will abide the result. The appeal is dismissed with costs.

M. C. P.

Appeal dismissed;
Memo. of objections allowed.

(2) 55 Ind. Cas. 516; 38 M. L. J. 201; 11 L. W. 219; 27 M. L. T. 100.
(3) 30 B. 603; 8 Bom. L. R. 751.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 234 OF 1918.

December 1, 1919.

Present:—Mr. Justice Shah and Mr. Justice Crump.

NAGINDAS BHUKHANDAS—APPELLANT

versus

GHELABHAI GULABDAS—RESPONDENT.

Provident Funds Act (IX of 1897), s. 4—Provincial Insolvency Act (III of 1907), ss. 16, 43—Provident fund, whether "property"—Provident fund received and paid over by insolvent—Fraudulent transfer.

NAGINDAS v. GHELABHAI.

By virtue of section 4 of the Provident Funds Act, neither the Receiver nor the creditors of an insolvent have any right to money drawn by the insolvent from his compulsory deposit in a Railway Provident Fund. There can, therefore, be no fraudulent dealing in respect of such money such as is made punishable by section 43 of the Provincial Insolvency Act. [p. 452, col. 2.]

Appeal from the decision of the District Judge, Surat, in Miscellaneous Insolvency Application No. 14 of 1915.

Mr. *N. K. Mehta*, for the Appellant.

Mr. *H. V. Divatia*, for the Respondent.

JUDGMENT.

CRUMP, J.—The appellant in this case appeals against an order of the District Judge of Surat sentencing him to three months' simple imprisonment under section 43 of the Provincial Insolvency Act (III of 1907).

The facts are shortly as follows: The appellant Nagindas was in the employ of the B. B. & C. I. Railway Company. On November 3rd, 1909, he was adjudged an insolvent under section 16 of the Act, and a Receiver was appointed. In January 1918, he resigned this appointment with the Railway Company and drew from them a sum of Rs. 2,000 odd which stood to his credit in the books of the Railway Provident Fund. This money was not paid over to the Receiver, and in the lower Court it was alleged that Rs. 1,600 out of this sum had been paid by the insolvent to his wife. It is with reference to this transaction that the learned District Judge has held him guilty of a fraudulent act within the meaning of section 43 (2) of the Act.

The reasoning of the learned District Judge may be summarized as follows: The protection afforded to the monies in the Provident Fund by section 16 (2) (*a*) of this Act ceased as soon as these monies came into the hands of the insolvent, and they forthwith vested in the Receiver and became divisible among the creditors as provided by section 16 (4). But in accordance with the doctrine in *Cohen* v. *Mitchell* (1) the insolvent was entitled to retain the money received from the Provident Fund unless and until the Receiver intervened, and had he merely retained it he would not have been guilty of any fraud. But he had advanced a false story to prove that the money had been paid to his wife in satisfaction of a legal claim. This allegation amounted to a fraudulent transfer punishable under section 43.

The case of *Cohen* v. *Mitchell* (1) is not a decision on the Provincial Insolvency Act but on the English Bankruptcy Act (46 & 47 Vic. c. 52), and the decisions on which the learned District Judge has relied for extending the applicability of the doctrine therein laid down to the case before him are decisions in cases arising in the presidency towns prior to the Presidency Towns Insolvency Act, 1909. These cases are governed by the provisions of the Indian Insolvency Act of 1848. It is, therefore, necessary in the first instance to examine the terms of the relevant Statute.

It is not disputed that the deposit with which we are now concerned was a compulsory deposit as defined in section 2 of the Provident Funds Act, 1897, and it is clear that at the date of the adjudication order it was not at the disposal of the insolvent for his own benefit. Therefore, it was not at that date "property" within the definition contained in section 2 (1) (*e*) of the Provincial Insolvency Act and did not, therefore, vest in the Receiver under section 16 (2). But, apart from the provisions of section 4 of the Provident Funds Act, 1897, it became "property" as soon as the money was paid to the insolvent, and was thus property acquired by him after the date of the order of adjudication. Under section 16 (4) such property "shall forthwith vest in the Court or Receiver and shall become divisible among the creditors in accordance with the provisions of sub-section (2), clause (*a*)." At first sight it would appear that these words in their literal construction are free from any doubt.

But there are grounds for holding that these words should not be literally construed. In *Cohen* v. *Mitchell* (1) the Court declined to follow the literal construction of sections 44 and 54 of the English Bankruptcy Act on the ground of inconvenience, and the Courts in India in dealing with the analogous provisions of section 7 of the Indian Insolvency Act (11 & 12 Vic. c. 21) have allowed themselves the same measure of freedom [see *Alimahmad* v. *Vadilal Devchand* (2)].

(1) (1893) 25 Q. B. D. 232; 59 L. J. Q. B. 409; 63 L. T. 208; 38 W. R. 351; 7 Morrell 207.

(2) 53 Ind. Cas. 197; 21 Bom. L. R. 342; 43 B. 380.

Acts are *in pari materia*, and the considerations which have led the Courts to reject a literal construction are equally present in the case of the Provincial Insolvency Act. Nor is there so great a difference between the words employed by the Legislature as to permit of any distinction. It must, therefore, follow that in the present case also the doctrine in *Cohen* v. *Mitchell* (1) is applicable.

But it remains to consider the effect of section 4 of the Provident Funds Act, 1897. So far as the section bears upon the facts of this case it runs as follows: "Neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure shall be entitled to or have any claim on any such compulsory deposit (*i. e.*, any compulsory deposit in any Railway Provident Fund)." By virtue of section 59 of the Provincial Insolvency Act, the reference to Chapter XX of the Code of Civil Procedure must, for the purposes of this case, be construed as applying to section 16 of the former Act. What then is the force of the words "shall be entitled to or have any claim on any such compulsory deposit?" We are not here concerned with cases of attachment under a decree or order of a Court, and it is unnecessary to refer to the provisions of the Code of Civil Procedure to which reference is made in section 16 of the Provincial Insolvency Act. We have a specific provision applying directly to the case of a Receiver appointed under that Act. The question is whether the learned District Judge is right in holding that the protection afforded by the section ceases when the money comes into the hands of the depositor. In my opinion that is too restricted a construction. The words used are very wide. No Receiver has any claim on such compulsory deposits. If that is so, how can he claim to receive the money when it is paid into the hands of the depositor? The case of *Official Assignee of Madras* v. *Mary Dalgairns* (3) is here in point. That decision was prior to the amendment of the Provident Funds Act in 1903 whereby clause 2 was added to section 4, and is, therefore, a decision as to the effect of clause (1) of the section. It was held that the effect of clause (1) was to deprive the Official Assignee of the right which had otherwise vested in him to receive the sum standing to the credit of the insolvent on the insolvent's retirement from the service. That decision is with reference to section 7 of the Indian Insolvency Act, but it is equally applicable to the present case. In my opinion that decision is correct and should be followed. The result is that neither the Receiver nor the creditors have any claim to the money drawn by the insolvent, and, therefore, there could be no fraudulent dealing such as is made punishable by section 43 of the Provincial Insolvency Act.

In this view of the case it is unnecessary to determine whether on the basis of the findings of the District Judge any fraudulent dealing is established. It may, however, be remarked that it is difficult to reject the defence specifically pleaded by the insolvent that he was under a *bona fide* belief that the amount was not attachable and consequently did not vest in the Receiver. Even if it be assumed that the learned District Judge has correctly apprehended the law, the point is surrounded with so much doubt that the insolvent may well have entertained a *bona fide* belief that the amount in question was entirely at his disposal.

For these reasons I would set aside the order of imprisonment. The respondent to bear the costs throughout. The bail bond to be discharged.

SHAH, J.—I concur.

Appeal decreed.

(3) 26 M. 440.

PATNA HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 49 OF 1920.

March 17, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.

SAURENDRA NATH MITRA—JUDGMENT-DEBTOR—APPELLANT

versus

MRITUNJAY BANARJI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 2 (2), 47

SAURENDRA NATH MITRA *v.* MRITUNJAY BANARJI.

—"*Decree*"—*Sale proclamation—Order rejecting application as to valuation, whether decree—Decision under s.* 47, *when amounts to "decree."*

An order made in execution proceedings rejecting a petition objecting to the valuation given by a decree-holder for the purposes of a sale proclamation is not a "decree" within the meaning of section 2 (2), Civil Procedure Code, and is, therefore, not appealable. [p. 454, col 1.]

In order that a decision under section 47 of the Code may be included within the definition of "decree" and be appealable, it must in some way determine the rights of the parties with regard to all or any of the matters in controversy in the suit. [p. 454, col. 1.]

Mr. *Abani Bhusan Mukherji*, for the Appellant.

JUDGMENT.

MILLER, C. J.—In my opinion the memo. of appeal ought to be rejected. The judgment-debtor filed a petition in objection to the valuation given by the decree-holders for the purpose of sale proclamation. The petition in objection was filed on the 22nd January 1920. It was then ordered in the presence of the petitioner that the decree-holders should be informed and that the matter should be put up for hearing on the 31st January, *i. e.*, roughly in about a fortnight's time. The judgment-debtor, therefore, had plenty of notice that on the 31st of January his application would be heard and he ought to have taken proper steps to get his witnesses before the Court. He, however, did nothing, and in due course, that is on the 31st of January, the matter came up before the Subordinate Judge, and at that late period the judgment-debtor prayed for time to serve notice upon his witnesses. It is obvious he should have taken steps to do that at a much earlier period, and the Judge very properly rejected the application which he described as frivolous, and the petition in objection to the sale proclamation was accordingly rejected.

Now, the first point which has been taken before us is that the judgment-debtor is entitled to appeal from that order made in execution on the ground that it is a decree within the meaning of the definition in section 2 of the Civil Procedure Code, and that this being a determination of a question under section 47 of the Code, it is appealable as a decree. Before the present Civil Procedure Code came into operation, there were certain cases in the Calcutta High Court in which it was decided that any question determined under section 47 of the Civil Procedure Code was appealable. One of the principal cases in which that decision was come to is *Ganga Prosad* v. *Raj Coomar Singh* (1). That view was dissented from by the Madras High Court in the case of *Sivagami Achi* v. *Subrahmania Ayyar* (2), and when the matter came up again before the Calcutta High Court in the year 1911, that Court in the case of *Deoki Nandan Singh* v. *Bansi Singh* (3), after reviewing the authorities on the subject, came to the conclusion that the Mardas High Court was right and that the previous decision in *Ganga Prasad* v. *Raj Coomar Singh* (1) was wrong. The question for determination in that case was very similar to the question for determination in this. There an order had been made by the executing Court by which the value of property directed to be sold under a decree had been assessed at a certain figure according to the statement of the decree-holder. A preliminary objection was taken upon the hearing of an appeal from that order on the ground that it was not a case falling within section 47 of the Code, and that it was not a decree within the meaning of section 2 of the Code, and consequently was not appealable. Now the learned Judges pointed out, following the earlier case of *Bekary Lal* v. *Kedar Nath Mullick* (4), that an interlocutory order in the course of execution proceedings which decides, for instance, a point of law arising incidentally or otherwise is not a decree within the meaning of section 2 of the Code of 1882, and that it was reasonably plain from the terms of section 2 that an order to be a decree must conclusively determine the rights of the parties, and that if any other view were adopted, the result would be that an appeal might be preferred against every order in the course of execution proceedings, and that this could hardly have been contemplated by the framers of the Code. The

(1) 30 C. 617.
(2) 27 M. 259; 14 M. L. J. 57.
(3) 10 Ind. Cas. 371; 16 C. W. N. 124; 14 C. L. J. 35.
(4) 18 C. 469; 9 Ind. Dec. (N. S.) 313.

only question is whether under the present Code any wider interpretation is to be given to section 2, sub-section (2), which defines "decree" and states that it shall be deemed to include the determination of any question within section 47. In my opinion these words must be limited by the words which immediately precede and unless the decision appealed from is one which in some way determines the rights of the parties with regard to all or any of the matters in controversy in the suit, it cannot be included under the definition of decree. In the present case this is merely an interlocutory order and although it may be true to say that the Judge acts judicially in coming to the conclusion about valuation, that does not in itself make his determination a decree within the meaning of the section, and I think that this order is not appealable.

We are asked by the learned Vakil who appears for the appellant to treat the matter as an application in revision. It is perfectly clear from what I have just stated at the beginning of my judgment that there is no ground whatever for supposing that he will make out a case in revision, if we were to allow him to serve notice upon the opposite party and to have the matter discussed. The facts are perfectly clear and there is no conceivable ground that I can see on which the Court would in fact have any powers in revision. For these reasons, I think, this memorandum of appeal should be rejected and that the application in revision should also be rejected.

COOTTS, J.—I agree.

Appeal rejected.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 746 OF 1919.

March 27, 1920.

Present:—Mr. Justice Martineau.

SHEO RAM—DEFENDANT—APPELLANT

versus

Musammat DHAPAN AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Custom—Village common land, building on, by co-sharer—Suit for demolition—Special damage, proof of, whether necessary—Delay in suing—Acquiescence.

A suit by some of the proprietors of a village for the demolition of a house built by another co-proprietor on the village common land is not maintainable without proof of special damage to the plaintiffs. [p. 455, col. 1.]

Hidayat Ali Khan v. *Basit Ali Khan*, 54 P. R. 1892, *Ram* v. *Pir Baksh*, 33 P. R. 1901; 71 P. L. R. 1901; *Majju* v. *Teja Singh*, 44 Ind. Cas. 844; 29 P. R. 1918; 114 P. W. R. 1918; 118 P. L. R. 1918 and *Lekhu* v. *Hanwanta*, 48 Ind. Cas. 418; 114 P. R. 1918; 176 P. W. R. 1918; 129 P. L. R. 1918, followed.

Where it appeared that the plaintiffs did not raise any objection to the building of the house at the time and instituted their suit after 5 or 6 years:

Held, that the plaintiffs by their conduct had shown that they had acquiesed in the building and that they were, therefore, not entitled to the relief they sought. [p. 455, col. 1.]

Second appeal from the decree of the Senior Subordinate Judge, Hissar, dated the 23rd December 1918, reversing that of the Munsif, 1st Class, Hissar, dated the 9th July 1918, dismissing plaintiffs' suit with costs.

Mr. *Manohar Lal*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The defendant Sheo Ram, one of the proprietors of the village of Majod, has built a *kacha* house on the village common land, and some of the other proprietors sue for an injunction for its demolition. The suit was dismissed by the first Court, but the Senior Subordinate Judge on appeal has given the plaintiffs a decree. Sheo Ram has filed a second appeal in this Court.

The Senior Subordinate Judge says that the plaintiffs need not prove that the building erected by the defendant causes special damage. This is no doubt the view taken by a Full Bench of the Allahabad High Court in *Ram Bahadur Pal* v. *Ram Shankar Prasad Pal* (1) and also in some rulings of this Court, such as *Ohuhar Singh* v. *Dhaunkal Singh* (2), and the proposition laid down in paragraph 235 of Rattigan's Digest of Customary Law that a proprietor may be restrained by his co-sharers from appropriating a vacant site to his own exclusive use is inconsistent with the proposition that the co-sharers cannot eject him without proving special damage. But, on the other hand, it was held in *Hidayat Ali Khan* v. *Basit Ali Khan* (3) that proof of special damage is necessary and the same view has

(1) 27 A. 688; 2 A. L. J. 455; A. W. N. (1905) 158.
(2) 74 P. R. 1885.
(3) 54 P. R. 1892.

been taken in more recent rulings, such as *Ram* v. *Pir Baksh* (4) and *Majju* v. *Teja Singh* (5) and *Lakhu* v. *Hanwanta* (6) and appears now to be generally accepted by this Court.

The Senior Subordinate Judge, while holding that special damage need not be proved, says at the same time that the special damage in this case is obvious, because if the defendant builds a *baithak* for the use of guests and strangers, it *may* cause inconvenience to the village women in taking water from the well, which is near, besides interference to the villagers in other ways. His opinion, however, on this point is only conjectural and is not borne out by evidence.

Want of proof of special damage is a sufficient reason for refusing an injunction, and another reason is the delay on the part of the plaintiffs in bringing the suit. They raised no objection to the building of the house at the time, and it was only after 5 or 6 years that they instituted their suit. Their conduct shows that they acquiesced in the building of the house by the defendant, and they are not now entitled to ask for its removal.

I accept the appeal, set aside the decree of the lower Appellate Court, and restore the decree of the first Court dismissing the suit. The plaintiffs will pay the defendant Sheo Ram's costs throughout.

Appeal allowed.

(4) 33 P. R. 1901; 71 P. L. R. 1901.
(5) 44 Ind. Cas 844; 29 P. R. 1918; 114 P. W. R. 1918; 118 P. L. R. 1918.
(6) 48 Ind. Cas. 418; 114 P. R. 1918; 176 P. W. R. 1918; 129 P. L. R. 1918.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 170 OF 1918.
December 19, 1919.
Present :—Mr. Justice Shah and
Mr. Justice Crump.
DAMU DIGA—PLAINTIFF—APPELLANT
versus
VAKRYA NATHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 3, 8, 9, O. XVII, r. 2, O. XXXII, r. 3—Suit against several defendants—Minor defendant—Dismissal for default, effect of—Minor not represented by guardian—Subsequent suit against minor, whether barred.

Where there are several defendants to a suit, the consequences of an order of dismissal for default need not necessarily be the same against all. If the suit is dismissed as against some under rule 8 of Order IX of the Civil Procedure Code and as against the rest under rule 3 of the same Order, a subsequent suit on the same cause of action would be barred as against the former but not against the latter. [p. 456, col. 1.]

The provisions of Order XXXII, rule 3, of the Civil Prcedure Code are imperative and without complying with those provisions the Court cannot make any decree between the plaintiff and a minor defendant. [p. 456, col. 2.]

Where a suit was dismissed for plaintiff's default in the presence of the major defendants and there was no appearance on behalf of the minor defendant, no guardian *ad litem* of the minor having been appointed:

Held, that a subsequent suit against the minor on the same cause of action was not barred, inasmuch as, (*a*) the order of dismissal as against the minor must be taken to have been made under Order IX, rule 3, of the Civil Procedure Code and not under rule 8 and (*b*) the minor not being properly represented in the suit, no binding order could be made as between him and the plaintiff. [p. 456, cols. 1 & 2; p. 457, col. 1.]

Appeal from the decision of the First Class Subordinate Judge at Dhulia, in Suit No. 43 of 1917.

Mr. *M. V. Bhat*, for the Appellant.
Mr. *P. V. Kane*, for the Respondents.

JUDGMENT.

CRUMP, J.—The only question for our decision is whether the lower Court has rightly held that this suit is barred by the decision in Suit No. 185 of 1915 of the same Court. That the present plaintiff is the representative-in-interest of the plaintiff in that suit is not denied. The then defendants were three in number, and the present defendant was one of them. The question is, what is the nature of the order disposing of that suit and what is its effect. The terms of the order made clearly show that the Judge who made that order dismissed the suit for plaintiff's default. The order was made at an adjourned hearing and the Court must be taken to have acted under Order XVII, rule 2, and to have based its order on the provisions of Order IX. It was argued that Order XVII, rule 3, applied but that is not so. The terms of the order show that the suit was dismissed on account of plaintiff's default and on no other ground. The decision in *Chandramathi dasi* v.

Narayanasami Aiyar (1) appears to contain a correct exposition of the relative scope of sections 157 and 158 of the Code of Civil Procedure of 1882, and that decision is equally applicable to rules 2 and 3 of Order XVII. As Order XVII, rule 2, applies, we must refer to Order IX for the authority to dismiss the suit.

So far as the first two defendants were concerned, Order IX, rule 8, clearly applies. They were present and plaintiff was absent. But they are not parties now and the question is how the case stands as between plaintiff and defendant No. 3. I find it difficult to follow the lower Court in holding that for the purposes of rule 8 of Order IX it is sufficient if one or some of several defendants appear. It is necessary, as I read the law, to take the case of each defendant on its own merits. Here the order itself is merely one dismissing the suit, and so far as the present defendant is concerned may be referred to Order IX, rule 3, just as readily as to Order IX, rule 8. In the one case a subsequent suit is barred, in the other it is not barred. In the case of several defendants the consequences of an order of dismissal need not necessarily be the same against all. The present defendant was absent and *prima facie*, therefore, the order of dismissal as between him and the plaintiff would not bar a subsequent suit.

But there is a further fact which requires consideration. The present defendant was (and is) a minor. In the previous suit he was at the time represented by a proper guardian *ad litem*, the Nazir of the Court. At the date when the suit was dismissed, the Nazir's appointment had terminated and no guardian had been appointed. A minor defendant is a party to a suit in the eye of the law, but without the appointment of a guardian it was not possible for him to appear. It was in fact, owing to the absence of any guardian, that the suit stood adjourned. The Nazir's appointment was cancelled because the plaintiff failed to furnish him with funds as directed by the Court, but the suit was not dismissed owing to plaintiff's failure in this respect. At the date of the dismissal there was no guardian and the minor defendant was not, therefore, represented. Now the provisions of Order XXXII, rule 3, are imperative, and without complying with those provisions the Court could not make any decree as between the plaintiff and the minor defendant. As between these parties, therefore, any order is (in my opinion) a nullity. And the second suit cannot, therefore, be barred.

I would, therefore, reverse the decree of the lower Court and remand the suit for a disposal on the merits. Costs to be costs in the cause.

SHAH, J.—I concur in the order proposed by my learned brother.

The facts connected with the previous suit filed by Devchand and his son Diga in 1915 have been accurately stated in the judgment of the lower Court. It is clear on those facts that the order dismissing the suit for default is referable to Order XVII, rule 2, and not to rule 3 of that Order. By the provisions of rule 2, the order must be taken to have been made under Order IX, rule 8, as regards defendants Nos. 1 and 2 in that suit, who were present on the date of the order.

The important question is as to what is the effect of that order on the present suit. In order to determine that it is necessary to consider whether the adopted boy was effectively made a party to the suit of 1915. On the admitted facts I am of opinion that he was really not a party to that suit at all at the date of its dismissal. He was joined as defendant No. 3 to the suit, but the first guardian for the minor proposed by the plaintiffs in that case was not accepted by the Court. Ultimately the Nazir of the Court was appointed the guardian *ad litem* of the minor. But in consequence of the plaintiffs in that suit having failed to supply the necessary funds to the Nazir, his appointment as the guardian *ad litem* was cancelled by the Court. The suit was then adjourned to enable the plaintiffs to propose another guardian. They proposed Laxmibai the then defendant No. 2, but she refused to act as such. On the date of the dismissal of the suit in fact there was no guardian

(1) 5 Ind. Cas. 23; 33 M. 241; 19 M. L. J. 710; 7 M. L. T. 369.

of the minor for the suit, as required by the Code of Civil Procedure, and it was not possible for the minor to appear on that day. Under those circumstances I am of opinion that really he was not a party to the suit at all on that day: and it is clear that no order binding on the minor could have been made in the suit. The order of dismissal must be held to be an order made on the footing that the only defendants in that suit were defendants Nos. 1 and 2 (*i. e.*, the natural father and the adoptive mother of the adopted boy). On this footing I think that the previous suit is no bar to the maintenance of the present suit. Order IX, rule 9, provides that the plaintiffs shall be precluded from bringing a fresh suit in respect of the same cause of action. The order of dismissal affects the parties to the suit and cannot be held to apply to a fresh suit which is filed against the adopted boy who was not a party to that suit. It is urged for the respondents that the rule refers to the same cause of action and does not require that the parties to the fresh suit should be the same in order that the bar created by the rule may take effect. No authority is cited in support of this proposition; and I am not prepared to hold that the rule bars a suit against a person, who was not a party to the suit dismissed for default under rule 8.

Apart from that consideration, I am not satisfied that the cause of action in the present suit is the same as that in the previous suit. The previous suit was against the natural father and the adoptive mother of the adopted boy. Any order in that suit could not have affected the adopted boy. No doubt the principal allegation in the plaint related to the invalidity of the adoption. But there were further allegations made against the defendants in that suit, which were personal to themselves as to their fraudulent and deceitful acts and intent. The relief was claimed against them only. Even assuming that the allegations other than those relating to the invalidity of the adoption were not material, I am unable to hold that the cause of action against the adoptive mother and the natural father, if any, is the same as that against the adopted boy. In the present suit neither the natural father nor the adoptive mother is a necessary or a proper party; and though there may be apparent similarity between the two causes of action, and though the ground covered by the evidence necessary to prove the material allegations in both the suits may be common to a large extent, I feel clear that the cause of action, if any, against the natural father and the adoptive mother is quite distinct from that against the adopted boy.

I am, therefore, of opinion that rule 9 is no bar to the present suit.

Appeal allowed;
Case remanded.

CALCUTTA HIGH COURT.
ORDINARY ORIGINAL CIVIL SUIT NO. 1708 OF 1919.
December 10, 1919.
Present:—Mr. Justice Greaves.
CHANDMULL GONESHMULL—PLAINTIFF
versus
DHANRAJ GANPATROY—DEFENDANT.

Civil Procedure Code (Act V of 1908), O. VII, r. 14, O. XI, r. 15—Documents on which plaintiff relies—Defendant, right of, to inspect documents.

A defendant is not entitled, as of right, to inspect documents relied on by the plaintiff and of which a list under rule 14 of Order VII of the Civil Procedure Code is annexed to the plaint, as such documents are not documents referred to in Order XI, rule 15, of the Code [p. 458 col. 1.]

Mr. *B. L. Mitter*, for the Plaintiff.

Babu *O. C. Ganguly*, for the Defendant.

JUDGMENT.—This is an application by the defendant for an order that the plaintiff firm do give inspection of the documents mentioned in the list annexed to the plaint of documents relied on in the plaint. The plaintiff firm offered inspection of the *sowdah* which is the only document actually referred to in the plaint, but denied the right of the defendant to inspect the documents in the list attached to the plaint of documents relied on by them until the defendant had filed his written statement.

The application for inspection was made in reliance on Order XI, rule 15, of the Code of Civil Procedure, which provides that every party to a suit shall be entitled at

any time to give notice to any other party in whose pleadings or affidavits reference is made to any document to produce such document for the inspection of the party giving such notice or of his Pleader and to permit him or them to take copies thereof.

Order VII, rule 9, provides that the plaintiff shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it and Order VII, rule 14 (1), provides that when a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint, and sub-section (2) provides that where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

Now, it seems to me that these rules make a distinction between documents sued upon and documents relied on. Of the 1st the plaintiff must give inspection and produce either the original or a copy when the plaint is presented, of the 2nd neither production at the time of presentation of the plaint is required nor delivery of the document or a copy. The list added or annexed to the plaint is not part of the pleading, and it is not verified as it would have to be were it part of the pleading and it does not, I think, fall within Order XI, rule 15, and consequently the defendant is not entitled to inspection as of right which is what he claims here. Moreover, the fact that the list is to include documents whether in the possession or power of the plaintiff or not, points to the fact that it cannot have been intended that inspection should be given of documents in the list. Reliance is placed by the defendant on *Ram Dyal Saligram* v. *Nurhurry Balkrishna* (1) which is a decision in his favour. In that case reliance is placed on *Quilter* v. *Heatly* (2) which is a decision under Order XXXI, rule 14, of the English Rules which corresponds to our Order XI, rule 15. Both these rules refer to documents referred to in the pleadings or affidavits, but the documents in the list referred to in Order VII, rule 14, are not, in my opinion, documents referred to in the pleadings within the meaning of those rules. I am unable to agree with the decision in *Ram Dyal Saligram* v. *Nurhurry Balkrishna* (1) (*ubi supra*) and I do not think the defendant is entitled to the order which he seeks. The application is dismissed with costs. I certify for Counsel.

Application dismissed.

(1) 18 B. 368; 9 Ind. Dec. (N. S.) 753.
(2) (1888) 23 Ch. D. 42; 48 L. T. 378; 31 W. R. 331.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1978 OF 1916.
April 23, 1920.

Present:—Mr. Justice Chevis, Acting Chief Justice, and Mr. Justice Wilberforce.

KARAM DAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HUSSAIN BAKHSH—DEFENDANT—RESPONDENT.

Jurisdiction of Civil and Revenue Courts—Pleadings—Suit by owner for declaration of rightful possession, whether cognizable by Civil Court—Defendant obtaining possession pending suit—Amendment of plaint, whether should be allowed.

The question of jurisdiction has to be decided entirely on the allegations in the plaint. [p. 459, col. 1.]

Plaintiffs sued for a declaration that they were in rightful possession of the land in suit, alleging that the land belonged to them and that the defendant had made a claim on the ground that he was the heir of a deceased occupancy tenant, while as a matter of fact he had no title to the land. The first Court decreed their claim, holding that the occupancy rights were extinct and that the defendant had no rights therein. On appeal the District Judge, finding that the defendant had since obtained a decree from a Revenue Court restoring him to possession as an occupancy tenant, held that the defendant was in legal possession and that the declaratory suit could not proceed. Plaintiffs filed a second appeal to the High Court;

Held, (1) that on the allegations in the plaint the suit was cognizable by a Civil Court. [p. 459, col. 1.]

(2) that the *locus standi* of the plaintiff to ask for relief from a Civil Court had in no way been affected by the subsequent decree obtained by the defendant in a Revenue Court; [p. 459, col. 1]

(3) that as the plaintiffs had lost possession during the pendency of the suit, they ought to have been allowed to amend their plaint and ask for possession. [p. 459, col. 1.]

HARI RAGHUNATH v. ANTAJI BHIKAJI.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 9th May 1916, reversing that of the Subordinate Judge, Gurdaspur, dated the 29th February 1916.

Mr. *Badr-ud Din Kureshi*, for the Appellants.

Mr. *Ghulam Rasul*, for the Respondent.

JUDGMENT.—The plaintiffs in this case stated that they were in possession of the land in suit which belonged to them and that the defendant had made a claim on the ground that he was the heir of a deceased occupany tenant while, as a matter of fact, he had no title to the land. They sued, therefore, for a declaration that they were in rightful possession. The first Court held that the occupancy rights in the land were extinct and that the defendant had no rights therein. The suit was, therefore, decreed. On appeal the District Judge, who ascertained that the defendant had obtained a decree from a Revenue Court restoring him to possession of the land as an occupancy tenant, considered that the first Court should not have allowed the declaratory suit to proceed, especially as in the meanwhile the defendant had taken out execution and was then in legal possession of the land. The appeal was, therefore, accepted and the suit dismissed. Against this decision a second appeal has been preferred and has been argued before us by Mr. Badr ud-Din Kureshi.

Counsel contends that on the facts found by the first Court his client was entitled to the declaration asked for and that his *locus standi* to ask for relief from a Civil Court had in no way been affected by the subsequent decree obtained by the defendant in a Revenue Court. He urges further that as in the meantime the plaintiffs had lost possession of the land, they should have been allowed to amend their plaint and ask for possession. He also urges that even without any amendment the Court itself could have changed the nature of the relief granted. We agree with these contentions, which have in no way been answered by Counsel for the respondents who merely questioned the jurisdiction of the Civil Courts to deal with the suit. The question of jurisdiction, however, has to be decided entirely on the allegations in the plaint, and upon these allegations the present suit was clearly cognisable by a Civil Court. The plaintiffs urged that they were the owners of the land and that the defendant had no connection therewith except as a trespasser.

We accept the appeal and remand the case under Order XLI, rule 23, Civil Procedure Code, to the lower Appellate Court for a decision on the merits after allowing the plaintiffs to amend their plaint by altering the suit from a declaratory suit to one for possession. Costs will be costs in the cause, and the stamp on appeal will be refunded.

Appeal accepted;
Case remanded.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 226 OF 1918.
November 19, 1919.
Present:—Mr. Justice Shah and
Mr. Justice Crump.
HARI RAGHUNATH PATVARDHAN—
DEFENDANT—APPELLANT
versus
ANTAJI BHIKAJI PATVARDHAN
AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Hindu Law—Temple—Manager, whether entitled to remove image to new temple—Ruinous condition of temple, effect of.

The fact that a public temple is in a ruinous condition would not entitle the manager of the temple to remove the image from the temple and instal it permanently in a new building, especially where the removal is objected to by a majority of the worshippers. [p. 460, col. 2.]

Appeal from the decision of the District Judge, Thana, in Appeal No. 189 of 1917, reversing the decree passed by the Subordinate Judge at Panvel, in Civil Suit No. 231 of 1916.

Messrs. *G. S. Rao* and *C. H. Patvardhan*, for the Appellant.

Mr. *P. V. Kane*, for the Respondents.

JUDGMENT.

SHAH, J.—This appeal arises out of a suit brought by certain villagers with leave under Order I, rule 8, for a declaration that the temple of Ganpati in question was a public temple and for an injunction

restraining the defendant from removing the image of Ganpati to another adjoining building put up by him. The plaintiffs, who represented the villagers, alleged that this was an old temple of Ganpati which was not the private property of the defendant, that the defendant was about to remove the image to another building which he had no right to do and which, they alleged, was contrary to their sentiments and religious belief. The defendant pleaded that the temple was a private temple, that he had been in management of the temple for many years, that the temple building was in a dilapidated condition and that he had put a new building on his own land where he wanted to instal the image after removing it from the old temple. He contended in effect that as the manager of the temple he had a right to do so.

The trial Court found that the temple was a public temple, that the defendant was the manager of the temple and that in view of the omission of the villagers to effect the necessary repairs in the old building which was in a dilapidated condition, the defendant was justified in putting up a new building for the location of the image. It was found that the land on which the new building was put up by the defendant belonged to him; but in the course of the proceedings the defendant expressed his willingness to dedicate the land with the building to the temple and agreed to treat the old building and the new building on the same footing as a public temple. The trial Court incorporated this undertaking on the part of the defendant in the decree and refused to grant the injunction which the plaintiffs had prayed for. In appeal the learned District Judge came to the conclusion that the defendant had no right as manager to remove the image from the present temple to the new building. In view, however, of the fact that the existing temple had fallen into disrepairs, the plaintiffs agreed to deposit Rs. 1,500 with a view to effect the necessary repairs, and a decree on that basis was passed restraining the defendant from removing the image to the new building.

In the appeal before us it has been urged on behalf of the defendant that the plaintiffs have taken up an unnecessarily obstructive attitude and that in view of the fact that he is willing to dedicate the new building to the temple there should be no objection to the image being installed in that building. On the other hand the plaintiffs urge that the defendant has been actuated by an indirect motive in thus removing the image from its present position to a building which has been erected by him. We are not, however, concerned in this litigation with the motives of either side. It may be that the defendant has acted only in the interest of the temple in putting up a building on his own land with the intention of removing the image to that building and of duly installing it in that building. It may be that the plaintiffs have not been so far diligent in seeing that the present building was properly repaired and that they may have some animus against the defendant in refusing his offer to dedicate the new building to the temple. We are concerned in this appeal only with the question of law which has been raised on behalf of the defendant that as a manager he is entitled to remove the image and to instal it in the new building. It is common ground now that the existing temple is an ancient public temple. It is also common ground that the defendant has been the manager of this temple for a number of years. It is not disputed that the existing building is in a ruinous condition and that it may be that for the purpose of effecting the necessary repairs the image may have to be temporarily removed. Still the question is whether the defendant as manager is entitled to remove the image with a view to its installation in another building which is near the existing building. Taking the most liberal view of the powers of the manager, I do not think that as the manager of a public temple he can do what he claims the power to do, *viz.*, to remove the image from its present position and to instal it in the new building. The image is consecrated in its present position for a number of years and there is the existing temple. To remove the image from that temple and to instal it in another building would be practically putting up a new temple in place of the existing temple. Whatever may be the occasions on which the installation of a new image as a substitute for the old may be allowable according to

the Hindu Law, it is not shown on behalf of the defendant that the ruinous condition of the existing building is a ground for practically removing the image from its present place to a new place permanently. We are not concerned in this suit with the question of the temporary removal which may be necessary when the existing building is repaired. The defendant claims the right to instal it in the new building permanently, and I do not think that as a manager he could do so, particularly when he is not supported by all the worshippers of the temple in taking that step. I am clearly of opinion that the view which the District Judge has taken in this case of the powers of the manager is right and that the decree passed by him under the circumstances is correct. In coming to this conclusion I have not overlooked the fact that in the appeal before us some of the villagers have supported the defendant in the position which he has taken up.

I would confirm the decree of the lower Appellate Court and dismiss the appeal.

The appellant to pay the costs of the plaintiffs-respondents. The other respondents who have been added here on the applicatson of Mr. Sathaye must bear their own costs.

CRUMP, J.—I concur.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2233 OF 1919.

April 14, 1920.

Present:—Mr. Justice Wilberforce.

GUL MUHAMMAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BANDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 16, 22, nature of—Failure to comply with directions of rule 16, effect of—Separate suit for declaring execution proceedings void, whether maintainable.

The provisions of Order XXI, rule 16, that notice shall be given to the judgment-debtor of the transfer of a decree are of a mandatory nature and the failure to comply with the directions of the rule makes all subsequent proceedings void. [p. 462, col. 2.]

On 16th July 1914 one *B* obtained a decree for Rs. 250 against three brothers *F*, and *G* majors and *A* minor under the guardianship of *F*. Execution was taken out on the 16th December 1914 and a house belonging to the three brothers was attached. It was mortgaged at the time and the rights of redemption were sold in April 1915 to the son of *J*. The purchase money not having been paid, the sale was not confirmed. The decree-holder then transferred his rights in the decree to *J*, and the house was again brought to auction and bought by *J* in November 1915. Notice of the transfer of the decree to *J*. was served on *F*. for himself and as guardian of *G* and *A* *G* having been misdescribed as a minor. On the 2nd December 1915 *G* and *A* sued for a declaration that the execution proceedings were not binding against them owing to the misdescription of *G* and the failure of *F*. to effecively represent *A*:

Held, (1) that execution having been taken out within a year, no notice was necessary to the judgment-debtors; [p. 462, col. 2.]

(2) that inasmuch as *G* knew of the transfer of the decree to *J*, he could not equitably raise an objection on account of want of personal service on him under rule 16; [p. 463, col. 2.]

(3) that the question of the irregularity or illegality of the notice issued under rule 16 and its effect was one arising between the parties to the suit and could have only been properly determined under section 47, Civil Procedure Code; [p. 462, col. 2.]

(4) that under the circumstances the suit was not maintainable. [p. 463, col. 2.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 10th May 1919, reversing that of the Junior Subordinate Judge, Ludhiana, dated the 21st January 1919.

The Hon'ble Mian *Fazl-i-Husain* and Maluvi *Ghulam Muhy-ud Din*, for the Appellants.

The Hon'ble Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—On 18th April 1914 one Bundu instituted a suit against three brothers, Ferczs Din and Gul Muhammad majors and Ata Muhammad minor through Ferczs Din guardian *ad litem*. A decree for Rs. 250 was passed on 16th July 1914. On the 16th December of the same year execution was taken out and a house belonging to the three brothers was attached. It was mortgaged at the time for Rs. 1,650 and the rights of redemption were sold in April 1915 to the son of Jan Muhammad, the defendant in the present case. As the purchase money was not duly paid, the sale was not confirmed. The decree-holder then transfereed his rights in the decree to Jan

Muhammad and the house was again brought to auction and bought by Jan Muhammad in November 1915. On the first occasion, the highest bid for the rights of redemption was Rs. 600 and on the second occasion Rs. 520. Notice of the transfer of the decree to Jan Muhammad was served on Feroze Din for himself and as guardian of his two minor brothers, Gul Muhammad and Ata Muhammad. It must be noticed especially that a mistake was made in describing Gul Muhammad as a minor. On 2nd December 1915 Gul Muhammad and Ata Muhammad sued for a declaration that the execution proceedings were not binding against them owing to the misdescription of Gul Muhammad and as Feroze Din took no effective steps to represent his minor brother Ata Muhammad in the execution proceedings. The Court first held that the suit did not lie as action should have been taken under section 47. On review, however, it, for some reason which is not clear, allowed an amendment, to the plaint praying that the decree also should be declared null and void. It then proceeded to hold that Gul Muhammad was actually a major at the time of the suit and execution, that he was prejudiced by not receiving notice of the sale, that the minor judgment-debtor was not properly represented and that the house had been sold for a wholly inadequate price. It declared the execution proceedings not binding against the plaintiffs. Against this decision an appeal was presented to the District Judge, who held that the decree itself was binding upon the plaintiffs and that this suit was not maintainable in view of the provisions of section 47 and Order XXI, rule 92 (3), Civil Procedure Code. The appeal was accepted and the suit dismissed, and against this decision an appeal has been preferred by the plaintiffs whose case has been argued at great length by Mr. Fazl-i-Hussain.

The learned Counsel did not seriously contend that the decree itself was not binding upon the minor plaintiff. Indeed no such contention was possible, as Feroze Din and Gul Muhammad both appeared in and defended the original suit. Counsel's main contentions are that in the case of Gul Muhammad he was entitled to receive notice of the transfer of the decree under Order XXI, rule 16, and that the failure of the transferee to give such notice rendered all subsequent proceedings void and inoperative against him. In the case of Ata Muhammad Counsel urges that Feroze Din did not appear in these proceedings and that the minor's interests were not properly protected. On the latter point Counsel referred to numerous decisions, such as *Ahmad Ali Shah* v. *Mir Shah* (1), *Lalla Sheo Ohurn Lal* v. *Ramnandan Dobey* (2), *Abdul Goffur* v. *Sona Bibi* (3) and *Oursandas Natha* v. *Ladkuvahu* (4), which are authorities that a minor is not bound by a decree where his guardian has been guilty of negligence in allowing it to be passed against him. They are in no way applicable to the present case, as they deal with the duties of a guardian in original suits, not in execution proceedings, and cannot be made applicable by way of analogy. As for Feroze Din's alleged negligence in the execution proceedings, it may be noted that execution was taken out within a year and no notice was, therefore, necessary to the judgment-debtors. If the first sale had been confirmed, the minor plaintiff could have no possible ground of complaint. The mere fact that notice on Feroze Din as guardian was necessitated by Order XXI, rule 16, has no material bearing on the case. There was no irregularity in the sale proceedings and when it is obvious that Feroze Din and Gul Muhammad were unable to raise the money to satisfy the decree, I cannot see what objection the minor can raise to the sale.

The case of Gul Muhammad stands on a somewhat different footing. The provisions of Order XXI, rule 16, that notice shall be given to the judgment-debtor of the transfer of a decree are of a mandatory nature and Mr. Fazl-i-Hussain refers to two authorities, *Gulzari Lal* v. *Daya Ram* (5) and *Kassum Goolam Hussein* v. *Dayabhai Amarsi* (6), that a Court has no jurisdiction in execution proceedings where the provisions of this rule have not been complied with. He urges further that the provisions of Order XXI, rule 22, are identical and that it is settled law that where

(1) 35 P. R. 1893.
(2) 22 C. 8; 11 Ind. Dec. (N. S.) 7.
(3) 14 Ind. Cas. 95.
(4) 19 B. 571 at p. 577; 10 Ind. Dec. (N. S.) 381.
(5) 9 A. 46; A. W. N. (1886) 287; 5 Ind. Dec. (N. S.) 461.
(6) 12 Ind. Cas. 547; 36 B. 58; 13 Bom. L. R. 973.

the required notice is not given under that rule, a subsequent sale is void for want of jurisdiction, [*Raghunath Das* v. *Sundar Das Khetri* (7)]. He further urges that a suit was maintainable as Gul Muhammad, not having been made properly a party to the execution proceedings, could not apply under section 47 and that Order XXI, rule 90, was equally inapplicable, as Gul Muhammad could not apply to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. He further urged that under the present Civil Procedure Code the Court was competent to treat the suit as a proceeding under section 47. As against this argument Mr. Sheo Narain contends that the law as laid down in *Kassum Goolam Hussein* v. *Dayabhai Amarsi* (6) is not applicable in the present case, as a legal attachment had already taken place and as subsequent proceedings were in continuation thereof. He refers to cases where proper notice had not been received by all the judgment-debtors or their representatives, *e. g.*, *Kunhammad* v. *Kutti* (8) and *Ramachari* v. *Duraisami Pillai* (9). The object of rule 16 of Order XXI is to prevent a judgment-debtor settling with a person who is no longer a decree-holder while the object of rule 22 is to give information to the judgment-debtor of a far more important description. He next urges that inspite of the misdescription of Gul Muhammad as a minor he was still a party to the suit and that his objections could only be made under section 47 or Order XXI, rule 90. He refers to authorities that an order under rule 92 confirming a sale must be an order aginst a judgment-debtor. He finally urges that the present suit was not instituted in the executing Court and could not have been so instituted on account of want of jurisdiction and that, therefore, no question arose of treating the suit as a proceeding under section 47.

As for the question whether the neglect of the mandatory directions contained in Order XXI, rule 16, renders all subsequent proceedings void even where a legal attachment has already taken place and the property is in custody of the law, I might be inclined to agree with Mr. Sheo Narain's contentions if the matter were *res integra*. It has, however, been decided in a Division Bench judgment of the Bombay High Court that the failure to comply with the directions of the rule makes subsequent proceedings void. In the present case Gul Mohammad undoubtedly knew of the transfer of the decree to Jan Mohammad, as not only was notice issued to his guardian but he was lying in the attached house at the time. In these circumstances I doubt if he can equitably raise an objection on account of want of personal service on him under rule 16. In all other respects the circumstances are very similar to those dealt with in *Ramachari* v. *Duraisami Pillai* (9). It is not, however, necessary for me to determine this point, as I consider this case undoubtedly barred by the provisions of section 47. The decree was against Gul Mohammad personally and a legal attachment had taken place. The remainder of the proceedings which were undobtedly within his knowledge were proceedings which directly affected him as a judgment-debtor, and the question of the irregularity or illegality of the notice issued under rule 16 and its effect was one arising between the parties to the suit and could have only been properly determined under section 47. The second sub-section of this section could not in any way assist him as the Subordinate Judge before whom the original suit was instituted was not the executing Court.

I agree that a separate suit did not lie and dismiss the appeal with costs.

Appeal dismissed.

(7) 24 Ind. Cas. 304; 41 I. A. 251; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154; 42 C. 72 (P. C.).

(8) 12 M. 90; 4 Ind. Dec. (N. S.) 412.

(9) 21 M. 167; 7 Ind. Dec. (N. S.) 474.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 625 OF 1918.

February 2, 1920.

Present:— Mr. Justice Sultan Ahmed.

RAMNANDAN RAM KANDU

—DEFENDANT—APPELLANT

versus

HARNANDAN PRASAD—PLAINTIFF—RESPONDENT.

Bihar and Orissa Public Demands Recovery Act

RAMNANDAN RAM KANDU *v.* HARNANDAN PRASAD.

(*IV of* 1904), s. 26—*Arrears in respect of whole holding—Certificate in respect of part holding against one of several tenants—Purchaser, position of—Priority over purchaser under money decree.*

If a decree-holder in execution of a rent decree chooses to sell part of a holding, although the decree is against the whole, the decree loses the character of a rent decree. [p. 464, col. 2]

If all the tenants of a holding are not made parties to a rent suit, the decree obtained will not be a rent decree, but will be a money decree. [p. 465, col. 1]

Where in respect of the arrears of rent of a holding which stood in the name of several tenants, a certificate under the Bihar and Orissa Public Demands Recovery Act was issued against only one of the tenants and only a portion of the holding was sold in execution of the certificate:

Held, that the purchaser was in the position of a purchaser in execution of a money decree and had no priority over a previous purchaser of the holding under a money decree. [p. 465, col. 1.]

Second appeal from a decision of the Subordinate Judge, Arrah.

Mr. *Shivanandan Roy*, for the Appellant.

Mr. *Parmeshwar Dayal*, for the Respondent.

JUDGMENT.—The plaintiff brought a suit for a declaration that the defendants have no title to the land in dispute, 2 acres 91 decimals in area, by virtue of their purchase at the certificate sale which was a nullity, and prayed for recovery of possession of the same, and also claimed mesne profits. The facts of the case will have to be shortly stated. A holding, consisting of 2 acres 91 decimals and carrying a rental of Rs. 9-9-6, was owned by one Bihari Sahu. After his death, Ramgulam and Raghubir were recorded in the landlord's *sherista* as the tenants of the holding. On the 16th of September 1914 the holding was attached in execution of a money decree, obtained on the basis of a handnote against Ramgulam, Jadunandan and Raghubir. On the 5th of January 1915 the property was sold in execution of this decree and was purchased by the plaintiffs. On the 8th of January 1915 the sale was made absolute. It appears that the Mouza in which the disputed land lies is *khas mahal* estate. The ledger for 1908-1909 shows that a holding of 7 *bighas* 1 *katta* and 6 *dhurs* was recorded against Bihari Sahu. In 1910 the names of Ramgulam and Raghubir were recorded in respect of the holding. There being arrears of rent in respect of this holding, a certificate for the rental of 1910—1914 was issued against Ramgulam only. A copy of this certificate, with the notice under section 7 of the Bihar and Orissa Public Demands Recovery Act, was served on Ramgulam only. The sale was held, but the sale certificate shows that only 2 acres 91 decimals was sold and purchased by defendants Nos. 1 to 4. It has been found by the Courts below that this 2 acres 91 decimals is the land in dispute and is a part of the holding of 7 *bighas* 1 *katta* and 6 *dhurs*. It is obvious, therefore, that this is a case of competition between two purchasers, and the main question is, whose purchase is to prevail, whether the purchase of the plaintiff under the money decree or of the defendants' as purchasers at the certificate sale? It is conceded that if the defendants' purchase was in execution of a rent decree, in that case they will have the priority. Therefore, it is necessary to see what actually passed at the certificate sale, whether the right, title and interest only of the certificate-debtor or the holding itself. The holding which was in arrears was 7 *bighas* 1 *katta* 6 *dhurs* standing in the name of Ramgulam and Raghubir. But the certificate was issued against Ramgulam only; and what is more important is that the sale certificate shows that only 2 acres 91 decimals was sold. This means that the arrears due in respect of a whole holding were realized by the sale of a part of it. As a matter of fact, it was urged before me that this holding of 2 acres 91 decimals was not even part of the 7 *bighas* 1 *katta* 6 *dhurs* but the finding of the Appellate Court is quite clear on that point, and I must take it that 2 acres 91 decimals formed part of 7 *bighas* 1 *katta* 6 *dhurs*. In the case reported as *Ram Kinkar Biswas* v. *Akhil Chandra Chowdhury* (1) it has been held that if the decree-holder in execution of the decree chooses to sell part of a holding though the decree was against the whole, the decree loses the character of a rent decree, and, therefore, the purchase of the defendants was in effect in execution

(1) 11 C. W. N. 350 at p. 351; 5 C. L. J. 242; 2 M. L. T. 137; 35 C. 519.

of a money decree. Then, it appears that, though the decree was against the whole holding of 7 *bighas* odd *kattas* which stood recorded in the names of Ramgulam, Raghubir and Jadunandan, only Ramgulam was made a party and it has been held in the cases reported as *Jogeswar Rai* v. *Kesho Persad Singh* (2), *Krishna Das Roy* v. *Kali Tara Chowdhurani* (3), *Beradar Singh* v. *Bacha Mahto* (4), that, if all the tenants are not made parties, the decree will not be a rent decree but will be a money decree. Therefore, on that ground also, the plaintiff's purchase will prevail. Under section 26 of the Bihar and Orissa Public Demands Recovery Act what the defendants purchased at the certificate sale was the right, title and interest of the judgment-debtor at the time of the sale. It was urged by the learned Vakil, appearing on behalf of the appellant, that even if the decree is found to be a money-decree he will have priority, because notice under the Bihar and Orissa Public Demands Recovery Act was prior to the attachment under the money decree. There is no force in the argument, and section 26 is a complete answer to it. The certificate sale took place on the 17th April 1915, while the sale under the money decree took place on the 5th of January 1915. It was next contended that Ramgulam was sued not only in his individual capacity but in his representative capacity and the cases reported as *Jeo Lal Singh* v. *Ganga Pershad* (5), *Nitayi Behari Saha Paramanik* v. *Hari Govinda Saha* (6), *Radha Pershad Singh Bahadur* v. *Ram Khelawan Singh* (7) and *Jagat Chandra Dutt* v. *The Collector of Chittagong* (8) were referred to. In my opinion these cases do not in the least help the appellant. To begin with, Ramgulam, it appears, was the nephew and, therefore, a junior member of the family and, as such, could not be sued in his representative capacity at all. Secondly, there is no indication at any stage that he was sued in his representative capacity. In my opinion, the learned Subordinate Judge rightly dismissed the appeal of the appellant. I uphold his findings and dismiss the appeal with costs.

Appeal dismissed.

(2) 37 Ind. Cas. 262; 1 P. L. J. 190.
(3) 44 Ind. Cas 80; 22 C. W. N. 289.
(4) 54 Ind. Cas. 39; (1920) Pat. 9; 5 P. L. J. 32; 1 P. L. T. 55.
(5) 10 C. 996; 5 Ind. Dec. (N s) 664.
(6) 26 C. 677; 13 Ind. Dec. (N. s.) 1033.
(7) 23 C. 302; 12 Ind. Dec (N. s.) 202.
(8) 18 Ind. Cas. 551; 17 C. W. N. 1001 at p. 1002; 17 C. L. J. 61; 40 C. 64.

LAHORE HIGH COURT.

CIVIL REFERENCE No. 14 OF 1920.

April 28, 1920.

Present:—Mr. Justice Wilberforce.

SARDHA—DEFENDANT

versus

LAKHU—PLAINTIFF

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (d), (c)—Occupancy rights, creation of, by widow—Reversioner, suit by, to contest alienation—Jurisdiction of Civil and Revenue Courts.

A suit by a reversioner to contest the validity of the creation of occupancy rights by the widow of the last male owner is cognizable by a Civil Court. [p. 466, col. 1.]

Case referred, under section 100 of the Punjab Tenancy Act of 1887, by the District Judge, Kangra, with his letter No. 412, dated the 12th March 1920, for orders of the High Court.

Lala *Mehr Chand Mahajan*, for the Defendant.

JUDGMENT.—Plaintiff's suit was for the recovery of possession of 30 *kanals* 14 *marlas* on the ground that it was his ancestral property. He stated that his predecessor-in title, one Rirku, had left a widow, *Musammat* Gandho, and that the land in suit was in possession of her brother, the defendant. He stated that the defendant was in reality a non-occupancy tenant, and that anyhow if *Musammat* Gandho had created occupancy rights in his favour, such alienation by her was not binding against him. The defendant produced a document by which *Musammat* Gandho created occupancy rights in his favour. The suit coming on appeal before the learned District Judge, that officer was of opinion that it was cognizable only by a Revenue Court, falling under section 77 (3) (*d*) or (3) (*c*) of the Tenancy Act, and the Judge, therefore, referred the case under section 100 of that Act with a recommendation that the Munsif's decree might be registered as that of an Assistant Collector, 1st grade,

RAGHUNATH CHATTERJI v. JUTHU CHATTAR.

I do not agree with the opinion of the District Judge, as the suit was in no way one by a landlord to eject a tenant, nor was it one by a landlord to prove that a tenant had no right of occupancy. The plaint, though not happily worded, was clearly to the effect that the defendant was either a trespasser, or else was in occupation under an alienation from *Musammat* Gandho which had no legal effect against him. In other words, again, that he was a trespasser. He did not admit that there had been any valid creation of occupancy rights. The learned District Judge pointed out that the plaintiff admitted that the relationship of landlord and tenant existed between *Musammat* Gandho and the defendant, and he considered that the plaintiff merely stood in the shoes of *Musammat* Gandho and was her successor-in interest. As a matter of fact the land being ancestral, the plaintiff did not derive his rights to possession through *Musammat* Gandho, but through the common ancestor, and the whole point of his case rightly or wrongly is that he is in no way bound by the actions of *Musammat* Gandho. The suit, therefore, appears to me clearly cognizable by a Civil Court, and in fact to be precisely on the same footing as the cases dealt with in *Ishar* v. *Sundar* (1), *Bhagwana* v. *Balik Ram* (2). In neither of these cases was there even any suggestion that a suit to contest the validity of the creation of occupancy rights was cognizable by a Revenue Court.

I, therefore, return the records of the case to the District Judge for disposal of the appeal.

Case sent back.

(1) 48 Ind. Cas. 808; 125 P. R. 1918.
(2) 51 Ind. Cas. 408; 37 P. R. 1919.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 744 OF 1918.

March 10, 1920.

Present:—Mr. Justice Jwala Prasad.

RAGHUNATH CHATTERJI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

JUTHU CHATTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy holding—Joint tenants—Surrender by one tenant of his share, validity of—Appeal, second—Finding of fact based on no evidence, whether binding.

A surrender by one of several joint tenants of an occupancy holding of his share in the holding is valid [p. 457, col. 2]

Where a finding of fact is arrived at by a wrong construction of the pleadings, and upon no evidence, the finding is liable to be set aside in second appeal. [p. 468, col. 2.]

Second appeal from a decision of the District Judge, Purulia (Manbhum).

Mr. *Harihar Prasad Sinha* for Mr. *Mritunjoy Lal*, for the Appellants.

Mr. *Abani Bhusan Mukherji*, for the Respondents.

JUDGMENT.—The plaintiffs are the appellants. They brought a suit out of which this appeal has arisen in the Court of the Munsif of Purulia for recovery of possession of the lands in suit after a declaration of their title thereto.

The lands in suit are alleged to have been settled with four persons, Juthu Chatar, Golam Chatar, Shridan Chatar and Nabin Chatar, by means of a lease, dated the 12th Magh 1296 (corresponding to the 24th of January 1890). Defendants Nos. 2 and 3 are the sons of Golam Chatar, defendants Nos. 4 and 5 are the sons of Shridan Chatar and defendant No. 6 is the son of Nabin Chatar.

The plaintiffs' case is that the aforesaid four persons who originally took the lease had four equal shares in the lands, the annual *jama* of which was Rs. 3 12 for the entire lands, and that they were holding the lands separately by dividing them in accordance with their shares for the purpose of cultivation, that defendants Nos. 2 to 5 being unable to pay rent for their shares of the land and to cultivate the same for want of money, surrendered their 8-annas share, the annual rental of which was Rs. 1-14, to the plaintiffs by a registered deed of relinquishment, dated the 4th March 1916, and thus the plaintiff became entitled to *khas* possession of half his share of the land covered by the original lease of 24th January 1890 described in schedule I to the plaint. The lands surrendered by defendants Nos. 2 to 5 are described in schedule II to the plaint.

The plaintiffs allege that when they went to take possession of the land in schedule

II in Asadh 1323, the defendant No. 1 resisted them by force and prevented them from taking possession of the same.

The defendants Nos. 2 to 5 filed written statements supporting the claim of the plaintiffs and admitting that they had willingly surrendered the lands on account of their inability to cultivate them and to pay rent therefor. The defendant No. 6, who has 4-annas share in the lands originally leased, also filed a written statement supporting the case of the plaintiffs.

The defendant No. 1, having 4 annas share only, resisted the plaintiffs' claim and filed a written statement. The defendant in his long written statement set up the title of a third person as the proprietor of the land and impugned the title of the plaintiffs and stated that the *kabuliyut* of the 24th January 1890 in favour of the plaintiffs' ancestor was executed through coercion. The defendant further pleaded that the surrender, if any, of a portion of the entire lands leased is invalid and the plaintiffs cannot acquire any title by virtue of the alleged partial surrender.

In paragraph 10 of the written statement the defendant set up a *ladawi* or surrender by defendants Nos. 4 and 5, in his own behalf, of their share in the lands in dispute, by means of a deed executed on the 14th day of Jestha 1322.

Upon the pleas taken by the defendant, five issues were framed in the Court of first instance. We are concerned here only with Issue No. 4.

This issue is in the following terms:—

"Have the plaintiffs any title to the land in suit?"

The Munsif held that the plaintiffs are the landlords of the lands covered by the lease, dated the 24th January 1890; that the defendants Nos. 2 to 5 are co-tenants of the lands; that all the co-sharers had divided the lands according to their shares; that the lands in schedule II fell to the shares of defendants Nos. 2 to 5 and that then the defendants Nos. 2 to 5 surrendered the lands in schedule II in favour of the plaintiffs. The Munsif was further of opinion that even if the lands were undivided and defendants Nos. 2 and 5 were joint tenants thereof with defendants Nos. 1 and 6, the surrender of their undivided shares in favour of the landlords was valid. In support of this proposition the Munsif relied upon a decision of Banerjee, J., in *Peary Mohun Mondal* v. *Radhika Mohun Hazra* (1), which was upheld in Letters Patent Appeal by Maclean, C. J., sitting with Bodilly and Mookerjee, JJ. The Munsif has relied also upon the case of *Ganga Chandra Choudhury* v. *Alak Chand Saha* (2).

On appeal the District Judge set aside the decision of the Munsif and dismissed the plaintiffs' case. The learned District Judge concludes his judgment in the following words:—"On these two findings of fact then (1) that there was no such surrender as alleged, but rather a transfer for consideration which is illegal under section 47 of the Chhota Nagpur Tenancy Act, and (2) that the tenancy is a joint and undivided one, the plaintiffs' case must fail." As to the second ground, the learned Judge is apparently of opinion that a surrender by a co tenant of his share in an undivided holding is invalid. In this view of the law he is clearly wrong. He has tried to distinguish the case of *Ganga Chandra Choudhury* v. *Alak Chand Saha* (2) on the ground stated by him that it "was a case of one *raiyat* surrendering a portion of his whole holding." But I fail to see any distinction in principle between the right of a tenant of an entire holding surrendering a portion of it and that of a co-tenant surrendering a portion of the holding according to his share in it. In both cases the surrender is of a portion of the holding, the validity of which is recognized in the said ruling. The case of *Peary Mohun Mondal* v. *Radhika Mohun Hazra* (1) is, however, a direct case on all fours with the present one, where the surrender by a co tenant of his share in the holding was held to be good and valid. Banerjee, J., in his very elaborate and detailed judgment in that case has discussed the question from every point of view, namely, from the provisions in the Bengal Tenancy Act and the general principles applicable to such a case, and has come to the conclusion that relinquishment made in favour of the landlord by some of the several tenants of a joint occupancy holding does not operate by way of enlarging the

(1) 8 C. W. N. 315.
(2) 18 Ind. Cas. 996; 17 C. W. N. 698.

right of the other co-sharers who did not relinquish and by way of depriving the landlord of what ordinarily would belong to him. It was distinctly laid down that a landlord has a right of re entry in respect of the portion of the holding surrendered by a co-tenant. In the words of Maclean, C. J., who dealt with that case in Letters Patent, I would adopt the reasoning and conclusion of Banerjee, J., in that case and cannot usefully add to what is said therein. This disposes of the second ground upon which the decision of the Munsif was set aside by the learned District Judge.

As to the first ground, I fail to understand upon what basis the learned Judge has held that the deed, which purports to be a deed of surrender and relinquishment, Exhibit 2, by defendants Nos. 2 to 5 in favour of the plaintiffs, was a transfer for consideration. The deed itself does not make mention of any consideration but a voluntary surrender of the holding in favour of the landlords. The pleadings of the parties are also conspicuously salient upon the point. It was not the case of either party that there was any transfer for consideration created in favour of the landlord by virtue of the deed in question. The second portion of the first ground, therefore, appears to me to be unsubstantial and based upon misconception. It was perhaps resorted to with a view to support the finding of the Court that the deed of surrender was a collusive one. This leads us to the consideration of the first portion of ground No. (1), namely, whether there was "no such surrender as alleged" by the plaintiffs. The deed of surrender filed by the plaintiffs is a registered document. It was not denied either by the executants of the deed, defendants Nos. 2 to 5, or by the contesting defendant No. 1 in his written statement, or for the matter of that in the entire evidence which I have now read in the case, that the deed of surrender filed by the plaintiffs was in fact executed. The learned Judge also does not hold that the deed was not, as a matter of fact, executed, but he declines to give effect to it by impugning it as a collusive transaction and in order to hold that the surrender was collusive, the learned District Judge relied upon paragraph 1 of the written statement of the defendant. In that paragraph the defendant avers "that there is no cause of action or right for plaintiffs' suit. Being under the control of avarice and in collusion with other defendants, they have instituted this false suit." That statement does not refer to the deed in question, but to the present suit brought by the plaintiffs to recover possession of the lands in suit. The learned Vakil on behalf of the respondent has conceded that there is nothing in the written statement expressly or by indication stating that the deed in question, the surrender, is a collusive one. Therefore the plaintiffs did not set up in their written statement the plea of collusion with regard to the surrender alleged by the plaintiffs. The learned Judge then says that the surrender is collusive, because the reason for the surrender stated in the deed as well as in the plaint, namely, that the defendants Nos. 2 to 5 could not pay rent for the land, is false, for the defendant No. 1 is said to have paid for the whole holding. Assuming for the sake of argument that defendant No. 1 has paid the rent of the holding to the landlords, defendants Nos. 2 to 5 would be liable to him for contribution of their shares of the rent. Besides, even if the defendants Nos. 2 to 5 had been paying rents in the past years, which they necessarily had to pay unless the holding was surrendered, they could still feel that they would not be able in future to pay the rent and would very well have relinquished their shares of the land in order to protect themselves from future liability to pay rent when the land, according to them, had deteriorated and they could not cultivate the same for want of funds. This is, therefore, not a sufficient reason for holding that the deed must necessarily be a collusive one. This is the only reason upon which the learned District Judge has based his finding of collusion with regard to the deed in question. The finding of the District Judge that the surrender was collusive has, therefore, been arrived at by a wrong construction of the pleading, the written statement of defendant No. 1, and upon no evidence, and hence is liable to be questioned in second appeal.

But does the question of collusion at all arise in the present case? Whether collusive or not, the surrender is valid so far as the defendants Nos. 2 to 5 are concerned. They abide by the surrender and do not want to avoid it on the ground of collusion. The surrender is, therefore, binding upon them. The defendant No. 1 is not at all affected by the collusion, if any, between the plaintiffs and the defendants Nos. 2 to 5 with respect to the deed in question, for his share in the land is not at all touched by the deed of surrender. He had never any right to hold the entire holding or anything in excess of his own share and so long as his share is not affected by the deed of surrender, I do not think that the Court can refuse to give effect to it, collusion or no collusion. I, therefore, disagree with the view taken by the learned District Judge and agree with that taken by the Munsif, whose judgment appears to me to be clearer and more precise than that of the District Judge.

The learned Vakil on behalf of the respondents says that upon the finding of the learned District Judge, that the land was not split up, the surrender could not be given effect to and the plaintiffs could not get possession of the specific plots in schedule II of the plaint claimed by them. I do not think that there is any substance in this contention. The plaintiffs expressly alleged in the plaint that the defendants held specified shares in the lands and that subsequent to the *kabuliyat* of 24th January they had divided the lands and had been in separate possession of the lands in schedule II. This statement in the plaint was not at all traversed in the written statement. The Munsif held that the defendants had specified shares leased out to them under the deed and that they were by division in possession of the specific land. The District Judge held that the holding was not split up, but the finding of the Munsif that the shares were well-known and definite, has not been disturbed by the District Judge. It is not disputed that the share of defendants Nos. 2 to 5, which was surrendered by the deed in favour of the plaintiffs, was 8 annas in the land covered by the lease of 1890, and in fact there is clear evidence on the point. The principle of the ruling in *Peary Mohun Mondal* v. *Radhika Mohun Hazra* (1) already referred to will, therefore, apply. In order to apply this ruling it is not necessary that the holding should have been split up and divided by metes and bounds between the co-tenants. I, therefore, overrule this contention.

The result is that the decision of the District Judge is set aside and that of the Munsif restored, and the plaintiffs' suit decreed with costs throughout.

Appeal decreed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2126 OF 1915.

April 13, 1920.

Present:—Mr. Justice Scott Smith and Mr. Justice Abdul Raoof.

SANT RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

KIDAR NANH AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Member joining firm—Presumption—Burden of proof—Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross-objections against non-appealing party, whether can be urged.

There is no presumption that a business carried on by a member of a joint Hindu family is a joint family business. [p. 471, col. 1.]

The burden of proving that a certain member of a joint Hindu family joined a firm not in his individual capacity, but as a representative of the whole family, is on the party who alleges it. [p. 472, col. 1.]

Hari Shankar v. *Babu Ram*, 18 Ind. Cas. 746; 241 P. W. R. 1912; 73 P. L. R. 1913; *Suraj Kumar* v. *Baldeo Das*, 18 Ind. Cas. 701; 48 P. R. 1913; 23 P. W. R. 1913; 60 P. L. R. 1913, followed.

As a general rule cross-objections can be urged only against the appellant and not against a co-respondent. [p. 474, col. 2.]

Bishun Churn Roy Chowdhry v. *Jogendra Nath Roy*, 26 C. 114; 13 Ind. Dec. (N. S.) 677, followed.

No cross-objections can be urged against a defendant who has not filed any appeal from the decree passed against him. [p. 475, col. 1.]

First appeal from the decree of the Subordinate Judge, 1st Class, Amritsar, dated the 28th May 1915.

Dr. *Gokal Chand Narang* and Lala *Tirath Ram*, for the Appellants.

Mr. *Duni Chand* and Lala *Mehr Chand Mahajan*, for the Plaintiffs-Respondents

Mr. *O. L. Anand*, for Gandoo Ram, Respondent.

Lalas *Faqir Chand* and *Arjan Das*, for Radha

Kishan, Prem Das and Bhagat Ram, Respondents.

JUDGMENT.—In the suit out of which the present appeal arises Kidar Nath and Amar Nath plaintiffs, sons of Kanshi Ram deceased, claimed dissolution of partnership and the taking of the partnership accounts and the recovery of any money that might be found due to them. The following pedigree-tables are necessary for the proper understanding of this case:

(*a*) KANSHI RAM, *Arora*, DIED 28TH NOVEMBER 1907.

Kidar Nath plaintiff No. 1.	Amar Nath plaintiff No. 2.

(*b*) RAM CHAND *Brahman*, DIED 28TH OCTOBER 1909.

Balmokand died 21-6-1906.	Gandoo defendant No. 1.	Sant Ram defendant No. 2.	Mahant Ram deceased,

Mohan Lal defendant No. 4.	Rupa deceased,
	Musammat Vaid Kaur widow, defendant No. 5.

(*c*) MADHO MAL, *Arora*, DIED 4TH MAY 1907.

Radha Kishan defendant No. 6.	Prem Das defendant No. 7.	Bhagat Ram defendant No. 8.

The lower Court found that the partnership had already been dissolved prior to the institution of the suit and gave plaintiffs a decree for Rs. 2,541-10-9 against defendants Nos. 1 to 5: it also gave the defendants Nos. 6 to 8, the sons of Madho Mal, a decree for Rs. 7,256-11-6 against the same defendants.

The present appeal was filed by Sant Ram and Mohan Lal and cross-objections have been filed as to items disallowed, both by the plaintiffs and by defendants Nos. 6 to 8. Devi Das, defendant No. 3, was not represented in this Court nor was *Musammat* Vaid Kuar, the widow of Rupa. Gandu is represented by Counsel who adopted the argument of the appellants' Counsel.

The following are the brief facts of the case.

The first partnership firm was started by Kanshi Ram and Ram Chand in Peshawar and carried on business from *Sambat* 1937 to *Sambat* 1942. In this Court there is no dispute as to the accounts of that business. In *Sambat* 1943 a new partnership was started, the partners being Kanshi Ram, Madho Mal and Balmokand, the son of Ram Chand, and the firm was called Kanshi Ram-Madho Mal and carried on business in Peshawar from *Sambat* 1943 to *Sambat* 1963. The third firm also in Peshawar, called Baij Nath-Balmokand, had the same partners and carried on business from *Asuj Sambat* 1943 to *Chet* 1951. The fourth firm was that of Kanshi Ram-Balmokand which carried on business at Hoti Mardan in the Peshawar District from *Chet Sambat* 1951 to *Poh Sambat* 1962, corresponding to December 1905, when it was dissolved by agreement. Its partners were the same as the firm of Kanshi Ram-Madho Mal. The fifth firm was that of Kanshi Ram Jawahri which carried on business in Amritsar. The partners were the same as in the firm of Kanshi Ram-Madho Mal. It was really a supplying firm to the firms in Peshawar and Hoti Mardan.

The principal question for determination in the lower Court was whether Balmokand

was a partner of the firm Kanshi Ram-Madho Mal and of other firms in his individual capacity or as representative of the joint family of which Ram Chand was the senior member and presumably the manager. Plaintiffs argued and the lower Court held that he was a member of these firms as representative of the joint family and it, therefore, passed a decree not only against Balmokand's son, but against his brothers, his nephew and his nephew's widow. The contention of the appellants is that Balmukand was a partner in his individual capacity only, and that they are not responsible for his debts or for rendering accounts of the firms in which he was a partner.

The first argument urged very strongly by Mr. Narang on behalf of the appellants is that the lower Court erred in presuming that because Balmokand was a member of the joint Hindu family, therefore, as partner in the various firms he represented the whole of the joint Hindu family of which he was a member. In paragraph 14 of the judgment the lower Court says:—"Admittedly Ram Chand and his sons constituted a joint Hindu family in *Sambat* 1943 and as presumably share of the capital for the partnership business contributed by Balmokand was drawn from his family property, he was merely an agent of the family. The whole of the family and not he alone were the proprietors of his share in the trade." The Court referred to Mayne's Hindu Law, 8th Edition, Article 300, where it is stated that where one or more joint members trade by themselves, or in partnership with strangers on capital which is not family property, the profits resulting are of course exclusively their own. If the capital is drawn from family property, the trade and profits are also family property. We have no quarrel with the latter proposition, but we do not think the lower Court was justified in assuming that Balmokand joined the firms in which he was a partner with capital drawn from the joint family funds. In principles of Hindu Law by Mulla, 3rd Edition, page 212, it is stated that there is no presumption that a business carried on by one who is a member of the joint family is a joint family business. One of the authorities cited by Mr. Mulla in support of this proposition is *Vadilal* v. *Shah Khushal* (1), where it was held that although a person carrying on business is a co-parcener in a joint family, it does not necessarily follow that all his co parceners are his partners in that business, entitled with him to its rights and responsible with him for its liabilities. The fact of the partnership must be proved by evidence showing that the persons alleged to be partners have agreed to combine their property, labour or skill in the business and to share the profits and losses thereof. In the case reported as *Hari Shankar* v. *Babu Ram* (2) it was held that no doubt the initial presumption is that members of a Hindu family are joint but it does not, however, follow that all the property owned or shops started by individual members of the family are joint of all the members. The same view of the initial onus was taken in *Suraj Kumar* v. *Baldeo Das* (3).

A great deal of oral evidence has been adduced on behalf of the defendants to show that after the original firm of Kanshi Ram-Ram Chand ceased its business in *Sambat* 1942, Ram Chand started a separate shop in Peshawar, dealing in the same class of goods, which was called Ram Chand-Sant Ram. The same witnesses have deposed that Ram Chand and Sant Ram were quite separate from Balmokand. We are not sure that much credit should attach to the evidence of these witnesses as to Balmokand being quite separate from his father and brothers, because we doubt that they had sufficient opportunity of knowing the facts, but we see no reason for not accepting their evidence to the effect that Ram Chand had a separate shop at Peshawar called Ram Chand Sant Ram. The lower Court has referred to this point in its judgment (on page 188 top of the paper-book) but has not come to a clear finding as to the existence of such a shop or not. We hold that there was such a shop, and this fact, in our opinion, is against the contention that Balmokand as partner in the firm of Kanshi Ram-Madho Mal represented the whole of the joint family of which he was a member. If Ram Chand had been a

(1) 27 B. 157; 4 Bom. L. R. 968.
(2) 18 Ind. Cas. 746; 241 P. W. R. 1912; 73 P. L. R. 1913.
(3) 18 Ind. Cas. 701; 48 P. R. 1913; 23 P. W. R. 1913; 60 P. L. R. 1913.

partner in that firm, there does not seem to be any reason why he should have started a separate shop at the same place dealing in the same articles. We are quite clear that the initial onus is upon plaintiffs to prove that Balmokand was a partner in the firms, not in his individual capacity, but as representative of the whole of the joint Hindu family. The evidence on which the lower Court mainly relies in support of its finding is given on pages 186 and 187 of the printed paper-book. The first point taken is that when the partnership was started in *Sambat* 1943 Balmokand was a member of the joint Hindu family and, therefore, he, as a partner, represented therein the joint Hindu family. We have already dealt with this point and there is no necessity to say anything more about it.

The second point relied upon was a statement by Devi Das defendant made by him before Lala Dina Nath on the 7th February 1910. This merely related to the jointness of the family and had nothing to do with the question whether Balmokand as a member of the various partnerships represented the whole of the joint family or not. The third point taken is that Balmokand's father and brothers on various occasions did work for the firms at Peshawar and Hoti. The work they did was that they made entries in the account-books and wrote letters relating to the partnership business. Thus Sant Ram on the 29th January 1914 admitted before the Commissioner that entries on leaf 8 and leaves 13 to 25 of the cash book of the shop at Hoti were in his handwriting. The latter entries were made during the period from *Jeth* 4th to *Jeth* 32nd *Sambat* 1958 (see page 135 of the paper-book). Sant Ram stated that he used to go to Hoti for his own business and made these entries in the book at the instance of some other person. He also admitted certain entries on 5 or 6 pages of the *bahi* of the Peshawar shop to be in his handwriting. Thus it is said to be proved that Sant Ram participated in the management of the affairs at Peshawar and Hoti, Mr. Narang, however, points out that Sant Ram was on good terms with his brother Balmokand and had his own business both at Peshawar and Hoti, and that there is no reason why on some occasions he should not have helped him by making entries in his account-books. The fact that Sant Ram made entries sometimes in the Peshawar account books does not, in our opinion, lead to any inference at all. Ram Chand and Sant Ram had themselves a shop at Peshawar and they must often have visited the shop of Balmokand, being members of the same family and presumably on good terms, and there was nothing remarkable in their occasionally helping him in his business.

The lower Court next referred to a letter dated 20th *Poh* 1944 in the handwriting of Ram Chand. This letter was written from Peshawar on behalf of Kanshi Ram-Madho Mal to Kanshi Ram Jawahri at Amritsar. This solitary instance of Ram Chand's writing a letter for the firm of Kanshi Ram-Madho Mal does not, in our opinion, prove that Ram Chand helped in the management of that firm. Mr. Narang very pertinently argues that a father might very well look after his son's shop in his temporary absence. The contents of the letter show that Balmokand was absent at Amritsar at the time. The lower Court then referred to the letter dated 22nd *Katak* 1945 (page 48 of the paper-book) written by Gandoo from Peshawar on behalf of the firm Kanshi Ram-Madho Mal to Kanshi Ram Jawahri at Amritsar. Gandoo as brother of Sant Ram might very easily have helped the latter occasionally by writing a letter of this sort for him. Moreover, Gandoo at one period worked for the firm of Kanshi Ram-Madho Mal as a servant, and received pay as such, see page 34 of the paper-book, where is printed an extract from *rokar bahi* of the shop at Peshawar which shows that in *Phagan* 1949 Gandoo was receiving pay from the shop. At the time when the letter D 3 was written, Gandoo may have been working as a servant of the firm. The letter D 2 dated 16th *Har* 1953 (page 51 of the paper-book) is the next piece of evidence referred to. It was written by Mahant Ram on behalf of the Peshawar firm to Kanshi Ram, but for the reasons already given by us we consider it proves nothing.

The letter Exhibit X dated 21st *Maghar* 1961 (page 36 of the paper-book) was written on behalf of the Hoti firm to Madho Mal Parem Das of Amritsar. It is in the handwriting of Balmokand, who was

admittedly a member of that firm, and was to the effect that money should be sent by the hand of Sant Ram. This letter, in our opinion, proves nothing in favour of the plaintiffs. The letter Z of the 28th *Maghar* 1961 (page 38 of the paper-book) is also from Balmokand in continuation of the letter X and is to the effect that Sant Ram had arrived. The letter was written by Sant Ram, though it was signed by Balmokand. It shows that Balmokand was suffering from fever and this was quite a sufficient reason for Sant Ram to write the letter on his behalf. The mere fact that Sant Ram wrote it and Balmokand signed it shows, in our opinion, that it was written by Sant Ram on behalf of Balmokand and not by Sant Ram because he was a member of the firm. The letter Y dated 5th *Poh* 1961 is another letter from the firm of Kanshi Ram Balmokand of Hoti and is in the handwriting of Sant Ram defendant. It was written about a week after the letter Z. Sant Ram apparently stayed a few days at Hoti because Balmokand had fever and there was nothing remarkable in his writing this letter also.

The lower Court in its judgment (at the bottom of page 187 of the paper book) refers to the existence of the family shop at Benares whose account books were written by Balmokand for 19 or 20 days. It appears from the evidence that a criminal case was brought against Balmokand and that after the conclusion of it he went to Benares.

On the way back he stopped at Amritsar, where he died. We see nothing remarkable in his having made entries in the Benares books for a few days. He probably went there to see his relations and could very well assist them in making entries in the account books while he was there, even if he was not himself a partner in the shop. Mr. Narang has referred to the following evidence in support of the contentions put forward by him that Balmokand was a member of the various partnerships in his own individual capacity only:—

(1) After Kanshi Ram's death an agreement was executed by Balmokand and Madho Mal and by *Musammat* Kahan Devi and Kanhya Lal, as guardians of Kedar Nath and Amar Nath, on the 19th October 1905 in reference to the shop at Hoti Mardan. This is printed at pages 54 and 55 of the paper-book. It shows that the partners in the firm stopped business of the shop as from that date. This agreement refers to Balmokand in his individual capacity and makes no mention at all of his father or brothers. After the accounts were gone into, a further agreement was executed on 8th *Poh* 1962, *i. e.*, December 1905. It is printed at page 53 of the paper-book. This agreement makes Balmokand personally responsible for the re-payment of the capital invested in the firm by Madho Mal and Kanshi Ram respectively. Again there is no mention of any other member of the family. In our opinion these two agreements very strongly support the argument of the appellants' Counsel that Balmokand was a member of those firms in his individual capacity only and not as representing the joint Hindu family of which he was a member. We think that had Ram Chand been a partner, he would certainly have been made to join in the execution of these agreements.

(2) Mr. Narang referred to the oral evidence as to the existence of a separate shop at Peshawar called Ram Chand-Sant Ram. We had already adverted to this and it is unnecessary to say any thing more about it.

(3) Prem Das's statement (printed at page 81 of the paper book) is referred to, wherein he admitted that Ram Chand was not a partner of the shop after 1942. This statement does not bind the plaintiffs in any way and can be considered as an admission by Prem Das only.

(4) Certain entries in the account-books of Kanshi Ram's private firm at Amritsar (printed at page 11 of the paper book) are referred to. In these accounts separate debits are shown against Ram Chand and Balmokand, from which the inference is sought to be drawn that they were separate. There is no other evidence about these entries and we are, therefore, not able to attach much value to them.

(5) The entry on page 34 is referred to which shows that Gandoo was receiving pay from the firm of Kanshi Ram-Madho Mal. This, so far as it goes, leads to the inference that Gandoo himself was not a partner in that firm.

(6) The Will of Kanshi Ram (pages 36 and 37 of the paper-book) is referred to, but in our opinion it is not proved nor is the *firkhati* (printed at page 47 of the paper-book) proved.

(7) Separate payment of *tamol* by Gandoo and Balmokand and by Ram Chand, mentioned in Sant Ram's statement printed at page 143 of the paper book, is referred to as showing separation. It is, however, not clear that the Ram Chand referred to in the entry in question is Ram Chand the father of Balmokand or some other Ram Chand.

(8) It is urged by Mr. Narang that there has been delay in bringing the present case. It was not brought by the plaintiffs till nearly four years after the agreement of December 1905. The plaintiffs being minors might, no doubt, have some excuse for not suing sooner, but defendants Nos. 6 to 8, the sons of Madho Mal, also brought no suit and allowed their claim, if any, to become barred by time. It is certainly remarkable that if the latter thought they were entitled to anything, they did not bring a suit. The Commissioner has laid great stress on the fact that Sant Ram appeared to have a very intimate acquaintance with all the account books. It must, however, be remembered that Sant Ram is a member of the same family and is apparently on good terms with his brother Balmokand. He appears to have travelled about to Hoti and Amritsar and elsewhere and no doubt was often in the shops at Hoti and Amritsar. Sant Ram helped in the examination of the *bahis* and in the preparation of the *chithas* referred to in the Commissioner's report. In the course of the examination of the account books he must have become acquainted with them very thoroughly and we do not think, therefore, that very much stress should be laid upon the fact that he appeared to possess knowledge of the various details of these accounts.

We have carefully considered all the facts and the arguments of Counsel and we are clearly of opinion that it has not been proved that Balmokand was a member of the various partnerships as representing the joint family of which he was a member. The facts that Sant Ram sometimes made entries in the account books of the firm and that he, Ram Chand and Mahant Ram occasionally wrote letters for those firms do not, in our opinion, at all prove that those persons were also partners in the firms. The firms were in existence for some 20 years and the number of instances in which these persons are proved to have assisted in the business of the firms are comparatively few and not sufficient, in our opinion, to give rise to the presumption that they were really interested in the affairs of those firms. We think that the agreements come to between Balmokand and the other partners at the time, when the business at Hoti was closed, are very strong evidence to show that Balmokand was a member of the firm merely in his individual capacity and not as representative of the joint Hindu family.

We, therefore, are of opinion that the appeal of Sant Ram and Mohan Lal must succeed. We accept their appeal and set aside the decree against them. Neither Gandoo nor *Musammat* Vaid Kaur have appealed, but the decree against them proceeds on the same grounds as against Sant Ram and Mohan Lal and, therefore, in exercise of the powers conferred upon us by Order XLI, rule 33, Civil Procedure Code, we set aside the decree against them also as well as against Sant Ram and Mohan Lal.

The cross-objections filed by the plaintiffs-respondents need not now be gone into nor is it necessary for us to go into the question of the accounts. With reference to the cross-objections filed by defendants Nos. 6, 7 and 8 it is necessary for us to say a few words. Devi Das, as already stated, has not appealed, and the question is whether the cross-objections of defendants Nos. 6 to 8, the co-respondents in this appeal, can be heard as against him. In *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy* (4) it was held that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against another respondent, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. The same view was taken in *Shabiuddin* v. *Deomoorat Koer* (5), where the general rule was followed that the right of a respondent to urge cross-objections under section 561 of the Civil Procedure Code

(4) 26 C. 114; 13 Ind. Dec. (N. S.) 677.
(5) 50 C. 655.

should be limited to his urging them against the appellant only.

In the present case as we have held that Balmokand was a member of the various firms in his individual capacity only, it is unnecessary for us to open up the whole case and to go into the accounts and to see whether the lower Court had disallowed any items which should have been allowed. Under these circumstances we are of opinion that the general rule must be followed in the present case and that defendantsNos. 6 to 8 cannot be allowed to urge their cross objections against Devi Das who has not filed any appeal from the decree passed against him. We, therefore, disallow the cross objections of defendants Nos. 6 to 8. The decree against Devi Das, who has not appealed, is not affected by the present order. We direct that the plaintiffsand defendants Nos. 6 to 8 respondents shall pay the costs of the appellants in both Courts.

Appeal accepted; Cross-objection disallowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 657 OF 1919.

January 2, 1920.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

FAKHRUNNESSA BEGAM *alias* BADSHA BEGAM, WIFE OF NAWAB SULTAN HOSSAIN KHAN—PETITIONER

versus

THE DISTRICT JUDGE OF THE 24-PARGUNNAS—OPPOSITE-PARTY.

Muhammadan Law—Endowment—Mutwalli, *lease by—Sanction of Court—Suit, whether necessary—Civil Procedure Code (Act V of 1908), s* 92.

To enable the Mutwalli of a Muhammadan endowment to grant a lease of a piece of land comprised in the endowment, it is sufficient to obtain the sanction of the District Judge. It is not necessary for such purpose to institute a suit under section 92 of the Code of Civil Procedure. [p. 475, col. 2.]

Rule against the order of the District Judge, 24 Pergunnas, dated the 10th November 1919.

Mr. *Nuruddin Ahmed*, for the Petitioner.

JUDGMENT.—The petitioner before us is the Mutwalli of a Muhammadan endowment and she applied to the District Judge for sanction to grant a lease of a piece of land comprised in the endowment. The learned District Judge disallowed the application on the ground that it was necessary for the Mutwalli to bring a suit under section 92 of the Civil Procedure Code with the consent of the Advocate-General.

We do not think it is necessary for the Mutwalli to institute a suit under section 92 of the Code. Under the Muhammadan Law, a trustee is not entitled to let out immoveable property for more than one year, or three years in certain cases, without the sanction of the Kazi. The powers of the Kazi are ordinarily exercised by the District Judge in the Mufasil and the sanction given by the District Judge on an application by the Mutwalli may be sufficient authority for the Mutwalli for letting out the property. The learned District Judge was of opinion that it was necessary to bring a suit under section 92, Civil Procedure Code, in a case like this because sub-section 2 of that section provides that "Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section."

That evidently relates to a suit claiming any of the reliefs specified in sub section (1). But the present application for sanction is not a suit under sub-section (1) of section 92. We may refer to a passage in Amir Ali's Muhammadan Law, 4th Edition, page 480, where the learned Author says: "The application for sanction should be made to the District Judge if the property is situated in the Mufassil or to the Judge on the Original Side of the High Court if it is within a presidency town. It is not necessary to bring a suit for obtaining such sanction; it will be granted upon a proper application being made by the Mutwalli. If there are Nazirs, their consent should be obtained as a condition precedent to the application. If the *wakf* is of a public nature, notice should be given to the beneficiaries in any mode the Judge directs either by advertisement in newspapers or by posting it up at the institution to which the *wakf* property belongs."

Any application made by the Mutwalli will, of course, be inquired into by the District Judge before sanctioning a lease as Kazi, and the manner in which the inquiry may be made is indicated above.

We are accordingly of opinion that the order of the Court below must be set aside and the case sent back to the learned District Judge in order that he may enquire into the merits of the application and dispose of it according to law.

Let the record be sent down without delay.

Order set aside;
Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1195 OF 1918.

December 11, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

MUTHUSAMI IYER—DEFENDANT No. 17—APPELLANT

versus

VARADA VYROYAN AND OTHERS—DEFENDANTS Nos. 1 TO 12, 14 TO 16 AND PLAINTIFF—RESPONDENTS.

Evidence Act (I of 1872), s. 92, proviso (2)—Construction of document—Ambiguity—Intention of parties—Oral evidence, admissibility of.

Where effect can be given to every word used in a document, it is not open to the parties to adduce evidence as regards their intention, but where certain words, the use of which is superfluous, render the document ambiguous and it is clear that the parties intended something different from what has been actually written, then under section 92, proviso (2) of the Evidence Act, oral evidence is admissible to show what the parties really intended. [p. 477, col. 1.]

The provision regarding interest in a document ran as follows: "I shall pay for the aforesaid sum every year calculating interest at ten *kalams* of paddy per year":

Held, that the word 'calculating' would be meaningless unless there was a basis on which the calculation was to be made and the document being silent as to the basis, oral evidence was admissible to show what the basis was. [p. 477, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 100 of 1917, preferred against the decree of the Court of the District Munsif, Valangiman in Original Suit No. 338 of 1914.

FACTS.—It was stated in a bond on a loan of Rs. 300 that interest was payable every year "calculated at the rate of 10 *kalams* per year". The question, which turned upon the construction of this phrase, was whether external evidence was admissible to explain its meaning. The lower Court refused to admit such evidence.

This second appeal and the memorandum of objections filed by respondents Nos. 1 and 2 came on for hearing on the 17th and 18th September 1919, before Seshagiri Aiyar and Moore, JJ.

Mr. *S. Jagadisa Aiyar*, for the Appellants.—Where there is any latent ambiguity in a document, evidence, both oral and of subsequent conduct, is admissible to show the real meaning. *Subramania Iyer* v. *Rajeswara Sethupathi* (1). The subsequent conduct of the parties is the best guide to show who the ambiguous portion was understood by them.

Mr. *S. Viswanatha Aiyar*, for Plaintiff-Respondents.—The words in question are capable of a clear meaning without external help. So external evidence is excluded in law. See *Bal Kishen Das* v. *W. F. Legge* (2), *Dattoo* v. *Ramchandra* (3), *Abaji* v. *Laxman* (4), *Achutaramaraju* v. *Subbaraju* (5), *Protap Chandra Saha* v. *Mohamed Ali Sarkar* (6), *Maung Kyin* v. *Ma Shwe La* (7) and *Venkatasubba Sastrial* v. *Subramania Aiyar* (8). The 10 *kalams* is the interest on the whole loan in the absence of words "per 100" or other words to that effect. *Subramania Iyer* v. *Rajeswara Sethupathi* (1) does not, therefore, apply.

Mr. *S. Jagadisa Aiyar*, in reply.—The pro-

(1) 38 Ind. Cas. 627; 40 M. 1016.
(2) 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523, 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1120.
(3) 30 B. 119; 7 Bom. L. R. 669.
(4) 30 B. 426; 8 Bom. L. R. 553.
(5) 25 M. 7; 11 M. L. J. 370.
(6) 20 Ind. Cas. 443; 41 C. 342; 19 C. L. J. 66; 18 C. W. N. 692.
(7) 42 Ind. Cas. 612; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 35; 27 C. L. J. 175; 20 Bom. L. R 278; (1918) M. W. N. 307; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).
(8) 42 Ind. Cas. 827; (1917) M. W. N. 674; 6 L. W. 703.

vision for yearly payment of interest would be a mere repetition, if read as contended. I submit that there is a latent ambiguity. Compare *Watcham* v. *East Africa Protectorate* (9).

Mr. *M. S. Venkatarama Aiyar*, for some other Respondents.—If section 92 does not apply, section 97 of the Indian Evidence Act applies. And evidence may be adduced to show to which set of two existing facts the language used was intended to apply. In the bond, the interest is payable yearly and is to be calculated. There is no calculation required if the rate was for the whole lot. The principle is explained in *Redfern, In re, Redfern* v. *Bryning* (10).

Mr. *Viswanatha Aiyar* in reply.

JUDGMENT.—The question in this case is whether evidence can be given as to the meaning to be attached to certain expressions in Exhibit A. The provision as to interest translated literally is as follows:—"I have borrowed from you Rs. 300 0 0... .....I shall pay.....for the aforesaid sum every year calculating interest at ten Kalams of paddy per year within the 30th of Masi and have the payments of the same endorsed hereon." The contention on behalf of the appellant is that the words "calculating interest" would be meaningless unless there is some basis on which the calculation is to be made. On the other hand, the Vakil for respondents Nos. 1 and 2 contends that the document read as a whole can be given effect to, and that there is no ambiguity in the language. The learned Vakil's contention is that the language, as it is translated, amounts to saying that the ten Kalams of paddy is to be the interest upon the whole sum of Rs. 300-0-0 borrowed under the document. If that meaning can be attributed to the document, he contends that it is not open to us to speculate as to what was the intention of the parties. If we are clear that the document, as it stands, that is, every word of the document, as it stands, can be given effect to, then there can be no doubt that it is not open to the parties to adduce evidence as regards their intention. But, as we pointed out, the words "calculating interest" do contemplate that there is some basis upon which the calculation is to be made. As Mr. Venkatarama Aiyar argued before us, all the words of the document cannot be given effect to, if the contention of the 1st and 2nd respondents is to be accepted. The words "calculating interest" would be then superfluous. We have no right to assume that the writer of the document used superfluous words. If once we come to the conclusion that there is no superfluity, the document becomes ambiguous and it is open to the parties to adduce evidence to explain its real intention.

A number of cases were quoted before us by Mr. Visvanatha Aiyar for 1st and 2nd respondents. No doubt the Judicial Committee have held in *Bal Kishen Das* v. *W. F. Legge* (2) and *Maung Kyin* v. *Ma Shwe La* (7) that it is not open to the parties to adduce oral evidence when the document is clear and explicit. He also relied upon the decision in *Protap Chandra Saha* v. *Mohamed Ali Sarkar* (6). But that was different from the present case. In the present case, unless we are prepared to agree with the learned Vakil for respondents Nos. 1 and 2 that the language "calculating interest" should have no operation, we are bound to accept the argument of the appellant that the parties intended something different from what has been actually written in the document. In these circumstances, proviso 2 to section 92 of the Evidence Act is applicable to the case. The document is silent as to the basis on which the calculation is to be made and, therefore, oral evidence is admissible to show what the basis is. It may be that respondents Nos. 1 and 2 may be able to satisfy the lower Court that the parties really intended to provide only ten Kalams as interest for the whole of Rs. 300. That conclusion may be come to on looking into the evidence which has been let in the case. The Subordinate Judge has held, relying upon some of the decisions quoted by him, that oral evidence is not admissible. In our opinion he is wrong. Under the circumstances, we must call upon the Subordinate Judge to return a finding in the light of the above observations on the question whether ten Kalams represent the interest due on the amount of Rs. 300 or upon each one hundred of the Rs. 300 [illegible]

(9) (1919) A. C. 533; 87 L. J. P. C. 150; 34 T. L. R. 481; 120 L. T. 258.

(10) (1877) 6 Ch. D. 133, 47 L. J. Ch. 17; 37 L. T. 241; 25 W. R. 902.

evidence will be allowed. Six weeks are allowed for submission of finding and seven days for filing objections.

In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Tanjore submitted the following

FINDING.—In this second appeal their Lordships of the Madras High Court remitted the following issue for a finding to be given on the evidence already on record.

The issue is:—

"Whether 10 Kalams mentioned in Exhibit A represent the interest due on the amount of Rs. 300-0-0 (Rupees three hundred) or upon each one hundred of the Rs. 300 0-0 (three hundred rupees)."

The endorsements on Exhibits A and B are quite clear as to the rate of interest the parties have stipulated for. At page 7 of the printed book of select documents, we find that towards interest due for three years, 90 Kalams of paddy was paid on 11th May 1899 under Exhibit A-1, and a similar endorsement for the subsequent payment of three years ending with 12th May 1902 was also made under Exhibit A-2. A payment of Rs. 200 was made towards the principal on 12th May 1902 and an endorsement to that effect was made on that day. Another endorsement of payment of 10 Kalams of paddy due on 12th May 1903 was also made on that day towards the interest due for one year on the balance of principal of Rs. 100. These three endorsements make it clear that the payments of interest were made at the rate of 10 Kalams for every Rs. 100-0-0. Similarly we find at page 9 of the printed papers that towards the interest due on Exhibit B for three years ending with 20th June 1902 75 Kalams of paddy was delivered as the interest of Rs. 250, as the endorsement on Exhibit B would show. Defendants' 2nd witness, whose evidence is printed at page 17, refers to all these payments. The learned District Munsif has also discussed the evidence in paragraphs 15 and 16 of his judgment and found that the rate stipulated for was 10 Kalams for every Rs. 100 and I quite agree with him. I, therefore, find on the issue that 10 Kalams mentioned in Exhibit A represent the interest due upon each one hundred of the three hundred rupees.

This second appeal and the memorandum of objections filed by respondents Nos. 1 and 2 coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and modify the decree of the lower Appellate Court by substituting the figure 2,500 for the figure 1,298-4-4 in the lower Court's decree printed at line 23 of page 46 of the printed paper. This figure is agreed to by both the Vakils.

As a consequence of the above modification paragraph 4 of the decree must be deleted. The decree will make it clear that this modification enures for the benefit of defendants Nos. 9 to 11 as well.

Appellant is entitled to his costs in this Court as against respondents Nos. 1 to 8. The time for redemption will be four months from this date. The memorandum of objections is dismissed with the costs of the appellant.

M. C. P.

Decree modified.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 998 OF 1917.

April 23, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

Musammat GANESH DEVI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

DARSHAN SINGH, MINOR, THROUGH *Musammat* DEWAN DEVI HIS MOTHER— DEFENDANT—RESPONDENT.

Custom or Hindu Law—Kapur Khatris *of Jhelum District*—*Presumption*—*Burden of proof*—*Mere inaction, whether enough*—*Hindu Law*—*Widow, right of, to share on partition*—*Widow in possession of family house*—*Declaratory suit, whether competent.*

Where the parties are high caste Hindus and do not depend upon agriculture for their livelihood, the ordinary presumption is that they are governed by the provisions of the Hindu Law, and the onus

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rests heavily on the party denying this to establish the existence of a custom at variance with that law. [p. 479, col. 2.]

Kapur Khatris of Jhelum District are governed by HinduLaw in matters of partition [p 480, col 2.]

In order to establish a custom wherein the interests of a female are in conflict with those of a male, it must be shown by clear and cogent evidence that there was actually an assertion of her claim by the female and a denial by the male. [p. 480, col 2.]

Mere inaction, which may be due to various causes, *e. g.* mutual good will or ignorance of the law, affords no indication of the fact that the rule of Hindu Law has been abrogated and a custom at variance with it has taken its place. [p. 480, col. 2.]

The rule of the Mitakshara Law is firmly established that a mother is entitled only to maintenance until partition, and that she can never herself demand a partition. But if a partition takes place by the act of others, not being strangers, she will be entitled to receive a share, if the effect of that partition is to break up or diminish the estate out of which she would otherwise be maintained. [p. 479, col. 2; p. 480, col. 1.]

Where, therefore, one of the co-sharers in a joint estate having applied for partition, the widow of the last male owner sued for a declaration of her title to a share in the estate:

Held, (1) that she had a right to claim a share equal to that of the other co-sharers; [p. 480, col. 1.]

Musammat Pal Devi v. *Fakir Chand*, 60 P. R. 1895, followed.

(2) that as the widow was residing in the family house, the declaratory suit was maintainable. [p. 481, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Jhelum, dated the 24th January 1917, dismissing plaintiffs' suit.

Mr. *Nand Lal*, for the Appellants.

Mr. *Mukand Lal Puri*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to the estate of Sardar Bahadur Rattan Singh, a Kapur Khatri of Kala in the District of Jhelum, who died in 1905 leaving house property as well as landed property. The following pedigree-table explains the relationship of the different persons interested in this litigation:—

RAJ RUP.

Dal Singh. | Mahbub Singh, | Halram Rai. | Wazir Singh.

Mahbub Singh,
S. B. Rattan Singh
=*Musammat* Ganesh Devi (P. No. 1.)

Gulab Singh, | S. Sher Singh (P. No. 2.)

Gulab Singh,
Darshan Singh minor, defendant.

On the death of Rattan Singh his two sons Gulab Singh and Sher Singh became the joint owners of his estate, and upon the former's death in January 1914 his minor son Darshan Singh was recorded as a joint owner with his uncle. It appears that the family continued to be joint until 1915, when on account of certain disputes several applications were made on behalf of the minor for the partition of the landed estate. *Musammat* Ganesh Devi, the widow of Rattan Singh, taking advantage of the partition proceedings, applied to the Revenue Officer praying that, as under the Hindu Law she, on partition, was entitled to a share equal to that of each of her male descendants, she should be allotted land representing that share. Her application was rejected by the Revenue Officer on the ground that she was not recorded as a joint owner in the revenue records, and she was directed to institute a suit in the Civil Court in order to obtain declaration of her title to a share in the estate.

In compliance with that direction *Musammat* Ganesh Devi, along with her son Sher Singh, brought the present action against her minor grandson Darshan Singh to obtain a declaration that each of the three members of the family was entitled to 1/3rd of the estate on partition. This claim was resisted by the defendant on the ground that the parties followed custom, in accordance with which a female in the position of *Musammat* Ganesh Devi was entitled, not to a share in the estate, but only to maintenance. The Subordinate Judge has upheld this contention, and dismissed the suit, with the result that the plaintiffs have come up to this Court on appeal in order to show that the custom set up by the defendant has not been established.

Now it is beyond question that, as the parties are high caste Hindus and do not depend upon agriculture for their livelihood, the ordinary presumption is that they are governed by the provisions of the Hindu Law, and the onus rests heavily upon the defendant to establish the existence of a custom at variance with that law. The rule of the Mitakshra Law is firmly established that a mother is entitled only to maintenance until partition, and that she can never herself demand a partition. But if a partition takes place by the act

of others, not being strangers, she will be entitled to receive a share, if the effect of that partition is to break up or diminish the estate out of which she would otherwise be maintained. *Vide* Mayne's Hindu Law, 8th Edition, paragraph 479.

There can be no doubt that the defendant took proceedings for the partition of the joint estate, and that fact gave *Musammat* Ganesh Devi a right to claim a share equal to that of her son or grandson, *vide Musammat Pal Devi* v. *Fakir Chand* (1). The vital question for determination is whether the right conferred upon her by Hindu Law has been taken away by a valid custom binding upon the parties. Now, we have carefully examined the evidence adduced by both the parties on this subject and reached the conclusion that the defendant, on whom the onus rested, has failed to discharge it. Our attention has been invited by Mr. Mukand Lal Puri for the respondent to ten instances (see pages 24 and 25 of the paper-book where these instances are set out), six of which are said to relate to Kapur Khatris and the remaining four to Khatris of other sub-castes. The first thing, which strikes us with respect to these instances, is the fact that there is not a single document to establish any of them, and a perusal of the testimony of the witnesses shows that, while they make bald statements, they do not give any particulars of the instances deposed to by them. Accordingly we are unable to ascertain the exact circumstances in which the females did not get their share. Now, it is a matter of common knowledge that a widowed mother among the Hindus ordinarily prefers to live with her sons, even if the latter effect a partition of the joint estate; and that she does dot desire to assert against them her right to a share in the estate. Her inaction may be due to ignorance of her rights under the Hindu Law or, as it sometimes happens, to her desire to allow her sons to take the whole of the estate.

Instances of the description described above cannot be regarded as a satisfactory proof of a custom contrary to the doctrine of Hindu Law on the subject. Indeed, even the meagre information supplied by the witnesses for the defendant shows that in at least three instances, namely, those relating to the partition of the estates of Hira Nand Khanna, Sakhira Mal Malhotra and Shib Dial Malhotra, the mother either resided with one or other of her sons or made no objection to the sons dividing the whole of the joint property among themselves; and we think that something very similar must have happened in other cases.

In order to establish a custom of this kind, in which the interests of a female are in conflict with those of a male, it must be shown by clear and cogent evidence that there was actually an assertion of her claim by the female and a denial by the male. As observed already, mere inaction, which may be due to various causes, *e g.*, mutual good will or ignorance of the law, affords no indication of the fact that the rule of Hindu Law has been abrogated and a custom at variance with it has taken its place.

The plaintiffs have made an attempt to prove four instances in which the mother is said to have got a share along with her sons on a partition of the joint estate. Here again, the evidence, which is wholly oral, does not appear to be satisfactory, but as the learned Subordinate Judge points out, there is at least one instance which has been satisfactorily established. It appears from the evidence of the plaintiffs' witness Kirpal Singh that his father's estate was divided equally among his three sons and his widow, and that the witness's mother is still alive and enjoys the profits of 1/4th of the estate. This instance, in which the widowed mother got her share on partition equal to that of each of her sons, is, in our opinion, entitled to great weight. It is certainly more valuable than half a dozen or more instances, in which a mother for some reason or other did not choose to assert her right and decided to live amicably with her sons.

On an examination of the entire evidence before us, we are not satisfied that any custom depriving the mother of her share in accordance with Hindu Law has been established. We cannot, therefore, confirm the finding of the District Judge on the question on which the case has been fought out between the parties.

(1) 60 P. R. 1895.

VELU PADAYACHI *v.* ARUMUGAM PILLAI.

The only other matter urged by Mr. Mukand Lal Puri for the respondent is the contention that the plaintiffs should have filed a suit for possession and not for a mere declaration. Now, it is admitted by the learned Counsel that this objection has no application to the landed estate and is confined to the house property. There can be no manner of doubt that one of the plaintiffs, Sher Singh, is in joint possession of all the houses; and he was not, therefore, called upon to sue for possession. Further, *Musammat* Ganesh Devi is residing in the family dwelling house, and as her son Sher Singh, who does not dispute her right to joint possession, is probably in actual possession of the other houses, we consider that the suit for declaration was rightly brought, more especially when it is not shown that the minor defendant is in exclusive possession of any of the houses.

For the reasons recorded above, we accept the appeal and grant a decree that the plaintiff, Sher Singh, is entitled to 1/3rd of the joint estate, and that *Musammat* Ganesh Devi is entitled, in the event of the joint estate being partitioned, to a similar share. As regards costs, we observe that Sher Singh's right to a share in the estate was never disputed, and that the controversy was confined to the claim made by *Musammat* Ganesh Devi. Having regard to the value of that claim, we direct that the plaintiffs shall recover half the costs incurred in both the Courts.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 177 OF 1919.

November 5, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

VELU PADAYACHI *alias* SADAYA PADAYACHI—DEFENDANT NO. 3—APPELLANT

versus

ARUMUGAM PILLAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 62, 63—*Limitation Act (IX of* 1908*), Sch. I, Art.* 11—*Sale in execution—Application to have encumbrance recognised, dismissal of, effect of—Suit to contest order—Limitation.*

The effect of an order dismissing an application to have it recognised that property about to be sold is subject to an encumbrance in favour of the applicant, is that the property is free of the encumbrance, and such order becomes final against both the applicant and the judgment-debtor, unless a suit is brought within one year to contest it. [p. 483, cols. 1 & 2.]

Appeal against the order of the Court of the Temporary Subordinate Judge, Cuddalore, dated the 19th February 1919, in Appeal Suit No. 217 of 1916, on the file of the District Court of South Arcot, preferred against the decree of the Court of the District Munsif, Mannargudi, South Arcot District, in Original Suit No. 434 of 1916.

FACTS appear from the judgment.

Mr. *M. Patanjali Sastri*, for the Appellant.—The plaintiff's suit was barred as it was not filed within one year of the order on the claim petition. The order on the claim petition was virtually one under Order XXI, rule 58. The claimant prayed that in settling the terms of the sale proclamation it be mentioned that the sale was subject to his mortgage. When that petition was dismissed, the sale was virtually one free from encumbrance. That order was outstanding against the plaintiff and plaintiff should have moved for the vacation of that order within the statutory period of one year. The substance and not the form of the claim application has to be looked to. The mortgagee cannot ignore the order and treat it as a nullity. The order is one relating to an existing liability under a mortgage.

The cases in *Ganesh Krishna Kulkarni* v. *Damco Nathu* (1) and *Ayya Pattar* v. *Attupurath Manakkal* (2) are distinguishable. See the Full Bench decision in *Machi Raju Venkataratnam* v. *Ranganayakamma* (3).

The auction-purchaser has a substantial right to resist the suit. He is interested in securing a good title and is entitled to raise the plea of limitation.

Mr. *C. Padmanabha Iyengar*, for the Re-

(1) 26 Ind. Cas. 627; 41 B. 64; 18 Bom. L. R. 782.
(2) 52 Ind. Cas. 938; (1919) M. W. N. 805.
(3) 48 Ind. Cas. 270; 41 M. 985; 8 L. W. 282; 24 M. L. T. 197; (1918) M. W. N. 599; 35 M. L. J. 835.

spondents.—The mortgagee's claim fell under Order XXI, rule 66. There was no prayer in it for the raising of the attachment and the order did not in terms set out that the mortgage was no longer subsisting. The order will only bind parties and those privy to it and the auction purchaser, not having been a party to the claim proceedings, has no *locus standi* to resist this suit. See *Ganesh Krishna Kulkarni* v. *Damoo Nathu* (1) and *Vadapalli Narasimham* v. *Dronamaraju Seetharamamurthy* (4).

JUDGMENT.

SPENCER, J.—The properties in suit were attached and brought to sale in execution of a simple money decree. After the decree was passed, the judgment debtor (1st defendant) executed a usufructuary mortgage over them in favour of the 2nd defendant in this suit, who, in his turn, assigned his mortgage rights to the present plaintiff. When the present plaintiff sued to recover possession of the properties on the strength of the mortgage, an objection was raised by the 3rd defendant, who was the auction-purchaser at the sale in execution of the simple money-decree, that the suit was barred by limitation.

It appears that the plaintiff's assignor applied a few days before the sale to have the properties sold subject to his mortgage and asked the Court to have it so stated in the sale proclamation. The claim was dismissed as being made too late. The date of the order was 24th August 1911. The present suit was not instituted till 1916 and is clearly out of time if Article 11 of the Limitation Act applies to it. The Subordinate Judge, dissenting from the view of the District Munsif, held that the suit was in time as the mortgagee's application on 24th August 1911 was, in his opinion, directed towards the settling of the terms of the sale proclamation and, as such, fell under Order XXI, rule 66, Civil Procedure Code, and not under rule 58.

The respondent seeks to support the lower Appellate Court's order on the ground that there was no prayer in the application that the attachment should be raised, nor any declaration in the order that the mortgage was no longer subsisting. He further argues that, assuming the order of 24th August 1911 was an order upon a claim petition, such an order will only bind those who were parties to it and, therefore, an auction purchaser who was not a party to those proceedings cannot take advantage of the fact that the claim was dismissed.

I am of opinion that none of these representations and arguments can avail the plaintiff who has come to Court after the period prescribed by law.

In the first place I may say I am not much influenced either by the fact that Exhibit I terms itself a claim petition and that the 2nd defendant in 3 places describes himself in that petition as a claim petitioner, or, on the other hand, by the fact that the provision of law under which it was presented is given as Order XXI, rule 66. We must look at the substance of the application. It was one to have it recognised by the Court that the property about to be sold was subject to an encumbrance in favour of the petitioner.

The effect of the dismissal of this application was to create a belief in the minds of those who bid for the property that the property was free of encumbrance.

Can the mortgagee or his representative be allowed to ignore the Court's order, to which he was a party, and proceed as if there had been no such proceedings and as if what was sold was an encumbered property?

I think the dismissal of his application was not a nullity. In *Lakshumanan Chettiar* v. *Parasivan Pillai* (5), which followed our earlier decision in *Ponnusami Pillai* v. *Samu Ammal* (6), it was pointed out that one form of order to be made under the head of investigation of claims and objections in Order XXI, Code of Civil Procedure, is that definitely provided for in rule 62, which permits a Court to continue an attachment subject to a mortgage in favour of a person not in possession. The learned Judges observed that if one particular form of order on the claim on a mortgage can be passed, then any claim that relates to an alleged mortgage or the existing liability under a mortgage must be a claim under rule 58. I think that we should follow the above two decisions of this

(4) 31 M. 163; 18 M. L. J. 26; 3 M. L. T. 256.

(5) 52 Ind. Cas. 720; 37 M. L. J. 159; (1919) M. W. N. 653.

(6) 38 Ind. Cas. 937; 31 M. L. J. 247.

Court, and that *Ganesh Krishna Kulkarni* v. *Damoo Nathu* (1), which was a case of a mortgagee asserting his title in response to a notice of the Court calling for objections to a sale proclamation, is distinguishable.

The case of *Ayya Pattar* v. *Attupurath Manakkal* (2) may be distinguished on the ground that the application in that case was merely to have certain objections to an auction recorded and did not ask for any order on the merits of the petition.

The Full Bench decision in *Machi Raju Venkataratnam* v. *Ranganayakamma* (3) is conclusive on the point that an order dismissing a claim petition for delay, delay being one of the grounds under which claims may be dismissed under the proviso to rule 58, is an order which becomes final against its claimant under rule 63, unless he files a suit within one year of the order. This disposes of the respondent's first two objections and of the Subordinate Judge's reasoning. As regards the third objection, it is obvious that the auction-purchaser is very much interested in obtaining a good title to his purchase and being a party (3rd defendant) to this suit, he can raise any objection such as limitation that may serve as a bar to the maintenance of the suit.

Now that the time has expired for instituting a suit to establish the right that was in effect negatived in the claim proceedings, the question is not one of estoppel or *res judicata* arising out of the former proceedings, but one of limitation. This does not depend on any nice question of law whether the auction purchaser represents the mortgagee's or the judgment-debtor's interest after the sale. It is sufficient answer to the respondent's objection to say that the plaintiff is necessarily bound by the final order on his assignor's claim petition and that any defendant, especially one who is in possession of the property sought to be recovered by the suit, can raise the plea of limitation.

This appeal must be allowed and the District Munsif's decree restored with costs here and in the lower Appellate Court.

SADASIVA AIYAR, J.—I entirely agree. An ingenious argument was advanced, namely that because the auction-purchaser is the representative of the judgment debtor and because the judgment-debtor was not a party to the order on the claim petition, he cannot take advantage of the order on the claim petition when it is passed against the claimant any more than he would be bound by that order if it had been in favour of the claimant; and for this proposition *Vadapalli Narasimham* v. *Dronamaraju Seetharamamurthy* (4) was quoted. In that case and in the cases following it and in the Full Bench case in *Krishnasami Naidu* v. *Somasundaram Chettiar* (7), which it professes to follow, no sale had taken place on the basis of the order disallowing the claim petition and the only question was whether *as between the claimant on the one hand and the judgment-debtor on the other*, either would be bound by the order on the claim petition. But it has never been held that the claimant is not himself bound by the order in favour of the decree-holder disallowing the claim of the former (unless, of course, he sets aside the order within one year) and if the Court auction-purchaser cannot take advantage of that order in favour of the decree-holder, the result would be that such an order becomes absolutely futile and would have no effect or even evidentiary value as regards the extent of title conveyed under the auction-sale to the purchaser therein. In other words, the unsuccessful claimant, who has not made the judgment debtor a party to the claim proceedings, can again put forward his claims against the auction-purchaser, whether as plaintiff or as defendant. No case has been quoted in which it has been held that such a startling result follows the omission to make the judgment debtor a party in the claim proceedings. On the other hand, it has been held in several cases that the judgment-debtor is not a necessary party to a claim proceeding and that the proper parties to such proceedings are the decree-holder and the claimant. Of course, if the judgment-debtor intervenes and actively opposes the claim along with the decree holder and the claim petition succeeds, he may be bound by the order unless he sets it aside within one year, as the order may be then said to be passed against him also. But ordinarily, it is the decree-holder's right to bring the property to sale against the claim of the claimant and the claimant's right to have the property released (or sold subject to the claim) which are litigated in such a

(7) 30 M. 335 (F. B.); 17 M. L. J. 95; 2 M. L. T. 116.

petition. The auction purchaser is entitled to take advantage of the order against the claimant in such a case (if it is not set aside by a suit within one year), not because the purchaser is the representative of the decree-holder, but because the order which established the right of the decree-holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the Legislature to have the effect of precluding the claimant from putting forward his claim again in opposition to the auction-purchaser at the sale held in pursuance of the order against the claimant. The conclusive establishment of the decree-holder's right to bring the property to sale free from the claimant's alleged incumbrance involves the right of the purchaser at that sale to get a title to the property free from such encumbrance.

I concur in allowing the appeal with costs.

M. C. P.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 63 OF 1917.

April 24, 1919.

Present:—Mr. Crump, A. J. C., and Mr. Kemp, A. J. C.

MIR SHER MAHOMED SON OF MIR ALLAHDAD KHAN AND OTHERS—APPELLANTS

versus

JETHOMAL SON OF VISHNOMAL AND OTHERS—RESPONDENTS.

Jagirdar, agreement by, with zemindars for commutation of customary dues—Agreement, whether can be avoided—Jagirs in Sind—Grant, nature of.

A *jagirdar* entered into an agreement with certain *zemindars* holding permanent rights in the *jagir* land, whereby he bound himself to accept certain rates in cash and kind in consideration of the customary dues he was entitled as *jagirdar* to receive. On the death of the *jagirdar* his son brought the present suit to avoid this agreement on the grounds that by the terms of the grant conferring the *jagir* a limited estate only was conveyed, the grantee's rights to alienate being restricted, that the agreement did not create permanent rights, and that he was not bound thereby.

Held, upon a consideration of the history of alienations in Sind and the terms of the *sanad* conferring the *jagir*, that the intention of the grantors was to confer a hereditary estate in perpetuity without imposing any condition restricting alienation; that upon a proper construction of the agreement the intention was to make a permanent settlement, and that the plaintiff was bound thereby. [p. 487, col. 2; p. 488, col. 2; p. 489, col. 1.]

Appeal from the decision of the District Judge, Hyderabad.

Mr. *Rupchand Bilaram*, for the Appellants.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Respondents.

JUDGMENT.—The 1st plaintiff (hereinafter called the plaintiff) is the Jagirdar of the lands held by the defendants and as such entitled to recover certain customary dues. The defendants are Zamindars having permanent rights in the land. The normal method by which the Jagirdar recovers what is due to him is by an annual appraisement of the crop (*batai*) whereat a share of one-third is assigned to the Jagirdar. In the present case the father of the plaintiffs on May 2nd 1887 executed in favour of the father of the defendants and certain other Zamindars an agreement (Exhibit 55), whereby he bound himself to accept certain rates in cash and kind in consideration of the customary dues. It appears from paragraph 6 of that document that there had been similar agreements in the past and that this was merely one of a series, but these earlier agreements have not been made evidence by either party.

Stated broadly the question which falls to be decided in this appeal is, whether the rights of the Jagirdar on the one hand and the Zamindars on the other are governed by this agreement, or whether plaintiff can set it aside, and either claim enhanced cash rates, or revert to the earlier system of "*batai*." The lower Courts have answered this question against the plaintiff and hence the present appeal. The case made for the plaintiff is twofold. In the first place it is argued that *qua* Jagirdar his father could not enter into any agreement which would bind his successor and in the second place that the arrangement evidenced by Exhibit 55 was not intended to be permanent as between the parties to it and could not in any case be invoked by successors of such parties. There are thus two distinct matters for discussion, *first*, the

nature of a Jagirdari estate such as is held by the plaintiff, and *second*, the correct construction and effect of Exhibit 55.

As to the first matter it is necessary to say a few words on the history of the Jagirs of Sind. Both parties have accepted as authoritative the account contained in the two volumes of the "History of Alienations in Sind" published under the authority of the Bombay Government, and the references in what follows are to the pages of that publication. The Jagir in the present case belongs to one of what are styled the "Four Great Families." These families, though not themselves ruling chiefs, were closely connected by blood with the Talpur Amirs who ruled Sind upto the date of the conquest in 1843 and their holdings were the subject of a separate settlement on the part of the British Government. The conquest of 1843, put an end to their rights, and forms the true starting point of this case. Before the conquest the rights of the Jagirdars were vague and ill defined (see pages 10 to 15) and were in no case more than grants for the term of the life of the grantor and the grantee (page 21). After the conquest the British Government took in hand the settlement of the Jagirs, and prolonged enquiries were made. As a result of these enquiries after a lapse of 18 years, Sanads were issued in 1861 for the purpose of defining the Jagirdars' rights in relation to the British Government. A detailed examination of the history of this settlement would be superfluous. It is sufficient to say that the intention manifested throughout was to confer hereditary rights in prepetuity. A few extracts will suffice. On the 22nd February 1847 Sir Charles Napier offered certain terms to the Jagirdars upon which they could have their holdings made perpetual (page 67). In 1850 Mr. Pringle, then Commissioner in Sind, held that this offer was still open, but the consideration of it must be deferred until full enquiries had been made (page 105). In 1853 Mr. Frere (afterwards Sir Bartle Frere), at that time Commissioner in Sind, held that the question was still open (page 129). In 1855 the question of a grant in perpetuity was still under consideration (page 177). In 1856 Colonel Jacob, then acting Commiesioner in Sind, advocated two courses with special reference to the Jagirs of the Four Great Families. The first was to leave the existing incumbents in possession for their lifetime of the estates which they held and on their deaths to resume the uncultivated portion and regrant the rest to their legitimate male heirs in perpetuity: the second to resume the whole on the death of the present holders, and to give pecuniary compensation to their heirs (page 192). In these preliminary stages of the discussion there is nothing to indicate any design to make a settlement in the form of a grant for one life only, or to restrict the rights of the Jagirdars to a succession of life estates.

Passing from the stage of preliminary discussion we find in 1858 a definite proposal submitted by the "Special Commissioner for Jagirs," which led directly to the settlement of the rights of the "Four Great Families" among which the plaintiff's family is included (see pages 210 to 219). In this report Mr. Ellis deprecates the second alternative advocated by Colonel Jacob (see paragraph 51) and proposes a re grant to the lineal male heirs. In dealing with this report the Government of Bombay recommended to the Government of India that "The Jagirs of the Talpurs on the death of the present incumbents should be continued to legitimate lineal male descendants" (page 221). On October 27, 1858, the Government of India accepted this proposal (page 230). In 1859 the Government of Bombay again addressed the Government of India on this subject and in so doing they classified these Jagirs as "hereditary" (page 241) in contradistinction to "grants for one life after the demise of the present holder" or "grants for the lifetime of the present holder." This classification was approved by the Government of India (page 242), and in 1859 the Secretary of State for India in Council decided that Jagirs should be "continued in perpetuity to lineal male descendants" (page 250).

This settlement is evidenced by the Sanad issued in 1861. In the case of the plaintiff's family the Sanad is in the form printed at page 442. The preamble recites the reason which moved the British Government to make the grant. The first paragraph confers a life estate on the existing incumbents in all the property then in their possession. The second paragraph confers upon the lineal

male heirs a smaller estate of 70,000 *bighas*. The property now in suit is admittedly comprised in those 70,000 *bighas*, and the question is, what is the nature of the estate conferred. The plaintiff is the grandson in the male line of the original grantee, and there are admittedly no sharers in the estate.

Reading the Sanad in the light of the previous history, it is clear that there is no expressed intention to confer anything but an absolute estate. The only expressed condition is "loyalty and good behaviour" on the part of the grantee and his successors. The appellant's Pleader has laid stress on this condition as indicating that it was intended that the holder for the time being should have a life estate only. But it is not easy to see why a condition of continued loyalty is incompatible with an estate in other respects absolute. That the future support of the family was among the motives which induced the British Government to make the grant as recited in the preamble, suggests no doubt an intention that the property should not be alienated, but the operative portion of the grant contains no restrictive condition of this nature. It was also somewhat faintly argued that where a grant was of the royal share of the revenue only, there was a presumption that a life-estate only was intended, but no authority was cited for a proposition which is certainly not self evident. It is unnecessary to set out in detail the passages in the History of Alienations on which the Pleaders on either side have more specially relied. They have not been overlooked, but the general trend of the discussion shows beyond doubt an intention to confer an hereditary estate in perpetuity, and that appears to be the plain meaning of the Sanad.

But it was urged that in the light of certain decisions of the Privy Council it was incumbent on this Court to interpret the Sanad as conferring no more than a succession of life-estates. As to these decisions it must be said, speaking with all deference, that a reported case is no authority except upon its own facts. There are Jagir tenures all over India. In every part of the country the history of those tenures varies, and the terms of the Sanads also vary. No doubt, the decisions cited lay down most valuable guides to construction, of which this Court will gladly avail itself, but it is unsafe to seek to argue from Jagirs in Chhota Nagpur to Jagirs in Sind. In the words of the Privy Council, "The question depends upon the construction of the Sanad, but that construction may be aided by a consideration of the surrounding circumstances, and of the occasion on which it was granted": *Gulabdas* v. *Collector of Surat* (1). Here both the Sanad and the history of the case indicate an hereditary grant in perpetuity. A large number of cases have been cited, and if they are not discussed, it is because they are readily distinguishable. There are, however, two decisions of the Privy Council which have an important bearing on the matter, and which embody to a large extent the respective contentions of the parties before us. The first of these is the case last cited. The second is the case of *Dosibai* v. *Ishvardas* (2). In the former case it was held that the grant was hereditary but that each of the descendants of the grantee took it for life only. The decision is based on (1) the object of the grant, and (2) the special terms of the Sanad. The object was held to be "the maintenance of an important family" and so far the case is analogous to that now before us, but when we come to consider the special terms of the Sanad, all resemblance ceases. There 'Mahals' granted in Jagir were in effect part of a pension secured to the grantee by the Sanad and as the pension was plainly inalienable, it followed that the Jagir land was also inalienable. Their Lordships, "having regard to the peculiar character of this grant," held, that there was only a life estate. In the present case the only words in the Sanad which can be relied on in support of the appellant's view are "So that provision may be made not only to meet the present necessities but also for the future support of the sons and lineal male descendants of a certain member." Can these words in the preamble be held to control the grant so as to exclude the ordinary meaing of the words, "it is ordered that the amount of 70,000 *bighas* be accorded to the lineal male heirs," which appear in the operative part of the document? The meaning of such words is laid down by

(1) 3 B. 186 at p. 189; 6 I. A. 54; 3 Sar. P. C. J. 889; 2 Ind. Dec. (N. S.) 125.

(2) 15 B. 222 (P. C.); 18 I. A. 22; 15 Ind. Jur. 154 & 281; 6 Sar. P. C. J. 10; 8 Ind. Dec (N. S.) 150.

the Privy Council in the second of the two cases cited, *Dosibai* v. *Ishvardas* (2): "where there is a grant to a man and his heirs and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest."

The essential question is what was the intention of the grantor, and in this connection it is relevent to consider the view which was held at the time of the issue of the Sanad as to the right of a Jagirdar to alienate his land. The Sanad in the present case was issued on May 23, 1861. During the discussion which preceded its issue the question of gardens was under consideration, and it is admitted that these holdings were treated as being on an entirely different footing from other holdings in Sind. The reasons need not be discussed. The fact is admitted. In 1858 (see page 371) the Government of Bombay write as follows:—"A garden being to a certain extent private property, the owner is at liberty to sell, transfer, give, or bequeath the same to any individual." The question of garden lands was referred to the Government of India at the same time as the general question of Jagirs, and the orders of the Government of India on both questions are contained in letter No. 711 of April 5, 1859 (pages 242 and 373). It is clear that those gardens were regarded as an exception to a general rule "being to a certain extent private property" in contradistinction to the Jagirs which were originally held for the performance of public services. The orders of the Government of India are contained in paragraph 17 of the letter last cited in the following words: —"Transfer cannot be allowed except in the case of garden lands." It is, therefore, clear that at the date when the Sanad was issued there was no intention to restrict the Jagirdar's right of transfer. This could be done either by the terms of the grant, or by separate orders. The Sanad, as has been seen, contains no express condition forbidding alienations, and it would appear that it was not regarded as having that effect. It was in substance drafted by Mr. Inverarity, at that time Commissioner of Sind (page 255), and in October 1861 after the issue of the Sanad, he writes: "The question of exchange and transfer of any but garden lands in alienation should not be entertained except on very special grounds" (page 278). It is hardly possible that these words should have been used had the Sanad itself been drafted with the object of preventing alienation. It seems fairly clear that the general power of the Government was considered a sufficient safeguard. It needs little knowledge of the early condition of Sind to know that in those days the Commissioner had power to make rules which had in practice at least the force of law. It was upon this power and not upon any condition attached to the grant that reliance was placed to prevent alienations by Jagirdars. The manner in which the rules framed from time to time have developed into the existing law is set out in the judgment of the learned District Judge (see also pages 82, 423 and 424). It is, therefore, difficult to read into the Sanad a condition forbidding alienation.

The conclusion appears to be that the intention of the grantors was to confer an hereditary estate in perpetuity without imposing by the terms of the grant itself any condition restricting alienation. The lower Courts have, therefore, rightly held that there is an absolute estate. How far the remedial legislation which has, from time to time, been introduced to relieve the position of indebted Jagirdars affects their powers over their estates, need not be considered here for it is not suggested that it has any application to the estate now in question. The necessity of such legislation is, however, an indication that the grantee is not restricted in the manner for which the appellant contends.

It is unnecessary to consider a lage number of cases which have been cited which are concerned with service tenures or endowments. Where the grant is burdened with the performance of a duty, considerations come into play, which do not exist in the case of a Jagir where no services are to be rendered. The case of *Hasomal* v. *Shah Nawaz Shah* (3) has been cited as showing that this Court has ruled that Jagirs are inalienable, but the grant there was a *khyrat* grant the object of which was to secure the performance of religious rites, and must, therefore, be distinguished. As to the other decisions of this Court which are cited in the judgment of the District Judge, and have been quoted in argument, it is sufficient to say that the opinions therein expressed as to Sind Jagirs

(3) 2 S. D. 380.

in general and this estate in particular were so far as they touch the present question *obiter*, but so far they go the remarks in *Mir Allahdad Khan* v. *Hiradas* (4) show that the view taken as to the nature of this same estate was similar to that expressed in this judgment.

The second question for consideration is as to the construction and effect of Exhibit 55. The parties to this document were on the one side a Jagirdar holding an absolute estate and on the other Zamindars having permanent rights in the lands. That a landlord can create a permanent tenancy so as to bind his successors is not open to doubt and *a fortiori* it seems impossible to doubt the competency of the plaintiff's father to create in permanency the lesser rights created by Exhibit 55. The object of the parties in this document is plain enough. They wished to substitute fixed cash payments for cash dues formerly paid in kind. The real question is whether the arrangement was intended to be permanent, and if so, whether the plaintiff is bound after his father's death. The intention of the parties as to the duration of the agreement can be gathered only from the document, which is unfortunately extremely obscure in its language. It may be observed that it is executed by the Jagirdar in favour of all the Hindu Zamindars of certain villages, a circumstance which makes it doubtful whether the executant can have intended to restrict its operation to the lifetime of each one of these persons, as the appellants now contend. Coming to the document the general tenor of it may be summarized thus:—

Clause 1.—All the Hindu tenants who now cultivate lands on which cash in lieu of *batai* is paid shall continue to pay fixed cash rates for such lands "for so much time or for so many years as they continue to cultivate."

Clause 2.—If any Hindu tenant does not himself cultivate such land but if it is cultivated by others, the same cash rates shall be charged.

(This clause appears to be introduced to meet the case of subletting).

Clause 3.—If Lilo *wd.* Sadhu cultivates any land in future he will be charged the above cash rates.

Clause 4.—If any cultivator (the word appears to be synonymous with tenant) takes up any new land in exchange for or in addition to that which he now cultivates, then if such new land is already charged cash dues, he will have to pay a premium in cash for the first year and the above cash rates in future years but if that new land is one on which dues are collected by *batai*, he will have to make a new settlement with the Jagirdar and pay either in cash or in kind as may be determined.

Clause 5.—The cultivators will render the customary assistance to the Jagirdar or to Government in matters of administration.

Clause 6.—All former agreements are cancelled.

Clause 7.—If two crops are grown the rates to be paid on both crops.

Clause 8.—No other dues than those set out above will be levied, and if the Jagir is leased by the Jagirdar or any one acting on his behalf, the same rates will remain in force.

In interpreting a document so loosely drawn it is impossible to place much reliance on mere textual criticism. On the one hand it is urged that the use of the terms 'Jagir' and 'Jagirdar' imply something more than the holder for the time being; on the other that the use of the words "by me or on my behalf" in clause 8 implies that the executant did not intend to bind the successors. Such arguments are, however, hypercritical. Taking the document as a whole the intention appears to have been to make a permanent settlement. It is difficult to understand how the arrangement in clause 4 could have been contemplated had there been any intention to limit the agreement to any definite term. The words used in clause 2 suggest the intention of fixing the rates in perpetuity.

In addition to the terms of the document itself the conduct of the plaintiff is relevant. The plaintiff's father died in 1903 but the rates imposed by this agreement continued to be levied for a long term of years.

But it is further argued that even if the plaintiff is bound by the agreement executed by his father, still that agreement

(4) 1 S D. 47.

has no force after the death of the persons in whose favour it was made. Reliance is placed upon the rule of construction that a lease to *A* is only a lease for *A's* life and does not convey an heritable estate. There are many reasons, however, why this rule cannot be applied here. The agreement is not in reality a lease. The parties in whose favour it is executed were Zamindars having *mauroosi* rights. Those rights are permanent rights. The document did not and could not effect the transfer of any interest in immovable property. Further it would, in any case, be difficult to apply a strict rule of construction derived from English Law to a document such as this. If it is a lease at all, it is not a lease in favour of any one person, or any defined person, but in favour of all the Hindu Zamindars, and it contemplates rights which were not in existence at the date of its execution. It is in reality a commutation into fixed rates of dues hitherto paid by cash in lieu of kind. Further as remarked by the learned District Judge, "this general rule is displaced by the language of the document and the circumstances and conduct of the parties attending and following its execution."

Taking, therefore, the case as a whole it would appear that plaintiff's father was competent to bind his successors, and that the effect of Exhibit 55 is to make a permanent commutation of the Jagir dues on a fixed cash basis. The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 642 OF 1919.

March 22, 1920.

Present:—Mr. Justice Martineau.

SAWAYA RAM—DEFENDANT—PETITIONER

versus

FATTU RAM—PLAINTIFF—RESPONDENT.

Mortgage—Hypothecation of future crops, when becomes complete—Suit against transferee without notice, whether maintainable—Revision—Misapprehension of nature of contract, whether material irregularity.

A hypothecation of future crop becomes complete when the crop is grown and the produce realized, and is enforcible against a transferee of such produce with notice of the obligee's equitable interest but not against a transferee without notice. [p. 490, col. 1.]

Bansidhar v *Sant Lal*, 10 A. 133; A. W. N. (1888) 35; 6 Ind. Dec. (N. S.) 90, followed.

On the 4th January 1918 *G* hypothecated the coming *rabi* crop by an unregistered deed to the plaintiff, and on the 10th February 1918 *G* and his son *N* hypothecated the same crop by an unregistered deed to *S*, who had no notice of the prior hypothecation. *S* having taken the crop, plaintiff sued *N* (*G* having died) and *S* for the amount due to him:

Held, (1) that the hypothecation to the plaintiff and *S* became complete at the same time, *i.e.*, when the crop was grown and the plaintiff could not, therefore, have any preference over *S*, who moreover had no notice of the former hypothecation; [p. 490, col. 1.]

Mrs. Stewart v. *Bank of Upper India Limited*, 34 Ind. Cas. 932; 32 P. R. 1916; 214 P. W. R. 1915, distinguished.

(2) that, therefore, *S* was not liable at all; [p. 490, col. 1.]

(3) that the lower Appellate Court's misapprehension of the nature of the contract entered into by *G* was a material irregularity justifying interference in revision. [p. 490, col. 1.]

Petition, under section 44 of Act VI of 1918, for revision of the decree of the Subordinate Judge, 1st Class, Muzaffargarh, dated the 23rd April 19 9, varying that of the Munsif, 2nd Class, Leiah, District Muzaffargarh, dated the 21st February 1919.

Lala *Jagan Nath*, for the Petitioner.

Lala *Rama Nand*, for the Respondent.

JUDGMENT.—On the 4th January 1918 Ghulam Muhammad hypothecated the comming *rabi* crop by an unregistered deed to the plaintiff, and on the 10th February 1918 Ghulam Muhammad and his son Nura hypothecated the same crop by an unregistered deed to Sawaya Ram, who had no notice of the prior hypothecation. The crop was taken by Sawaya Ram. Ghulam Muhammad having died, the plaintiff has sued his son Nura and also Sawaya Ram for the amount due to him on the deed of the 4th January 1918.

The Munsif gave a decree against Nura alone, dismissing the claim against Sawaya Ram, but on the plaintiff's appeal the Subordinate Judge has held on the authority of *Mrs. Stewart* v. *Bank of Upper India Limited* (1) that Sawaya Ram is liable, and has

(1) 34 Ind. Cas. 932; 32 P. R. 1916; 214 P. W. R. 1915.

passed a decree against him as well. Sawaya Ram has applied to this Court for revision.

In the case relied upon by the lower Appellate Court it was held that the defendant's oral charge on certain moveable property, being prior in time, prevailed over the rights of the plaintiff Bank under its written deed, and that the question of notice did not arise. But that was a case in which moveable property already in existence was hypothecated and the learned Subordinate, Judge has made the mistake of treating the present case as one of that nature, overlooking the fact that what Ghulam Muhammad hypothecated was a future crop.

In *Bansidhar* v. *Sant Lal* (2) it was held upon principles of equity that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence, and that the hypothecation became complete when the crop was grown and the produce realized, and was enforcible against a transferee of such produce with notice of the obligee's equitable interest, but not against a transferee without notice. The same principle is enunciated in paragraph 1502 of Gour's Law of Transfer, 4th Edition, and in Ghose's Law of Mortgage on page 177. In accordance with these authorities it must be held that the hypothecations to the plaintiff and Sawaya Ram became complete only when the crop was grown. They both became complete at the same time, and the hypethecation in favour of the plaintiff cannot, therefore, be given preference over that in favour of Sawaya Ram, who moreover had no notice of the former. The claim against Sawaya Ram consequently fails.

The Subordinate Judge's misapprehension of the nature of the contracts entered into by Ghulam Muhammad is a material irregularity justifying interference in revision. I accordingly accept this application, set aside the decree of the lower Appellate Court and restore that of the trial Court. The plaintiff will pay Sawaya Ram's costs throughout.

Application accepted.

(2) 10 A. 133; A. W. N. (1888) 35; 6 Ind. Dec. (N. S.) 90.

PATNA HIGH COURT.

CIVIL REFERENCE No. 1 OF 1919.

December 18, 1919.

Present :—Mr. Justice Coutts and Mr. Justice Adami.

SHE KH AZMAT

versus

BIBI TAMZAN.

Bengal Tenancy Act (VIII of 1885), ss. 161, 170 (3) —Rent decree—Occupancy holding, sale of—Usufructuary mortgagee, whether entitled to deposit decretal amount to prevent sale.

A usufructuary mortgagee in possession of a non-transferable occupancy holding, which has been advertised for sale in execution of a rent decree obtained against the mortgagor, has an encumbrance which is an interest voidable on the sale of the holding, and is entitled to deposit the decretal amount under section 170 (3) of the Bengal Tenancy Act and prevent the sale. [p. 492, col. 1.]

Reference under section 113 of the Civil Procedure Code by the Munsif, Sitamarhi, dated the 26th May 1919.

Mr. *Parmeshwar Dayal*, for the Decree-holder.

Mr. *Lachmi Narain Singh* and *Khurshed Husnain*, for the Usufructury Mortgagee.

JUDGMENT.—The question referred to us for decision by the Munsif of Sitamarhi is whether an usufructuary mortgagee in possession of a non-transferable occupancy holding, which has been advertised for sale in execution of a rent decree obtained against the mortgagor, has an interest voidable on the sale of the holding, which would entitle him to deposit the decretal amount under section 170 (3) of the Bengal Tenancy Act and prevent the sale. In the case under reference the mortgage did not cover the whole holding and had not been recognised by the landlord decree-holder.

Under section 170 (3) of the Bengal Tenancy Act "any person having in the tenure or holding any interest voidable on the sale" may make a deposit under the section, and it has been settled by the decisions of this Court in the case of *Rameshwar Singh Bahadur* v. *Raghunandan Khawas* (1) and in the Full Bench case of *Mahadeo Lal* v. *Langat Singh* (2) that the only interests which are voidable on the sale within the meaning of section 170 are the interests defined in

(1) 38 Ind. Cas. 337; 1 P. L. J. 403; 2 P. L. W. 364.
(2) 40 Ind. Cas. 257; 2 P. L. J. 457; 1 P. L. W. 504; (1917) Pat. 169.

section 161 (*a*) as "incumbrances." Section 161 (*a*) runs thus :—

"The term 'incumbrance,' used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section."

In the above cases it was decided that the purchaser from the tenant of the whole or part of a non-transferable occupancy holding does not hold any of the interests mentioned in section 161 (*a*) and, therefore, does not hold an interest voidable on sale of the holding which would entitle him to make a deposit under section 170 (3).

The learned Munsif in his reference, and Mr. Parmeshwar Dayal in support thereof, have relied on these two decisions of this Court and contend that a mortgagee from the tenant of a non-transferable holding has not any of the interests mentioned in section 161 which would entitle him to make a deposit. The cases of a mortgagee and a purchaser are clearly distinguishable; the *ratio decidendi* in the above cited cases was that a purchaser cannot be said to have acquired a lien, sub-tenancy, easement or other right or interest of the same nature or in limitation of his own interest, for a sale is not in limitation of, but is a destruction of, the interest of the tenant. The learned Vakil admits that ordinarily a usufructuary mortgage would come within the term of a lien and a limitation of interest and so be an "incumbrance," but he urges that the mortgage of a non-transferable occupancy holding without the consent of the landlord is illegal, neither sanctioned by custom nor binding under the law, and that, therefore, such a mortgage is not covered or contemplated by section 161 (*a*). He contends that the transfer by mortgage was void *ab initio*, and that section 161 (*a*) does not refer to non transferable occupancy holdings.

Neither of these contentions can be supported. It may be true that, if the entire holding had been mortgaged and the mortgagee left in possession of the whole, the landlord would be entitled to treat the transfer as an abandonment of the holding, and could seek for *khas* possession, but still the mortgagee, until ejected in due course of law, would hold an incumbrance [*Krishna Chandra Datta Chowdhury* v. *Khiran Baiania* (3)]. In the present case a part only of the holding was mortgaged and the landlord could not have sought for ejectment of the mortgagee, as the tenant had not abandoned the holding. The mortgagee would hold an incumbrance and the transfer could not be said to be void or illegal. The transfer, in fact, is a valid one as between the tenant and his mortgagee, but as between these two and the landlord its validity depends on the landlord's consent; it is voidable by the landlord but not illegal.

In the reference it is argued that wherever in the Bengal Tenancy Act rights are given to transferees of occupancy holdings, the framers of the Act referred only to transferable holdings. In support of this argument the learned Munsif cites the case of *Girish Chandra Choudhry* v. *Kedar Chandra Koy* (4), which merely decides that section 22 of the Act, when read with other sections, must refer to transferable holdings ; it does not support the Munsif's contention.

On the other hand, Mr. Parmeshwar Dayal urges that under the law all occupancy holdings are non-transferble and that it is only custom that can make them transferable. If this is right, it is most unlikely that the framers of the Act would draw up the provisions as to the rights of transferees in contemplation only of the transferability of holdings, such transferability being the exception. There is nothing to show that section 161 (*a*) relates to transferable holdings only.

The learned Vakil would have us read into section 161 (*a*) the words "valid against the landlord" after the words "or other right or interest" and treat the section as relating to transferable holdings only. This plainly cannot be done, the section must be read and interpreted as it stands; it is quite clear and needs

(3) 10 C. W. N. 499.

(4) 27 C. 473; 4 C. W. N. 569; 14 Ind. Dec. (N. S.) 311.

no interpolation or addition to make its sense plain, and it contains no words limiting its operation either to transferable holdings or to interests valid against the landlord.

If we turn to clause (*g*) of section 160, we find that where a landlord has expressly and in writing given his tenant permission to create any right or interest, such right or interest becomes a "protected interest;" thus where the written consent is obtained for the transfer of a non-transferable occupancy holding, the interest transferred will be a protected one, which is a higher interest than an incumbrance and is excluded from the definition of incumbrances. Section 160 (*g*) it not limited to transferable occupancy holdings or even to occupancy holdings. It may be inferred from the two sections that, where no permission is given in writing in the case of a transfer by mortgage of a non-transferable occupancy holding, the interest acquired by the mortgagee is an incumbrance.

The effect of a deposit by a mortgagee is that under section 171 he becomes entitled to possession as mortgagee of the tenant, and the landlord by withdrawing the money deposited will be taken to consent. It is argued that it is hard on the landlord that he should be forced to accept as mortgagee in possession a man whose claim he refused to recognise; but after all, if a holding is put up to sale, the landlord has to accept as tenant whoever makes the highest bid, and, by putting up the holding to sale, he voluntarily takes the risk of getting a tenant he does not want.

It is clear that the decisions in *Rameshwar Singh Bahadur* v. *Raghunandan Khawas* (1) and *Mahadeo Lal* v. *Langat Singh* (2) with regard to the rights of a purchaser of a non-transferable holding to make a deposit under section 170 (3) are not wholly applicable to the case of a mortgagee of a like holding, and we are satisfied that in the terms of section 161 (*a*) the mortgagee of a non-transferable occupancy holding has an incumbrance which is an interest voidable on the sale of the holding entitling the mortgagee to make a deposit under section 170 (3).

We are supported in our finding by the *dictum* of Roe and Jwala Prasad, JJ., in the unreported case of *Iswar Prasad Singh*, C. R. 129 of 1915, that "The corollary to the case of *Rameshwar Singh* v. *Raghunandan Khawas* (1) is that any person holding a lien by which a tenant has limited his interest is entitled to make a deposit under section 170." Furthermore, it has admittedly been the practice hitherto to allow a mortgagee of a non-transferable occupancy holding to deposit the decretal amount under section 170 (3).

We would accordingly answer this reference by saying that the usufructuary mortgagee in possession of a non-transferable occupancy holding is entitled to make a deposit under section 170, sub-section (3), of the Bengal Tenancy Act.

Answer accordingly.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 20 OF 1916.

April 29, 1919.

Present:—Mr. Fawcett, J. C., and Mr. Crump, A. J. C.

SHAHAB UD DIN—APPELLANT

versus

VOHIDBUX AND OTHERS—RESPONDENTS.

Sind Encumbered Estates Act (XX of 1896), s. 28—Hindu female, purchase from—Presumption as to limited interest, whether arises in case of Muhammadan zemindar—Estoppel—Person taking active part in bringing about sale, whether estopped from challenging it—Purchase in good faith—Improvements by purchaser—Compensation, purchaser, whether entitled to—Transfer of Property Act (IV of 1882), s. 51—Good faith, what constitutes.

The rule that a purchaser from a Hindu female must be presumed to know that he is dealing with a person who has only a limited interest, does not arise in the case of a Muhammadan *zemindar* who, but for the operation of section 28 of the Sind Encumbered Estates Act, would have been the absolute owner of the property. [p. 493, col. 2.]

There is no estoppel against a person challenging a sale merely because he took an active part in bringing about the sale, was present at the execution of the document, and who, at the time, represented that no claims of his would affect the vendee's title. [p. 493, cols. 1 & 2.]

Where a purchaser of immoveable property, under the honest belief that he is the absolute owner

thereof, undertakes permanent improvements on the property, he is in equity entitled to compensation for the improvements made by him, on the sale being annulled on the ground that the vendor had only a limited interest in the property and could not convey an absolute title, but he is liable for mesne profits from the date his possession became wrongful, *i. e.*, from the date of the death of the vendor. [p. 494, col. 2; p. 495, col. 1.]

What constitutes "good faith" within the meaning of section 51 of the Transfer of Property Act is a question of fact, and a person may act in good faith even if he acts under a mistake of law, or is negligent in investigating title. Whether there is good faith or not must depend upon the facts of each case. [p. 493, col. 2; p. 494, col. 1.]

Appeal from the decision of the District Judge, Sukkur.

Mr. *Tolasing Khushalsing*, for the Appellant.

Mr. *Tahilram Maniram*, for Respondent No. 3.

JUDGMENT.

CRUMP, A. J. C.—It is admitted that Sumar, father of plaintiff No. 1, was the sole owner of the property in suit, that from 1877 to 1885 his estate was under management and that in 1896 he executed a sale deed in favour of the defendant, the appellant in this Court. The learned District Judge has found that plaintiff is entitled to recover the property with mesne profits for three years and has rejected the defendant's claim for compensation for improvements.

Mr. Tolasing for the appellant sought to argue that the plaintiff was also a party to the sale and was bound by it and that in any case he was estopped from disputing its validity.

This argument was at the outset based on the hypothesis that plaintiff was jointly entitled to the property, but in view of paragraph 6 of the written statement, this position was necessarily abandoned. It is plainly not possible to hold on the evidence that plaintiff was in any way a party to the sale. There is some evidence that he was present and that the purchase money was utilised in paying his debts, but had defendant desired his acquiescence or believed that his acquiescence was necessary, he would no doubt have caused him to join as an executant; that defendant did not do so is an indication that he believed that Sumar alone could convey an absolute title. That there can be no estoppel in such a case, has been decided in the case *of Mir Mahomed* v. *Khubomal* (1). The facts there are not identical with those now before us, but the case is nonetheless in point. The further point which Mr. Tolasing sought to make, that the plaintiffs were in some way bound by the manager's action in handing over possession of the property to the defendant in Sumar's lifetime, is equally unsustainable. While Sumar lived defendant was entitled to possession.

The question whether on the facts of this case the appellant is entitled to the benefit of section 51 of the Transfer of Property Act is less simple. The sole question is whether the defendant believed in good faith that he was absolutely entitled to the poperty. The conduct of the true owner has nothing to do with the matter. The lower Court is wrong in supposing that it is necessary for defendant to prove that plaintiff No. 1 encouraged him to believe that he had an absolute title. That would be a case outside the scope of section 51, and might or might not furnish good grounds for compensation according to circumstances. What constitutes "good faith" within the meaning of section 51 of the Transfer of Property Act is a question of fact and a person may act in good faith even if he acts under a mistake of law: *Durgozi Row* v. *Fakeer Sahib* (2). Nor is good faith precluded by negligence in investigating the title: *Nanjappa Goundan* v. *Peruma Goundan* (3). It means no more than honest belief in the validity of the title: *Mathunsa Rowthan* v. *Apsa Bin* (4). These cases appear to furnish the principles which are applicable to the facts of the present case. It may perhaps be pointed out that those authorities which deal with purchases from Hindu females plainly stand on a different footing. In such cases, the purchaser must be presumed to know that he is dealing with a person who has only a limited interest. There is no such presumption where the vendor is a Muhammadan Zamindar who, but for the operation of section 28 of the Sind Encumbered Estates Act of 1877, would have been the absolute owner of the property. It cannot be presumed that the purchaser here

(1) 21 Ind. Cas. 517; 7 S. L. R. 58.
(2) 30 M. 197; 1 M. L. T. 423; 17 M. L. J. 9.
(3) 4 Ind. Cas. 18; 32 M. 530; 6 M. L. T. 284; 19 M. L. J. 454.
(4) 12 Ind Cas. 444; 36 M. 194; 21 M. L. J. 969; 10 M. L. T. 373; (1911) 2 M. W. N. 425.

knew that the estate of his vendor had formerly been under management.

Whether there is good faith or not must depend upon the facts of each case. Here the estate of Sumar was released from management in 1885, and the property was purchased by the defendant 11 years later. There is nothing to show that the defendant had any previous dealings with his vendor, or was in any way acquainted with his circumstances. After the sale, when the estate again came under management, possession was transferred to the defendant without any indication that Sumar had only a limited interest. The sale deed itself purports to convey an absolute title and the price paid was a fair price on that footing. The permanent improvements undertaken by the defendant point to a belief on his part that he was the absolute owner. Taking the facts as a whole he appears to have acted honestly in that belief. If so, he is entitled to the benefit of section 51 of the Transfer of Property Act.

But even if it be assumed that the defendant knew at the time of his purchase that the estate had been under management, the fact is not conclusive as against him. The evidence goes to show that plaintiff No. 1 took an active part in bringing about the sale. He was present at the execution of the document and according to the attesting witnesses who are in the best position to know, he represented that no claims of his would affect the defendant's title. Defendant may well have believed that plaintiff No. 1 was precluded by his conduct from asserting his own title after Sumar's death. If this be a mistaken view of the law, still, as has been said above, a mistaken belief as to law does not prevent the operation of section 51 of the Transfer of Property Act. That the law did so stand was, as a matter of fact, laid down by this Court in *Abdul Hakim* v. *Muhammad Kamil* (5) and though this decion has been overruled in *Mir Mahomed* v. *Khubomal* (1), it is relevant as showing that an honest belief that plaintiff was estopped could well have been entertained at the date of the sale. In either view of the case, defendant is in equity entitled to compensation for improvements made by him under that belief.

A word may be said as to the supposed conflict between section 51 of the Transfer of Property Act and section 29 of the Sind Encumbered Estates Act of 1896. Section 51, it may be observed, gives the transferee the option of either of two remedies: (*a*) the transferee may have the value of the improvement paid or secured to him, (*b*) he may require the person causing the eviction to sell his interest in the property. The learned District Judge argues that if plaintiff No. 1 is required to sell his interest, there will be a permanent alienation whereas by section 29 of the Sind Encumbered Estates Act plaintiff No. 1 can only sell his life interest. But if plaintiff No. 1 is within the terms of section 29, the interest he can convey is a life-interest only, and it would be that interest alone which he would be required to sell, if he is not within the terms of section 29 *cadit quæstio*. In point of fact section 29 does not apply for the estate of plaintiff No. 1 is not under management and has not yet been restored. The relevant section is section 9 (4), which would absolutely forbid any alienation by plaintiff No. 1. But here we are not concerned with a question of that nature, for it is the first, and not the second, remedy which is invoked, and there is nothing in the Encumbered Estates Act to prevent the assessment of compensation for the improvements.

It follows that defendant is entitled to have the value of the improvements estimated and paid or secured to him. It is always a matter of difficulty to arrive at an estimate of this kind on conflicting oral evidence. The plaintiff admits that defendant has sunk a well at a cost of Rs. 400 or Rs. 500, has built a wall round the property and planted some trees. He values the property for the purposes of this suit at Rs. 2,000. The defendant gives details of the amounts spent by him on improvements which make up a total of about Rs. 1,400. One witness, Dani, states that he was employed in sinking the well and that the cost was Rs. 800 or Rs. 900. The defendant says he spent Rs. 843 on the well. There is no other evidence bearing on the point. As is usual in such cases either party is no doubt exaggerating or minimising the value of the improvements to suit his own case. The defendant is not entitled to his out of pocket expenses but to the value of the improve-

(5) 2 S. D. 598 at p. 612.

ments. In the circumstances a sum of Rs. 600 may fairly be allowed.

The last point raised is the question of mesne profits. Mr. Tolasing argues that in view of the last paragraph of section 51 of the Transfer of Property Act no mesne profits can be allowed. It is urged that if defendant is entitled to remove the standing crops, he cannot *a fortiori* be liable to account for crops of the preceding years. The true meaning of that paragraph is that the transferee is entitled to the benefit of the crops sown by him when he was under a *bona fide* belief that he had an absolute title. Sumar died in 1906, and it is difficult to believe that the defendant had no notice of any defect in his title until the suit was filed. The plaint was filed in June 1914 and judgment was pronounced in June 1916. In these circumstances it is difficult to understand how there can be any standing crops on the land to which the provisions of the last paragraph of section 51 can be applicable.

That mesne profits are chargeable follows from the fact that after Sumar's death the defendant's possession was wrongful: see *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (6) and *Perumal Udayar* v. *Krishnama Chettyar* (7). It is not easy to estimate the profits on the vague evidence on the record. The figure given by the plaintiff is Rs. 250 per annum. The defendant will have it that there are practically no profits. In these circumstances the best guide is the statement of the tenant Usman. He is in a position to know the value of the Zamindar's share of the produce for the three years, which as stated by him is about Rs 470. He says the tenant pays the expenses of cultivation. The assessment is apparently paid by the Zamindar. Allowing for the fact that Usman is plaintiffs' witness, the profits may be fairly estimated at Rs. 400 It is not probable that the land in view of its value could produce more than this. The estimate adopted by the District Judge rests on a hypothetical relation between the assessment and the rent which is not supported by any evidence.

Setting the past mesne profits against the value of the improvements there is a balance of Rs. 200 due by plaintiff No. 3 to defendant. The decree of the lower Court must, therefore, be varied. As the appeal succeeds to a large extent, parties should bear their own costs in this Court. In the lower Court defendant should pay half plaintiff's costs and bear his own, plaintiff No. 3 to recover possession of the land and to pay or receive, as the case may be, the balance found due on setting off the mesne profits found due on the enquiry ordered by the lower Court against the balance of Rs. 200 due by plaintiff No. 3 to defendant.

FAWCETT, J. C.—I concur.

Decree varied.

(6) 21 C. 142 (P. C.); 20 I. A. 160; 17 Ind. Jur. 576; 6 Sar. P. C. J. 366; 10 Ind. Dec. (N. S.) 727.

(7) 17 M. 251; 6 Ind. Dec. (N. S.) 173.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 83 OF 1919.

February 25, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

ADYA SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

NASIB SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 4, applicability of, to private agreements between parties—Agreement by decree-holder to set aside sale on payment of decretal money by judgment-debtor within certain time—Payment beyond time fixed but on re-opening of Court, effect of.

Section 4 of the Limitation Act does not apply to a case where a certain date has been fixed for the payment of money by agreement of the parties. [p. 496, col. 2.]

A decree-holder agreed to set aside the sale of the properties of the judgment-debtor if the latter paid up the decretal amount within two months of the date of the sale. The Courts were closed on the last day allowed for payment and the decretal amount was deposited on the day that the Courts re-opened:

Held, that payment not having been made within the time agreed upon, the sale could not be set aside. [p. 496, col. 2.]

Appeal against the order of the District Judge, Monghyr, dated the 20th February 1919, reversing that of the Sub-Judge of that place, dated the 21st December 1918.

ADYA SINGH *v.* NASIB SINGH.

Mr. *Fakhruddin* and Mr. *Panchanan Banerji*, for the Appellants.

Mr. *Sivanandan Ray*, for the Respondents.

JUDGMENT.

SULTAN AHMED, J.—The respondents, decree-holders, obtained a decree against the appellants and in execution of that decree, the lower Court had assessed a certain amount as the value of the property sought to be sold. An appeal was preferred by the judgment-debtors, and during the hearing of the appeal from the order of assessment the decree-holders, respondents, filed a petition on the 28th of May 1918, by which they agreed that if the judgment-debtors, appellants, paid to the decree-holders the entire decretal amount with costs, within two months even after the sale was held, the decree-holders shall have no objection to have the sale set aside and further agreed, on receipt of the entire decretal amount with costs, to file a petition certifying payment and to have the sale set aside.

The sale took place on the 27th of July 1918 and was confirmed on the 26th August 1918. It is admitted that the decretal amount with costs was not paid within two months from the date of sale, that is, 27th July 1918. The Court rose for the Poojah holidays on the 17th of September and re-opened on the 21st October, on which date the judgment-debtors filed an application for permission to deposit the decree money, and the money was deposited on that very day. The first Court on the application of the judgment debtors, appellants, set aside the sale.

An appeal was preferred to the Subordinate Judge, who held that the payment of the decretal amount with costs not having been made within two months from the date of sale, the sale stood good and could not be set aside. A second appeal has now been preferred to this Court against the order of the first Subordinate Judge.

It was *first* contended by the learned Vakil appearing on behalf of the appellants that time was not of the essence of the contract and the appellants were entitled to pay the decretal amount with costs on the re-opening of the Court. In my opinion this position is not available to the appellants in the face of the clear language of the petition itself. It is clearly stated therein that the appellants, judgment-debtors, had to pay the decretal amount with costs within two months from the date of sale.

The *second* ground taken up by the learned Vakil on behalf of the appellants was that as the respondents, decree-holders, had to do a certain thing under the petition of compromise after the receipt of the decretal amount, and as their part of the contract would not be performed as long as the Court was not sitting, the appellants, judgment-debtors, were not bound to pay the decretal amount before the re opening of the Courts. In my opinion this contention is not sound. All that the decree-holders agreed to was that the sale would be set aside on the entire decretal amount with costs being paid by the judgment-debtors within two months after the sale. What they had to do after the decretal amount was paid was not really a part of the contract. The application stating full satisfaction could be made when the Court was sitting, but that had absolutely nothing to do with the payment of the decretal amount within two months, a condition which had to be fulfilled before the sale was set aside.

The *third* ground urged was that in any case section 4 of the Limitation Act applied to the facts of the present case and the money could be paid on the re-opening of the Courts on the 21st of October. Section 4 of the Limitation Act, however, has got no application inasmuch as there was a private contract between the parties, and section 4 does not apply to a case where a certain date has been fixed for the payment of the money by agreement of the parties.

The three grounds urged by the learned Vakil appearing on behalf of the appellants, therefore, fail, and this appeal must be dismissed with costs.

MULLICK, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 81 OF 1919.

January 7, 1920.

Present:—Mr. Justice Adami.

MOHAMED YUSUF—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Police Act (V of 1861), s. 29—Superintendent of Police, order by, regulating duties of Police Force—Disobedience of order—Offence.

An order by a Superintendent of Police regulating the duties of the men under his command is a lawful order under section 29 of the Police Act which the men are bound to obey, and a disobedience of any such order renders the person disobeying liable to conviction under that section. [p. 498, col. 2.]

An order by a Superintendent of Police directing members of the Mounted Police Force to groom their horses is a lawful order which the men are bound to obey. [p. 498, col. 2.]

Criminal reference under section 438, Criminal Procedure Code, by the Officiating Sessions Judge, Gaya, dated the 20th November 1919 recommending that the conviction and sentence of the petitioner under section 29 of the Police Act may be set aside.

FACTS appear from the order of reference of the Sessions Judge, material portions of which which are as follows:—

"The accused Mohamad Yusuf is a Mounted Police Officer of the Additional Force located at Jahanabad. The Superintendent of Police, Gaya, issued an order called District Order No. 75, dated the 14th July 1919, ordering the members of the Force to groom their horses. The accused is charged with not grooming his horse but made his grass cutter groom it on the 14th September last and on the following day he did not groom it until the Deputy Suprintendent had personally warned him. The Deputy Magistrate of Jahanabad convicted the accused under section 29 of Act V of 1861 and sentenced him to go under rigorous imprisonment for 15 days. The accused has been enlarged on bail till the disposal of this case.

The question arising in this case is, whether the order of the Supritendent of Police, Gaya, is a lawful order made by a competent authority under the provisions of section 29 of Act V of 1861, and my answer is in the negative.

Under section 12 of the said Act the Inspector-General of Police may frame rules and orders relative to the particular services to be performed by the members of the Police Force and that also subject to the approval of the Local Government. The case of *Queen-Empress* v. *Abdul Hossein* (1) is applicable to the present case, where in deciding as to who is the competent authority it has been held that there has been no express power given in this Act to any Officer save the Inspector-General of Police to make rules The rule issued under the District Order of the Suprintendent is a rule regarding particular services, *viz.*, grooming of their own horses to be done by the member of the service, and not individually by the accused.

The order of the Superintendent called the District Order No. 76 (wrongly put by the Deputy Magistrate as Order No. 75 in his summary judgment) is a general rule which the Superintendent was not competent to make. In another case [*Bhola Nath Das, In the matter of the petition of* (2)] a Superintendent of Police ordered his Constables to cut down Jungles in the vicinity of their lines and on their refusal to do so, he punished them with extra drill, but the Hon'ble High Court declared that the Superintendent was not competent to issue such general rule.

The Public Prosecutor who appeared in the case raised three points:—

1. As the accused was a member of an Additional Police Force located at Jahanabad, the Force was exclusively under the orders of the District Superintendent.

2. That the order for grooming was passed on 14th July 1919 and the members of the Force including the accused acquiesced in it for a long time before he broke it.

3. It was necessary as a disciplinary measure.

None of these points appear tenable.

1. There is no evidence that the Force in question was employed at the cost of private individuals. The sections refer only to control of the District Superintendent of Police as against such third person who pays the cost of other local officers.

2. I believe that the ground of acquiescence cannot be allowed to prevail in a

(1) 15 C. 194; 12 Ind. Jur. 347; 7 Ind. Dec. (N. S.) 714.

(2) 12 C. 427; 6 Ind. Dec. (N. S.) 290.

criminal case and the grooming of horses by members of the Police Force apparently appears to be of such a character as not likely to be acquiesced in by them.

3. It does not concern Courts which are only to administer the law as it stands,

In my opinion the Deputy Magistrate has misapplied the law to the facts of the case and I beg to suggest that the conviction may be set aside and the accused may be acquitted of the charge."

The Government Advocate, for the Crown.

ORDER.—This is a reference by the Sessions Judge of Gaya under section 438 of the Criminal Procedure Code, recommending that the conviction of the petitioner under section 29 of the Indian Police Act, V of 1861, should be set aside on the ground that the Superintendent of Police had no power to pass the orders for the breach of which the petitioner has been convicted.

The petitioner belongs to the Mounted Police Force stationed at Jehanabad. The Superintendent of Police of Gaya passed orders regulating the routine work of Sowars belonging to the Mounted Police Force. One of these orders was that the men should parade, water, and feed their horses and groom them. The petitioner neglected to groom his horse and left it to his grass cutter to do the work, and on another occasion neglected also to groom the horse and when warned was impertinent.

The learned Sessions Judge urges that the Superintendent of Police had no power to issue rules regulating the conduct or work of the Mounted Police. He refers to section 12 of the Police Act in support of his contention that the Inspector-General of Police alone may frame rules and orders relative to the particular services to be performed by the members of the Police Force. He relies on the case of *Queen-Empress* v. *Abdul Hossein* (1) and also on *Bhola Nath Das, In the matter of the petition of* (2). I am of opinion that the contention of the learned Sessions Judge cannot be supported. The order as to the duties of the members of this Force was an order which the Superintendent of Police could pass in view of his position as Commander of the Force. It was not in the nature of a rule but was a lawful order regulating the duties of the men under his command. It is a District Order similar to regimental orders passed by the Colonel of a Regiment, and the Superintendent of Police had as much power to order the men to groom the horses themselves as he had to order them to do any duty in the course of their day's work. It was a lawful order and under section 29 the members of the Force were bound to obey it. It was in no way a rule of the nature contemplated in section 12 of the Police Act.

The conviction, therefore, I hold, was a legal one. It is in my mind, however, somewhat unfortunate that recourse was had to the Criminal Court. The offence was one which might better have been punished departmentally. I am of opinion too that the sentence under the circumstances of the case was unduly severe. I uphold the conviction, but would reduce the sentence to imprisonment for five days including any term of imprisonment which the petitioner has already served.

Sentence reduced.

MADRAS HIGH COURT.

REFERENCE No. 7 OF 1920.

March 29, 1920.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

In re SUBBIAH THEVAN—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 303, 307—Verdict of Jury—Perverse verdict—Jury, when may be questioned for reasons of verdict—Penal Code (Act XLV of 1860), s. 380—Accused caught with stolen property—Explanation, absence of—Offence.

Accused was tried by a Jury upon a charge of theft. He produced no witnesses in defence. The prosecution evidence showed that immediately after the theft he was pursued and was caught red-handed with the stolen property in his possession. The Jury returned a verdict of not guilty:

Held, that the verdict was perverse, and that the accused should be convicted under section 380 of the Penal Code. [p. 499, col. 1.]

SUBBIAH THEVAN, *In re.*

Per *Sadasiva Aiyar, J.*—Although a Sessions Judge has no power under section 303 or section 307 of the Criminal Procedure Code to question a Jury as to the reasons for their verdict, it nevertheless is not improper to put them questions for the purpose of coming to a satisfactory conclusion whether the case is a fit one for reference to the High Court. [p. 499, col. 2.]

Reference under section 307 of the Code of Criminal Procedure, 1898, by the Assistant Sessions Judge of the Tinnevelly Division in Case No. 10 of his Calendar for 1920.

FACTS appear from the judgment.

Mr. *V. L. Ethiraj*, for the Public Prosecutor, for the Crown.—The verdict of the Jury is against evidence and perverse.

The procedure of the Assistant Sessions Judge in questioning the Jury as to the reasons for their verdict may not be appropriate when the verdict is not ambiguous. The decision in Reference Case No. 30 of 1919 seems to give him the power. It is expedient that the Judge should know the reasons for the verdict to make a proper reference to the High Court or it is open to the Judge to change his mind after hearing the reasons for the verdict. The contrary view has been taken in *Emperor* v. *Siranadu* (1) and *Public Prosecutor* v. *Abdul Hameed* (2).

JUDGMENT.

SADASIVA AIYAR, J.—This is a reference by the Assistant Sessions Judge of Tinnevelly, the Jury having returned a verdict of "not guilty" against the accused by a majority. The charge was that at about 10 P. M. the accused committed theft of two cloths from the yard in the dwelling house of P. W. No. 1. No doubt the time is not very accurately spoken to by the witnesses, but there can be no question that it was after sunset and between (about) 8 and (about) 10 P. M. The accused examined no witnesses and beyond wild insinuations made by him in cross examination, there is nothing to show that any of the prosecution witnesses was actuated by feelings of enmity towards the accused in giving evidence against the accused. As soon as the theft was discovered, the accused was pursued and he was caught red-handed with the stolen cloths in his possession. On the whole, I think that the Jury's verdict is perverse.

One matter relating to the procedure of the Assistant Sessions Judge has to be considered. After the Jury had pronounced their verdict that the accused was not guilty, he asked them to state briefly the reasons for their opinion. It has been held in *Emperor* v. *Siranadu* (1) and in *Public Prosecutor* v. *Abdul Hameed* (2) that the Sessions Judge has no power under section 303 or section 307, Criminal Procedure Code, to question the Jury as to the reasons for their verdict unless he considers that there has been an accident or mistake, or there is some ambiguity or doubt as to the nature and meaning of the verdict which has to be cleared. The Assistant Sessions Judge in this case, however, relies in justification in the course he took on the decision of a Bench of this Court which dealt with Reference Case No. 30 of 1919, even though the verdict in this case cannot be said to be ambiguous. The decision relied on by him does seem to lay down that the Court, if it intended to make a reference to the High Court, should have asked the Jury for their reasons for not believing the evidence of the witnesses for the prosecution and the learned Judges refer to section 303 of the Criminal Procedure Code. With great respect, I do not think that section 303 gives any power to the Sessions Court to call upon the Jury to give their reasons for their verdict unless the Court is unable to ascertain what the verdict of the Jury really is (section 307 is the section which deals with cases where the Sessions Judge disagrees with the verdict).

However, the decisions in *Emperor* v. *Siranadu* (1) and *Public Prosecutor* v. *Abdul Hameed* (2) do not, in my opinion, lay down that, for the purpose of coming to a conclusion satisfactorily to his own mind whether the case is a fit one for reference to the High Court, the Sessions Judge may not put questions to the Jury and even to the individual members of the Jury to ascertain the reasons for their verdict. It may be that after hearing these reasons he might change the view which he might have arrived at as to the necessity of a reference to the High Court or he might be confirmed in his opinion as to such necessity. He may not be *entitled under these particular sections* to put those questions and the Jury may not be bound to answer such

(1) 30 M. 469; 17 M. L. J. 476; 6 Cr. L. J. 373.
(2) 22 Ind. Cas. 931; 33 M. 535 at pp. 589, 590; 15 Cr. L. J. 197.

questions, but I do not find anything to render it improper, for the *particular* purpose mentioned by me, for the Judge to put such questions. While I, therefore, differ from the ruling in Reference Case No. 30 of 1919 that under section 303 (1) the Sessions Judge *should* have asked the Jury for their reasons for their not believing the evidence of the witnesses when he considered the verdict perverse, I do not think that his having asked such questions in this case is improper or is a sufficient ground for not accepting the reference.

In the result, I convict the accused under section 380, Indian Penal Code, and sentence him to 4 years' rigorous imprisonment.

SPENCER, J.—I agree in thinking that the accused is guilty and that he should be sentenced to 4 years' imprisonment.

As regards the question that the Assistant Sessions Judge thought fit to put to the Jury, I consider that section 303, Criminal Procedure Code, does not authorise him to question the Jury as to the grounds for their opinion, although it would be convenient and even desirable, when such references are made, that the Court that makes the reference as well as the Court that disposes of it should know what is in the mind of the Jury. The rulings in *Emperor* v. *Siranadu* (1) and *Public Prosecutor* v. *Abdul Hameed* (2) have laid down that such questions should not be asked. I think that all Courts should follow these decisions, and I am of opinion that so long as the present wording of the Criminal Procedure Code is retained, a Sessions Judge is neither authorised to ask questions nor is the Jury bound to answer questions as to the reasons for their verdict and that they can only be asked questions to make it clear what their verdict is when it is ambiguous.

M. C. P.

Accused convicted.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 17 OF 1920.

March 17, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

EMPEROR—COMPLAINANT

versus

DEVA KANTA JHA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 562, *applicability of—Penal Code (Act XLV of 1860)*, s 420.

The provisions of section 562 of the Criminal Procedure Code are inapplicable to an offence under section 420 of the Penal Code. [p. 501, col. 1.]

Criminal reference by the Sessions Judge, Saran, dated the 6th February 1920.

Mr. *H. L. Nandkeolyar* (with him Mr. *Gour Chandra Pal*), for the Accused.

JUDGMENT.—In our opinion the view taken by the learned Sessions Judge is correct.

Section 562, Criminal Procedure Code, describes the offences to which it applies by the short marginal descriptions given in the Indian Penal Code in the sections dealing with those offences. Section 562 might, no doubt, have referred to the offences by the number of the respective sections of the Penal Code, but that is no reason for holding that the section as it stands warrants the construction that dishonest misappropriation and cheating include every offence under the respective headings of "Criminal Misappropriation" and "Cheating" in the Penal Code.

The learned Counsel who has appeared for the accused urges that if it had not been the intention of the Legislature to give this wide meaning to the words, the section would have run as follows:—

"In any case in which a person is convicted of theft, theft in a building or any other offence under the Indian Penal Code punishable with not more than two years' imprisonment."

That might, no doubt, have served the intention of the draftsman, but we do not think that there is any difficulty in understanding his meaning. He first of all specifies the particular offences and he then adds a general restrictive clause to cover offences other than those particular offences.

On the other hand if dishonest misappropriation and cheating include offences

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graver than simple dishonest misappropriation and simple cheating, than theft should also include theft in a building and the enumeration of this later offence was unnecessary.

The following authorities are also in favour of the view taken by the learned Sessions Judge: *Harnam Singh* v. *Emperor* (1), *Emperor* v. *Ranjan Dadubhai* (2).

In the Calcutta High Court the procedure of section 562 has been applied to trials other than trials under the Criminal Procedure Code, but we have been shown no case under this Code which has given to section 562 the wider interpretation which it is now sought to give.

So far as we can find the only case which favours the wider view is the judgment of Piggott, J., in *Har Narayan* v. *Ramji Das* (3), and we respectfully venture to differ from this judgment.

We set aside the order of the Deputy Magistrate directing the release of the prisoner on his entering into a bond with two sureties and direct that the case be remitted to him or his successor in office in order that it may be dealt with according to law.

Order set aside.

(1) 10 Ind. Cas. 114; 12 Cr. L. J. 212; 16 P. R. 1911 Cr; 155 P. L R. 1911; 55 P. W. R 1911 Cr.

(2) 31 Ind. Cas. 381; 17 Bom. L. R. 921; 16 Cr. L. J. 781.

(3) 23 Ind. Cas. 743; 12 A.L. J. 465; 15 Cr. L. J. 375.

ALLAHABAD HIGH COURT.
FULL BENCH.

MISCELLANEOUS CRIMINAL CASE No. 104 OF 1920.

March 30, 1920.

Present:—Sir Grimwood Mears, Kt., Chief Justice, Justice Sir P. C. Banerji, Kt., and Mr. Justice Walsh.

In the matter of A VAKIL.

Letters Patent (All.), cl. 8—Vakil preparing and presenting petition without authority from his clients —Misconduct.

A vakil prepared and presented to a Sessions Judge in the course of a criminal trial a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas in truth and in fact it was a petition which originated with him and in respect of which he had received no instructions, and he put therein allegations which were made recklessly and without any reasonable grounds for belief:

Held, that he was guilty of professional misconduct. [p. 507, col. 1.]

The Hon'ble Dr. *Tej Bahadur Sapru*, Messrs. *A. P. Dube* and *S. N. Sen*, for the Vakil.

Mr. *A. E. Ryves*, for the Crown.

JUDGMENT.

MEARS, C. J.—The respondent,.....a Vakil of this Court, practising at Farrukhabad, has appeared before us on a notice, dated the 10th of March 1920, to show cause why he should not be disbarred or suspended, in that :—

(*a*) On the 20th of January 1920, he prepared and put before the Sessions Court a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas in truth and in fact it was a petition which originated with him and in respect of which he had received no instructions ;

(*b*) that he knowingly prepared and filed the said petition before the Sessions Court and put therein allegations which were to his knowledge untrue or, alternatively, which were made recklessly without any reasonable grounds for belief :

(*c*) that by means of the aforesaid he intended to deceive or mislead the Court.

The facts which have given rise to this matter must be stated by us in some detail in order that this case may be thoroughly understood. On the night of the 5th of November 1919, Pultu Singh, a Zamindar, was sleeping in a room in his house when he was attacked by three men. Three servants slept in an adjoining room. They heard his cries and came to his rescue, and by the aid of a light which was burning and also by the fact of it being a light night, the three servants saw one man on either side of the *charpoy* holding down Pultu Singh with their *lathis* across him, whilst a third man was striking Pultu Singh with a chopper. The three servants recognised each of the men, and they were eventually arrested. An examination of the premises resulted in the discovery, amongst other things, of a piece of wood of an irregular triangular shape, about 2 inches long and blood-stained. The Sub-Inspector, who found it, took it

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away along with other things discovered on the premises, having no doubt, quite reasonably, in his mind that it might possibly prove to be a material piece of evidence in the trial. Apparently the Police did not send it up as an exhibit, and the chopper, when secured by the Police, did not show that any wooden part of it was missing. Therefore, as far as the story of the prosecution went, the finding of the piece of wood turned out to be a matter of no importance, as it did not fit in with any Police theory of the case which they proposed to put forward. They rested their case upon the identity of the three accused, as sworn to by the servants, certain motives for the murder and the identification of the blade of the chopper by a blacksmith, named Khargu, who had sharpened it a few hours before the commission of the murder at the instance of one of the accused men. The Magistrate took the piece of wood and placed it in an envelope which he sealed down. It was then handed over to the Police and remained in their possession in the envelope unopened, and at the Sessions trial (on the 19th of January) was lying on the desk of Mr. Bennett, the presiding Judge and there it remained throughout the whole of the evidence of the prosecution, not being referred to at all by the prosecution, until the last witness for the prosecution was in the box. That was the Sub-Inspector Muhammad Khalil. He gave evidence of his arrival on the spot. He detailed what he saw, and spoke to statements being made to him, of making a map, and then his examination-in-chief closed. That is important because after that, all that was going to happen was the cross-examination of the Sub-Inspector and the reading of the medical evidence. Then this Vakil, whose conduct is called in question, arose to cross-examine. What possessed him to bring this piece of wood into the case will never be known. But he asked that the piece of wood should be handed down to him and that was done. He then cross-examined the Sub Inspector and the Sub-Inspector said in answer to his questions: "Below the corpse I found a piece of wood," Exhibit H; (and then in brackets is a note, which is clearly a note by Mr. Bennett, which says that it was a "blood-stained piece of wood about 2 inches long, seems a bit of the *charpoy*.") That as far as we see is the only question in cross-examination which relates at all to this piece of wood. The medical evidence was then given and the Court rose for the day. Probably sometime in the morning of the 20th the Vakil drafted a petition. It is quite certain that he did not have any communication with his clients on the 19th, and it is certain that he never saw them on the 20th until after the petition had been completely drafted by him. It was suggested on Saturday last that he saw the brother of one of the accused, but we think it is fortunate for him that he did not pursue that line of defence, because it will be seen in a few moments that that was a suggestion entirely at variance with the explanation that he gave Mr. Bennett, the Sessions Judge, and is not likely to have been the correct version. However, that is not before us now and it is not put forward in any way as his defence that he in fact received instructions from a brother or some relative of one of the accused. He drafted the petition. Now it is important to see what he says in that petition. And we may pause here for a moment to say this. It is the duty of an Advocate, if he himself thinks that there has been some irregularity in the conduct of the Police, or in the conduct of any of the witnesses, to call that irregularity to the attention of the Court, and this Vakil would have been perfectly within his rights and would have acted with the utmost propriety in bringing the matter to the attention of the Court, if when he took that piece of wood in his hand on the afternoon of the 19th of January he honestly thought that the piece of wood had been changed. But he should have brought it to the attention of the Court by saying, "I saw this piece of wood in the Magistrate's Court. I have seen the piece of wood to-day. I say that in my opinion these two pieces are not the same. I demand an enquiry—the fullest enquiry." Anything less than a demand for an investigation based upon his personal application would have been a failure by him in his duty to his client. But he chose a crooked course and drafted a petition which on the face of it makes it appear to the Court that the three prisoners, in whose minds there had never been any

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suspicion of any change in this piece of wood, are made by him to say: "We noticed this, we noticed that, we noticed the other," each of those statements being false statements.

Now here is the petition. We shall refer to some only of its relevant parts. But we must bear in mind throughout that the first charge against this Vakil is that, having no instructions from his clients, he fabricated a petition which made it appear that instructions had been given to him by his clients and that he was the mere agent to pass on to the Court the beliefs of the men who were then standing their trial for their lives. The petition was addressed in form, as we have said, by the accused to the Judge. It begins—

"Sir, In the case noted above the piece of wood (Exhibit H) shown yesterday by order of the Court, is not, in fact, the same wood which was produced by the Sub-Inspector, Khalil Ahmad, in the Court of the Magistrate. Because (1) that piece of wood was much thicker than this and was of a different shape. The former clearly appeared to be a broken piece of the handle of a chopper. We had seen it in broad daylight."

Now that statement drafted by the Vakil, and signed by these men, would convey to the Judge that in the minds of those three men there rested a conviction that the piece of wood which they had seem in broad daylight in the Court of the Magistrate was not the same piece of wood which they had seen on the afternoon of January 19th in the Court of the Sessions Judge. There was nothing in the prisoners' minds at all in the matter until this Vakil put it into their minds in Court on the morning of the 20th. One will search in vain the evidence in the Magistrate's Court or in the Court of the Sessions Judge to find any suggestion put forward by any witness that this piece of wood was in fact, or appeared to be, a broken piece of the handle of a chopper. That the Police may originally have formed a theory that it was possibly the broken piece of the handle of a chopper is, we think, quite likely, but they never formulated that theory in words and it is important to remember this because there are statements hereafter which deal with it.

The petition continues:—

"2. In the Court of the Magistrate, where the enquiry was held, the prosecution had tried to prove that the blade of the chopper which has been produced was the same which was made by the blacksmith Khargu, but the handle or the wooden part was different."

Now there it says that in the Court of the Magistrate the prosecution had tried to prove that the blade was the same but the handle or the wooden part was different. Beyond the fact that Khargu, the blacksmith, split up his identification into two parts and said, "this is the same blade that I sharpened, this is the same handle," the evidence went no further than that, and we have examined every statement of fact that is contained in paragraph 2 of the petition by the light of every deposition that bears upon it. The petition continues:—

"This is clear from the statement of Ram Sarup, Sub-Inspector of Police Station Thatia, made in the Court of the Magistrate. On the same day Sub Inspectors Khalil Ahmad and Ram Sarup were examined first and the blacksmith Khargu was examined after them. Therefore, when the blacksmith Khargu was asked as to whether the handle of the chopper was the same to which the blade was fitted when it was made, and he replied to the disappointment of the prosecution that the handle was exactly the same, the prosecuting Inspector put the same question to him 3 or 4 times, but each time his reply was the same."

The Magistrate has been called, but he has no recollection of the prosecuting Inspector behaving in this extraordinary way and being permitted to put the same question to Khargu 3 or 4 times, and there is no record of it in his notes. Then paragraph 2 concludes:—

"In this way the prosecution lost the most important piece of evidence against us because the handle which is at present fitted to the blade of the chopper is not in any way so broken as to allow the piece of wood produced by the Sub-Inspector Khalil Ahmad to fit in."

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Then paragraph 3 deals with the conclusion that the three accused men wished the Court to draw,—and we pass on to paragraph 4.

"The piece of wood, Exhibit H, before the Court is apparently a piece of the leg of a cot, and no one can call it a piece of the handle of a chopper."

(No one had called it the handle of a chopper until it occurred to this Vakil to draft this most disingenuous petition).

"For these reasons we fully believe that this piece of wood has been put in place of the former piece."

We have already said the men had no belief about the matter at all; they had never said one word about this to the Vakil and yet he had the audacity to draft this petition, setting up this deceitful story, and present it to the Court as emanating directly from his clients. The petition continues—

"For these reasons we fully believe that this piece of wood has been put in place of the former piece. If the former piece had been produced before the Court, the nature of the case would have been entirely changed."

That is a sentence which demonstrates in our view that this Vakil was acting dishonestly in the matter. The petition goes on :—

"It is, therefore, prayed with folded hands that in order to prove these facts the prosecuting Inspector, Pandit Chandrabhan Pande, who had examined the Sub-Inspector Khalil Ahmad and the blacksmith Khargu, may be called forthwith in order to prove the piece of wood in the Court of the Magistrate and the following questions may be put to him."

Then there were four questions set out, which were proper questions on the basis of it being part of the case (which of course it was not) that this was a piece of the handle of a chopper. Then the petition concluded—

"If necessary our Pleader may be permitted to cross examine him (*i. e.*, Pandit Chandrabhan Pande). Because, Sir, the Court is being clearly duped in this matter and an effort is being made to secure our execution by means of an unfair and cunning act."

Now it is difficult to conceive greater rubbish than this and the Vakil cannot be so incompetent as to have believed a word of it. The fact all too clearly appears that he was acting dishonourably in the presentation of this petition and hoped to mislead the Court.

We pass over the questions which he suggested should be put to the Magistrate. Again, they were proper questions on the basis of it being part of the prosecution that this broken piece of wood in fact formed part of the chopper. It continues—

"As no question was asked by the prosecution in this Court about the piece of wood which was enclosed in an envelope, and we the three accused were fully believing from the day it was produced in the Magistrate's Court that it would save our lives, it was absolutely necessary for our Vakil to enquire of the last prosecution witness, Sub-Inspector Khalil Ahmad, about this piece of wood."

Now, follows this :—

"When the cover was opened, our Vakil was busy with cross examination. We could have, therefore, no opportunity to inform our Vakil of this fact and to put in this application. And as soon as the cross-examination of Sub-Inspector Khalil Ahmad was over, the hearing of the case was closed for the day, we were ordered to be taken out. This application could not, therefore, be put in yesterday."

That, of course, is designed to bring to the mind of the Sessions Judge and to convince him that the three men immediately on seeing the piece of wood were satisfied that the piece of wood had been changed and that if they could, they would on the afternoon of the 19th have communicated with their Vakil and made the application instantly, the truth being as we have reiterated, that this application originated in the mind of the Vakil alone and he put all these statements, partly falsehood and partly nonsense, into the mouth of the three men.

The last prayer is :—

"That by these questions suggested by us, the Court should satisfy itself about the identity of the piece of wood, and this can be done only if the Court takes the trouble of asking these questions, whereby

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the facts will become clear. As it is a question of life and death to three persons, it is most respectfully, and with folded hands, prayed that the Court may take this trouble and pardon us for giving this trouble."

Then this precious document is signed by the three accused men and witnessed by the Vakil.

That document was laid before the Sessions Judge and he acted with admirable promptitude, and we are greatly indebted to him for the course he took, which we commend to the consideration of every judicial officer in this Province. What he did was to call the Magistrate and Sub-Inspector and examine them on the basis of the petition being a genuine one—genuinely emanating from the three accused and laid before the Court by the Vakil in his capacity as Vakil. And then of course it turned out that the story was a fabrication, and thereupon the Sessions Judge very wisely asked a few questions of this Vakil and most sensibly made the Vakil sign what he said, a very necessary precaution when dealing with a person of shifty character. In the result we get the following note from the Sessions Judge:—"An application in regard to a piece of wood, Exhibit H, was handed in by..... .....Vakil for the accused signed by the accused, on the commencement of the proceedings on the 20th of January 1920." The statement of the Vakil.....is as follows:—

"The idea that this piece of wood was changed after being exhibited before the Committing Magistrate was present in my mind in a hazy form when Exhibit H was produced before the Sessions Judge yesterday. I am not quite sure whether I spoke to the accused or not on the subject yesterday."

Then there is a note by the Judge. "Note.—Vakil said at first he did not speak to the accused on the subject yesterday." "I then drafted out the application this morning at my house before coming to Court and before seeing the accused."

Now he had not spoken to them on the afternoon of the 19th and there we get it from him that the petition was written before seeing the accused on the morning of the 20th in the Court of Session.

"All the statements in the application as to the piece of wood being different from that in the Magistrate's Court were written by me of my own accord and not dictated to me by any one. All the information in the application is original and no information was given to me by any one. I had the application written out ready and read it over to the accused and asked them if they agreed with it and got it signed by them and presented it to Court."

We have already referred to the fact that on Saturday this Vakil even in this Court seemed to be prepared to put up a substantive case that the petition had been drafted on the instruction of a brother, or some relative, of one of the accused. But it happened by good fortune that the Court rose at 1 o'clock and that matter was not pursued to day or it might have led to further and serious developments, because it is clear from this document that when he was giving his explanation to the Sessions Judge, that explanation did not include any suggestion that anybody on behalf of the accused had said anything to him in regard to this matter. The statement continues—

"I asked the accused whether they agreed to what I had written and they said they agreed to it. Then I asked whether it should be presented, and they said it should be. I handed it in. The piece of wood was not handed to the accused yesterday, it was only seen by them at the distance from the dock to the Court table (0 feet). I stated to the Court this morning that before handing the application in I wanted to make sure and I asked that the piece of wood should be handed to the accused to make sure that they would persist in making the application."

"Persist in making the application" is a strange phrase when the accused were as a fact mere puppets in the hands of this unscrupulous Advocate.

"The reader handed the accused the piece of wood and I do not know what they said (and then said—wants to add 'probably')."

We do not quite understand what this means it is put in brackets and it is "(then

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said) wants to add ('probably')." Then it continues:

"They said it was not the same."

We should have been very astonished if they had said that it was the same after seeing the petition drafted by their Vakil.

"After seeing this wood they said they do persist in making the application; then I handed it in. I cannot say whether the accused had seen this piece of wood clearly yesterday. They said it was not the same piece of wood when I saw them this morning."

Then Mr. Bennett put the question, "Why was it necessary for them to see it again this morning if they had seen it yesterday in Court?" and the Vakil's answer was "To make sure that they will make the application."

Question.—Anything more to state?

Answer.—"My first intention was before presenting this application to the Court, I wished to request the Court that the piece of wood should be shown to the accused. The Court asked me to speak louder. The piece was shown to accused. After it was shown I presented the application. I have authority by *vakalatnama* to make the application."

And here we find that by that time even this Vakil had realised that Mr. Bennett had taken his measure, and we now see the complete lack of moral stability when he continues:—

"If the Court think any improper conduct on my part, I would like to take back the application, though I think I have done nothing wrong; personally I would like to take back the appliation, but I do not know whether I have authority to do so or not. Before I actually take it back I wish the permission of my clients. That is all."

Now having regard to the fact of this petition being made and to the information which the learned Sessions Judge obtained by asking questions of this Vakil, it is small wonder that he sent the matter up to this Court for our enquiry.

Now the notice which was served on him has been read. On Saturday last the Vakil appeared before us with the great advantage of having as his Advocate Dr. Sapru. After what really might be called persuasion on our part on Saturday, the Vakil seemed to think that there was some slight cause for him to express some slight shade of regret. Then there came an alteration of mood on his part and he really thought himself quite an honest man who would like to fight the matter out. He had, of course, a perfect right to do that and the case continued for a short time on that basis. To-day his point of view has again changed and he has said through his learned Advocate that he has considered the matter very carefully, that he is sincerely sorry for his conduct and admits that he is unable to substantiate practically all the allegations in the statement, and he further unreservedly and without any qualification withdraws every single allegation which is damaging to any one interested in the prosecution, and he desires Dr. Sapru to express his genuine and sincere apology to this Court, to Mr. Bennet, Sessions Judge, and to the Police.

Well, that is making some amends, and Dr. Sapru whose judgment in matters like this can well be relied upon, has admitted on behalf of his client that he could do nothing less, that the facts which are proved, or admitted, bring this case within section 8 of the Letters Patent, and he referred to his client quite properly as a young man who had gone wrong, hopelessly wrong. Those are Dr. Sapru's own words. He has also put forward the plea of inexperience. But a plea of inexperience is not apposite to a case of this character. You do not want to be an experienced Advocate to know that you must not tell lies or try to confuse or deceive the Court. It is a matter of instinct,—a matter of right feeling. But he is a young man and after a good many shiftings about in this case he has at last made an apology, which in terms is a full apology. But, of course, that is not adequate at all, and we have got to vindicate the power that is given to us under section 8 and we have also got to exercise discipline for people who stand so much in need of it as this Vakil seems to do. We are going to take a course, which all three of us regard as lenient. But it is not to be regarded as by any means the sort of scale that will prevail in the future. But nevertheless the penalty must be a substantial one, which will not be forgotten by this Vakil, and should be borne in mind by other people. And the order that we make is that we find (A) that on the 20th of

January 1920 the Vakil prepared and put before the Sessions Judge a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas in truth and in fact it was a petition which originated with him and in respect of which he had received no instructions; (B) that he knowingly prepared and filed the said petition before the Sessions Court and put therein allegations which were made recklessly and without any reasonable grounds of belief, and we find him thereby guilty of professional misconduct. And in those circumstances in exercise of our powers under section 8 of the Letters Patent we do order that he be suspended from practice from this day until the 1st day of January 1921. We direct the Vakil to hand over his certificate of practice to the Registrar of this Court.

Vakil suspended.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1024 OF 1918.

April 8, 1920.

Present:—Mr. Justice Mullick and Mr. Justice Sultan Ahmed.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—APPELLANT

versus

LOWN KARAN MARWARI—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 524—Property seized on suspicion of being stolen—Order for forfeiture and sale, legality of—Suit to recover possession, maintainability of—Limitation.

An order under section 524, Criminal Procedure Code, directing property seized on suspicion of its being stolen to be forfeited and ordering the sale-proceeds thereof to be credited to Government, is illegal and without jurisdiction, as all that that section authorises is that the Government shall be free to sell the property or to hold it as a trustee for the true owner. A suit, therefore, for the recovery of possession of such property is maintainable, and the fact that such suit is brought more than a year after the order of confiscation is no bar, as it is not necessary to set that order aside. [p. 509, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Sambalpur, dated the 14th April 1918, confirming that of the Munsif, Sambalpur, dated the 24th September 1917.

Mr. *Mohammad Fakhruddin*, Government Pleader, for the Appellant.

Mr. *Wasi Ahmad* (with him Mr. *D. N. Sircar*), for the Respondents.

JUDGMENT.—This second appeal arises out of an order made under section 524 of the Criminal Procedure Code by the Sub-Divisional Magistrate of Sambalpur on the 7th of January 1916, declaring certain gold ornaments valued at Rs. 2,000 to be forfeited and ordeing the sale-proceeds thereof to be credited to Government. These ornaments were seized by the Police on suspicion that they were stolen property, or that they had been manufactured out of gold looted in certain dacoities in which plaintiffs Nos. 3 and 5 were concerned.

It appears that these two plaintiffs, who are members of a joint family with plaintiffs Nos. 2 and 4, were prosecuted for an offence under section 411 of the Indian Penal Code in connection with certain other articles but were eventually acquitted. During the investigation in that case the plaintiff No. 1 at the request of the Police made over the ornaments in suit to the Police, stating that they had been pawned with him by plaintiffs Nos. 2 to 5.

After the acquittal of the plaintiffs Nos. 3 and 5, a proclamation, inviting claimants to the property, was issued under section 523, Criminal Procedure Code. Thereupon the plaintiffs Nos 2 to 5 claimed the ornaments numbered 7 and 8 and the plaintiff No. 6 claimed the ornaments numbered 1 to 6; but although they were the sole claimants the Magistrate directed the properties to be forfeited.

It is necessary to explain that plaintiff No. 6 is the minor daughter of plaintiff No. 4 and that the jewellery in question was claimed by her as having been presented to her by her father in law at the time of her betrothal.

The plaintiffs thereafter unsuccessfully appealed to the Sessions Judge of Purulia, and finally on the 28th of August 1916 the High Court declined to interfere in revision with the learned Judge's order.

The present suit was lodged on the 17th of February 1917. It is resisted by the Secretary of State, who justifies the order and

also contends that a suit does not lie.

It appears that the properties have not yet been sold and are still in the possession and custody of the defendant.

The Munsif found that the allegation that the properties were pledged with plaintiff No. 1 was not true but that it was true that they were in the custody of plaintiff No. 1 on behalf of plaintiffs Nos. 2 to 6, and he made a decree directing the defendant to deliver the property to these plaintiffs jointly.

In appeal the decree was slightly varied and it has been ordered by the Subordinate Judge that delivery is to be made to plaintiffs Nos. 2 to 5 only.

The appeal before us has been preferred by the Secretary of State and there is no cross-appeal on behlf of the plaintiffs.

The first point is, whether a suit lies at all. It is contended that section 524 of the Code of Criminal Procedure concludes the right of the true owner to enforce his claim by a civil suit, and reliance is placed upon the words "shall be at the disposal of Government."

Now section 517, which relates to property produced before the Court, allows the Court to make such order as it thinks fit for the disposal of that property. It has been held that under this section the Magistrate cannot confiscate property, and that he is entitled only to make arrangements for possession, leaving the Civil Courts to decide, in the event of competent proceedings taken therein, the question of title [see *Kong Lone* v *Ma Pay* (1)]. So again it has been held by the Madras High Court that the words do not authorise the Magistrate to bestow property in charity [*High Court Proceedings, dated 20th July* 1875 (2)].

Special powers are given under section 521 for the destruction of libellous and other matter, but with regard to property dealt with either under section 517, or section 524, it would seem that the power of the Criminal Court is limited to making arrangements for the custody and protection of the property while in the possession of Government and to making a transfer of possession to such person as it thinks proper.

(1) 4 L. B. R. 13; 6 Cr. L. J. 125.
(2) 2 Weir 666.

It does not seem that these sections in any way empower the Government to confiscate the property, or conclude the right of the person from whose possession the property was taken, or of any other person, to contest the decision of the Criminal Court by a civil suit.

This view is in accordance with the decision of their Lordships of the Bombay High Court in *Queen-Empress* v. *Tribhovan Manekchand* (3) and *Wasappa* v. *Secretary of State for India* (4).

The learned Vakil for the appellant relies on *Bhukhooree Singh* v. *Government* (5). That was a case where, under section 185 of the Criminal Procedure Code of 1861, the property of an absconding offender had been attached and declared to be at the disposal of Government, as he had not within two years after the attachment of the property been able to show that he had not wilfully evaded the service of process. It was held by their Lordships of the Calcutta High Court that he might have availed himself of his right of appeal against the Magistrate's order but he had no right to institute a civil action.

The learned Vakil also relies upon *Behary Shaha* v. *Nubby Khan* (6). In that case certain property was the subject of a charge of theft. The Magistrate discharged the defendants, returned to them a part of the property, and ordered the confiscation of the remainder, but he did not follow the procedure required by sections 131 and 132 of the Code of 1861. It was held that the order of confiscation was irregular as he had not followed the provisions of the law. It is suggested to us that the view of the High Court was that, if the correct procedure had been followed, an order for the confiscation of the property might have been legally made.

In *Secretary of State for India* v. *Vakhatsangji Meghrajji* (7) their Lordships of the Bombay High Court referred to *Bhukhooree Singh's case* (5), but did not decide whether a civil suit could be brought to contest the Magistrate's order either in respect of the property of an absconding

(3) 9 B 131; 5 Ind. Dec (N. S.) 58.
(4) 31 Ind Cas. 498; 17 Bom. L. R. 979; 40 B. 200
(5) 8 W. R. 207.
(6) 9 W. R. 13 Cr.
(7) 19 B. 668; 10 Ind. Dec. (N. S.) 447

criminal, or in respect of property seized on suspicion and pronounced to be at the disposal of Government. On the other hand the decisions in *Queen-Empress* v. *Tribhovan Manik Chand* (3) and *Wassuppa* v. *Secretary of State for India* (4) are clear authorities for the view that, so far at least as sections 523 and 524 are concerned, the owner's right to bring a civil suit is not taken away.

It seems to me that Mr. Justice West in *Tribhovan Manik Chand's case* (3) was right in observing that the Magistrate may under these sections make an order which is good as to the delivery of possession but it is not conclusive as to title.

A reference to the English Law also leads to the same conclusion. The Police Property Act, 1897, 60 and 61 Vict. c. 30, section 1 (1), provides that where any property has come to the possession of the Police in connection with any criminal charge, a Court of summary jurisdiction may make an order for the delivery of the property by the Magistrate to the person appearing to be the owner thereof, or if the owner cannot be ascertained, make such order with respect to the property as to the Magistrate or Court may seem meet. But the Act provides that the order will not affect the right of any person to bring an action within six months against any person in possession of the property delivered by virtue of the order.

The learned Vakil for the appellant, however, contends that, though there is no direct authority in his favour, he is entitled to rely on the principle that, when an Act of the Legislature gives power to any person for a public purpose from which an individual may receive an injury, if the mode of redressing the injury is pointed out by the Statute, the jurisdiction of the ordinary Court is ousted, and in case of injury the party cannot proceed by action [*Governor and Company of the British Cast Plate Manufacturers* v. *Meredith* (8), *Stevens* v. *Jeacocke* (9) and *West* v. *Downman* (10)].

The reply is that every such case depends on its own Statute. It must be ascertained from the Statute itself whether it is intended to be conclusive and to bar all other remedies. For instance in cases relating to exciseable articles the Statutes give a Criminal Court power to confiscate; any civil suit for recovery will, in these cases, be clearly unsustainable. So again while a civil suit will not lie to modify the amount of maintenance ordered under section 488 of the Criminal Procedure Code, a civil suit will certainly lie where maintenance has been refused: on the other hand, if it had been necessary to decide that point now, I should hold that sections 88 and 89 of the Criminal Procedure Code debar an absconder from suing for the recovery of his property.

But in section 524 of the Criminal Procedure Code the words "at the disposal of Government" may reasonably be interpreted as meaning that Government shall be free to sell the property, or to hold it as a trustee for the true owner. The Statute does not profess to bar the ordinary legal remedies; and there is no reason for reading into it something which is not there. I think the title of the plaintiffs is still alive.

The learned Vakil's final contention is that the suit is barred by limitation inasmuch as the plaintiffs have not sued to set aside the order of the Magistrate within one year after it was made. The reply to this is that this is a suit for recovery of possession and that it is not necessary for the plaintiffs to get the order of the Magistrate set aside at all. The order declaring the property forfeited to Government being illegal and without jurisdiction, it was not necessary to set it aside.

The plea of misjoinder raised in the Courts below is not pressed and the result is that the appeal must be dismissed with costs.

The learned Vakil requests us not to award costs against the Secretary of State on the ground that he must be deemed to have acted in good faith. In our opinion that excuse will not avail; the Secretary of State resisted the action with the intention of keeping the plaintiffs out of their property. He must, therefore, pay costs like any other unsuccessful litigant.

Appeal dismissed.

(8) (1792) 4 T. R. 794; 100 E. R. 1306.
(9) (1848) 12 Q. B. 731; 17 L. J. Q. B. 163; 12 Jur. 477; 116 E. R. 617; 75 R. R. 614
(10) (1880) 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 513 OF 1919.
CRIMINAL REVISION PETITION No. 435 OF 1919.

December 17, 1919.

Present :—Sir Abdur Rahim, KT., Offg. Chief Justice, and Mr. Justice Spencer.

In re PACKIANATHAN—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), ss. 415, 419—Cheating—Obtaining health certificate by giving false name—Health certificate, whether property within s. 415.

A health certificate is property within the meaning of section 415 of the Penal Code and if a person by falsely personating another dishonestly or fraudulently induces a Health Officer to deliver to him a health certificate, he is guilty of an offence under section 419 of the Penal Code. [p. 510, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate, Ramnad, dated the 3rd June 1919, presented against the order of the Court of the Sub-Divisional 1st Class Magistrate, Ramnad Division, in Calendar Case No. 130 of 1918.

Mr. *C. Madavan Nair*, for the Petitioner.

The Public Prosecutor, on behalf of the Crown.

ORDER.—The accused was prosecuted in this case for an offence under section 419 read with section 511 of the Indian Penal Code. He was going to Ceylon, and he used a permit which stood in the name of one Kumaraswami while the accused's own name is J. Packianathan. On seeing the permit the Health Officer at Mantapam, who is an employee of the Ceylon Government, issued a health certificate, but, according to the case of the prosecution, P. W. No. 2, the Health Officer's clerk, recognised the accused as he had seen him before and seeing that he had given a false name reported the matter to the Health Officer. He questioned the accused and the accused at first, according to the Health Officer's evidence, gave his name as Kumaraswami but afterwards gave the correct name. A bond was taken from him and there the correct name was entered.

The trying Magistrate after examining two witnesses, *i. e.*, the Health Officer and his clerk, discharged the accused, holding that no offence of attempt at cheating had been made out. He says that the Health Officer could not be said to have suffered in any way either in reputation or property and that the accused did not intend to cause any sort of harm to him and that, therefore, section 419 would not apply. An application was made to the District Magistrate for revision of this order with the result that the District Magistrate set aside the order, holding that the first part of section 415 would apply even if the second part did not, that is to say, on the facts established by these two witnesses, the accused, by deceiving the Health Officer, fraudulently induced him to deliver a health certificate which is property within the meaning of the law. That a health certificate is property within the meaning of this section cannot be doubted. Reference may be made to the case in *Ramaswami Aiyar* v. *Vaithilinga Mudali* (1) and the case of *Queen-Empress* v. *Soshi Bhushan* (2). But that in itself is not sufficient; it has to be proved that the accused, by deceiving the Health Officer, fraudulently or dishonestly induced him to deliver the health certificate. It is pointed out by Mr. Osborne that all the witnesses which the prosecution had to adduce on this point have not been examined. An application was put in on the 4th November, but apparently the trying Magistrate thought that he was at liberty to dispose of the case without taking any further evidence. We do not think that he was justified in refusing to hear further evidence which the prosecution had to adduce, and on that ground the order of discharge was wrong and liable to be set aside. It is unnecessary for us to pronounce any opinion on the question of law as to what would amount, in circumstances like those of the present case, to fraudulent or dishonest inducement within the meaning of section 415, as we think that the question will have to be decided after all the evidence has been recorded and the enquiry has been completed by the Magistrate. After hearing all the evidence which the prosecution may have to adduce, the Magistrate will decide whether an offence has been made out by

(1) 1 Weir 28.
(2) 15 A. 210; A. W. N. (1893) 96; 7 Ind. Dec. (N. S.) 853.

the facts proved against the accused. This revision petition is, therefore, dismissed.

M. C. P.

Petition dismissed.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISIONS NOS. 3 AND 4 OF 19 8.

March 1, 1918.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

BALDEO KOERI AND ANOTHER—PETITIONERS

versus

LAKSHMI NARAYAN KUER AND OTHERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195 (6) —Appellate Court, power of, to remand case for further inquiry—Inherent power of Court to make inquiry.

Although a Court, before which an application comes under section 195 (6) of the Criminal Procedure Code for re-consideration of orders passed by a Subordinate Court has no power to remand the case for further inquiry, it, nevertheless, has inherent power to make an inquiry itself and to proceed in accordance with law. [p. 512, col. 1.]

Civil criminal revisions against the order, dated the 22nd November 1917, of the District Judge, Muzafferpur, refusing to set aside the order, dated 22nd August 1917, of the Munsif, Motihari, declining to grant sanction to the petitioners, to prosecute the opposite party.

Mr. *Fakhruddin*, for the Petitioners.

Messrs. *Pugh* and *Chandra Sekhar Banerjee*, for the Respondents.

JUDGMENT.—We are asked in these cases to set aside an order of the District Judge of Muzafferpur declining to interfere in a case decided by the Munsif of Motihari refusing to grant sanction to prosecute a plaintiff for offences under section 209 of the Indian Penal Code. The main facts of the case are that this plaintiff brought a suit against certain tenants of whom, it is alleged, the other two persons against whom these applications were made were Maliks. It is alleged that out of old enmity the Maliks had arranged with this plaintiff to bring a false civil action against these tenants. On the case coming to trial, the Munsif after the usual adjournments was asked to allow it be withdrawn with power to bring a fresh suit. Nothing further was done for six and a half months, when the defendants in the suit with the advice and the assistance of the Criminal Investigation Department made the applications referred to. The Munsif, on the ground that the applications were made six and a half months late and on the ground that there were no materials before him to justify in saying that the case was false, refused the applications and recorded a finding that they were made merely in order to harrass the plaintiff and the Maliks. He had no materials whatever before him for the latter view, and the delay in bringing the case had been the subject of a full explanation in the application made. This application the Munsif entirely declined to consider. On his refusal of the applications the parties went to the District Judge. The District Judge recorded that he had no power to make any order on the matter, because there was no material before him on which he could ascertain the facts. It had been held both in Allahabad and Madras and has since been held in Calcutta in *Budhu Lal* v. *Chattu Gope* (1) that the Court before whom an application comes under section 195, clause (6), for re-consideration of orders passed by a Subordinate Court had no power to remand the case for further enquiry The applicant, therefore, comes to us under section 115 of the Criminal Procedure Code, or under section 107 of the Government of India Act, with a prayer that the orders either of the Munsif or of the District Court be revised and that an enquiry be held into the matters alleged in the application made before the Munsif for sanction to prosecute. We have considered carefully the view taken in the case reported as *Budhu Lal* v. *Chattu Gope* (1), and we note the procedure therein taken was that a Court was constituted before whom the proceedings contemplated under section 195, clause (6), should be conducted. That Court having been constituted, it was

(1) 39 Ind. Cas. 465; 21 C. W. N. 269; 25 C L. J. 193; 44 C. 816; 18 Cr. L. J. 497.

directed to take evidence upon the merits of the case. We agree with the whole trend of case-law that the Court to which appeals lie has no power under section 195, clause (6), to remand the case for further enquiry. We also agree that it must have inherent power, as said by Mukerjee, J., to collect materials upon which its decision may be based. In this view we are of opinion that the learned Judge acted erroneously in the exercise of his jurisdiction in refusing to take further action in the matter. He had jurisdiction to make an enquiry himself and we direct him now to exercise that jurisdiction in accordance with law. He will take such evidence as the parties may desire to adduce before him, and on consideration of that evidence pass such orders as he may think proper under section 195, clause (6). We do not propose to make any orders as to costs.

Petitions accepted.

PATNA HIGH COURT.

CRIMINAL REVISION No. 108 OF 1920.

March 24, 1920.

Present:—Mr. Justice Sultan Ahmed.

CHANDRA MOHON SINGH AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 379—Unlawful assembly, common object of, to commit theft—No finding as to who removed property—Separate sentences, whether legal.

Where it is found that the common object of an unlawful assembly was to commit theft, but there is no finding as to which of the persons composing the unlawful assembly removed the property stolen, it is illegal to convict them both under section 147 and under section 379 of the Penal Code and to pass separate sentences for each offence.

Criminal revision against the order of the Deputy Magistrate, dated 21st February 1920, dismissing the appeal of the petitioners from their conviction passed by the Sub-Divisional Officer, Bhadrak, dated the 7th February 1920.

Messrs. *K. B. Dutt* and *Bankim Chandra Dey*, for the Petitioners.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application on behalf of the petitioners who were convicted by the Deputy Magistrate under sections 147 and 379, Indian Penal Code, and sentenced to two months' rigorous imprisonment under section 147 and to one month's rigorous imprisonment under section 379.

On appeal the learned Sessions Judge upheld the convictions under sections 147 and 379, but reduced the sentence under section 147, Indian Penal Code, from two months' rigorous imprisonment to a fine of Rs. 25 each; in default three weeks' rigorous imprisonment each. He upheld the sentence on the accused under section 379.

The main ground that has been urged in this application is that a separate sentence under section 379 is illegal. There being no finding in the judgments of the two Courts below as to who were the accused who individually took away the crops and the common object of the unlawful assembly being to commit theft, the separate sentence under section 379 is undoubtedly illegal. The case reported as *Mithoo Singh* v. *Gopal Lal* (1) is a direct authority on the point.

The second point that was urged was that the Magistrate held a local enquiry and did not place the result of that enquiry on the record and as such the accused were prejudiced. This point was not raised before the Court below and has not much force in it.

The result is that I uphold the conviction of the accused under section 147, and while affirming the sentence of fine of Rs. 25 imposed upon each of the petitioners by the Sessions Judge under section 147, I quash the sentence of one month's rigorous imprisonment inflicted upon them under section 379, Indian Penal Code. The accused will now be discharged from their bail.

Petition partly accepted.

(1) 3 C. W. N. 761.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 111 OF 1919.
April 1, 1920.
Present:—Mr. Justice Rafique.
FIRM DEBI DIN-BHAGWAN DIN THROUGH BINDA RAM—DEFENDANT—PETITIONER
versus
FIRM SARKAR & CO, THROUGH SATYA RANJAN SARKAR—PLAINTIFF—RESPONDENT.

Revision—Limitation, plea of, not taken in trial Court, whether can be taken in High Court—Plea depending on evidence—Procedure—Remand.

The fact that a defendant omits to plead limitation in the trial Court, would not estop him from taking the plea in revision before the High Court. If such plea depends upon evidence, the proper course is to remand the case for re-trial.

Revision against the decree of the Judge, Small Cause Court, Cawnpore, dated the 14th of March 1919.

Dr. *Kailash Nath Katju*, for the Applicant.

Mr. *Peare Lal Banerji*, for the Respondent.

JUDGMENT.—This is an application in revision from the decree of the learned Judge of the Small Cause Court at Cawnpur decreeing the claim of the opposite party for Rs. 480. It appears that the plaintiff, the opposite party, sued for the recovery of Rs. 355 for balance of price of goods supplied and Rs. 125 for damages for goods supplied but not accepted. It was alleged in the plaint that the defendants-applicants had ordered 30 wagons of coal at the price agreed upon and that 30 wagons had been sent to them but only 25 had been accepted. The sum of Rs. 355 was due for the wagons accepted and Rs. 125 for damages on the five wagons not accepted. Under the terms of the contract between the parties the defendants applicants had agreed to pay Rs. 50 per wagon as damages in case of their non-acceptance, but the plaintiffs were claiming only at the rate of Rs. 25 per wagon. The sum of Rs. 355 was the balance of the price of the 25 wagons after deducting the amounts paid from time to time by the defendants-applicants. The learned Judge of the Small Cause Court decreed the claim. In revision to this Court it is contended that on the evidence of the plaintiffs themselves the claim with regard to damages is barred. No plea of limitation was taken in the Court below. It is true that the omission to take that plea does not estop the defendants from taking it in this Court, but as is urged on behalf of the opposite party, the plea depends upon evidence. Had the plaintiffs notice of the plea of limitation, they would have met it by producing proper evidence on the point. I think that under the circumstances the only course open is to set aside the decree of the Court below and to remand the case for trial on the merits according to law, allowing the defendants to take the plea of limitation and permitting both parties to give evidence in support of it. Costs of this appeal and of the trial below will be costs in the cause.

Case remanded.

MADRAS HIGH COURT.
APPEAL AGAINST ORDER No. 122 OF 1919
AND
CIVIL REVISION PETITION No. 267 OF 1919.
December 11, 1919.
Present:—Mr. Justice Spencer and Mr. Justice Krishnan.
SANGAYYA TEVAN—PLAINTIFF—PETITIONER—APPELLANT
versus
PETHAMALL—DEFENDANT No. 1—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 7, 47 (a)—Order appointing guardian subject to furnishing security—Nature of order—Final order—Appeal, maintainablility of.

An order appointing a guardian for a minor subject to the person appointed furnishing security is a preliminary and conditional order, and is no bar to an appeal against the final order made under section 7 of the Guardians and Wards Act after the security is furnished. [p. 514, cols. 1 & 2.]

Appeal against, and petition under section 115 of Act V of 1908 to revise, the order of the District Court of Ramnad, Madura, in I. A. No. 45 of 1919, in O. S. Petition No. 47 1918.

FACTS appear from the judgment.

Mr. *S. Subramanya Aiyar*, for the Respondent, took the preliminary objection that

no appeal lay. There was first an order of appointment of guardian. Any party aggrieved by that order should have appealed against it. The furnishing of security was a matter of routine. The fact that security was not furnished did not make the first order conditional. In the analogous cases of appointment of Receivers an appeal was held to lie against the order appointing a Receiver though no security was furnished. *Palaniappa Chetty* v. *Palaniappa Chetty* (1). See also *Gopammal* v. *Srinivasa Aiyangar* (2) and *Gopammal* v. *Srinivasa Aiyangar* (3). A reading of section 34 of the Guardians and Wards Act also makes it clear that the appointment is complete on the passing of the first order. *Jaddo Tiwari* v. *Baram Deo Singh* (4).

The order in this case was passed by consent of parties. No appeal lies.

Mr. *M. S. Ramanuja Aiyangar*, for Mr. *C. S. Venkatacharier*, for the Appellant.—The first order was only conditional on the furnishing of security. See Rules 240, 241 and 242 of the Civil Rules of Practice. The final order is provided for in Form No. 94 of the Rules and that order is the only one that is appealable.

The *quantum* of security is also objected to. The Courts should have enquired into allegations of immorality against the guardian.

JUDGMENT.—A preliminary objection has been taken that, the Judge's order of the 6th December 1918 appointing a guardian not having been appealed against, the present appeal against the order of 3rd May 1919 is out of time and incompetent. The latter order is itself an indication that no final appointment was made before that date as it ends with the words "the final order will now issue," by which was evidently meant an order in Form No. 94 of the Civil Rules of Practice under section 7 of the Guardians and Wards Act. There are also indications in the earlier orders on the 6th December 1918, 10th and 23th April 1919 that the proceedings of those dates were only preliminary and conditional upon the furnishing of security. In such a case the order does not take effect till the security is furnished [see *Subba Naik* v. *Rama Aiyar* (5)]. We overrule the preliminary objection On the merits we are of opinion that there is no substance in the appellant's objection to the respondent's appointment, seeing that in the lower Court he withdrew his objection to her being made a guardian of Court. As to the sufficiency of the security, the lower Court was in the best position to judge whether it was sufficient, and it has declared its readiness to increase the amount of security required if it be found necessary to do so at a later date. There is no ground for us to interfere. The appeal is dismissed with costs. The civil revision petition is also dismissed but without costs.

Both appeal and petition dismissed.

M. C. P.

(1) 40 Ind. Cas. 185; 40 M. 18; 32 M. L. J. 304; (1917) M. W. N. 393; 5 L. W. 776.
(2) 27 Ind. Cas. 921; 28 M. L. J. 96.
(3) 34 Ind. Cas. 432; 30 M. L. J. 508.
(4) 51 Ind. Cas. 88; 17 A. L. J. 377.
(5) 37 Ind Cas. 892; 40 M. 77; 5 L. W. 261; (1917) M. W. N. 426.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 5 OF 1919.

April 30, 1919.

Present:—Mr. Crump. A. J. C., and Mr. Kemp, A J. C.

FIRM OF POKERDAS KISHINDAS—APPELLANTS

versus

FIRM OF VISHINJI GORDHANDAS—RESPONDENTS.

Arbitration—Contract, clause in, providing for arbitration—Cross-contract in precisely similar terms, effect of, on contract—Arbitration, whether may be claimed.

Where there is a contract and a subsequent cross-contract on the same printed form, containing the same clauses, for the same quantity of goods of the same kind and for the same delivery, the obligations under the earlier contract are extinguished, being cancelled by the latter cross-contract, which has the effect of fixing the difference to be paid by one party to the other, and it is not open to either of the parties to the earlier contract to claim arbitration, there being no difference which is referable to arbitration, mere non-payment not amounting to such a difference. [p. 516, col. 1.]

FIRM OF POKERDAS KISHINDAS *v.* FIRM OF VISHINJI GORDHANDAS.

Appeal from the order of Mr. Fawcett Judicial Commissioner of Sind.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Mr. *Mulchand Thawardas*, for the Respondents.

JUDGMENT.

KEMP, A. J. C.—This is an appeal against an order of the learned Judicial Commissioner staying plaintiff-appellant's suit in the Small Cause Court under section 19 of the Indian Arbitration Act IX of 1899.

The facts of the case are as follows:—

Plaintiffs and defendants are merchants trading in Karachi and as such they entered into contracts for the sale and purchase of wheat and gunny bags with one another.

There were 4 contracts according to the plaintiff—a contract and cross contract for wheat and a similar contract and cross contract for gunny bags.

We are not concerned with the wheat contracts because although the defendant denied one of the wheat contracts, the plaintiff before us has given up his claim under the wheat contracts by virtue of which he claimed a balance as due to him and has confined his claim to the difference on the contract and cross-contract for gunny bags. These latter were as follows:—

On 14th November 1917, plaintiffs bought from defendants 30 bales May, June, July *vaidas* in equal lots at Rs. 42-8 0 per 100 bags. On 6th January 1918, plaintiffs sold to defendants 30 bales May June, July *vaidas* in equal lots at Rs. 44 8-0 per 100 bags. The suit was filed on 15th August 1918, *i. e.*, after the last date for delivery, *viz.*, 31st July 1918. There is, therefore, no question of the suit being premature.

Plaintiffs' claim is for difference on the contract and cross contract for gunnies. Defendants claimed to go to arbitration under the arbitration clause in both contracts. It is to be noted that the contract and cross-contract are on the same printed form containing the same clauses, for the same quantity of goods of the same kind, and for the same delivery.

The learned Judicial Commissioner stayed the suit, and no doubt, if the contracts are still considered as open and in existence on the due date, he had a discretion under section 19, Act IX of 1899, to decide whether the matters in dispute should be stayed or not and this Court will not lightly interfere with that discretion.

But the question is whether this cross-contract has the effect of cancelling the earlier contract and determining the damages payable by the defendant to the plaintiff. If the cross contract was entered into for the purpose of extinguishing the obligations under the earlier contract and determining the defendant's liability, he cannot now claim to keep alive the terms of the earlier contract entitling him to go to arbitration in the event of any dispute arising out of that contract.

Now, let us consider the practice of merchants in Karachi with regard to this kind of business. I may say that practice is not confined to Karachi but is one of the universal methods of business where the same merchants enter into forward contracts of sale and purchase with one another. Let us suppose the merchants are contracting for July 1918 delivery.

On a day in November 1917, merchant A sells to merchant B 100 bales July 1918 delivery at, say, Rs. 11. The market goes up. On a day in December 1917 merchant B sells to A on the same contract form 100 bales July 1918 delivery at the market rate for forward contracts of that day, say Rs. 12. There may subsequently be further contracts between the parties before the due date, *viz.*, 31st July 1918. When the due date arrives we will suppose A has sold under different contracts with B 500 bales and bought from B 600 bales. Each merchant keeps an account of his purchases and sales for July 1918 delivery with the other in his books. This account is called a Sonda Khata.

In the illustration we have taken there will be 100 bales left over for delivery by B to A. The 500 bales sold by A are set off against the 500 bales bought by him and *miti khari* is only made with regard to the balance of 100 bales. The effect of this is that as to 500 bales the differences between the contracts of sales and purchases only are paid. The parties appropriate the bales sold to those bought in order of date in much the same way as payments are appropriated according to the rules in *Clayton's case* (1).

(1) (1816) 1 Marivale 572 at p. 608; 35 E. R. 781; 15 R. R. 161.

PROSUNNA CHANDRA v. BOIDYA NATH.

This is the practice amongst merchants, a practice which is incidentally referred to in the judgment of Sir Lawrence Jenkins in *Bhagwandas* v. *Kanji* (2).

This practice of appropriation has the effect of extinguishing the obligations under the earlier contract, which is cancelled by the latter cross contract. It enables a merchant to determine his liability with the other party before waiting till the due date. Any other construction would enable the party who has to pay on the contract and cross-contract to take an undue advantage of the other party. Thus in the case before us, the plaintiff bought from and sold to defendant 50 bales under a forward contract of purchase and a forward contract of sale. As the plaintiff had no other transaction for that *vaida* with the defendant he naturally, according to the practice, considered that his contract of purchase from defendant was cancelled by his contract for sale to defendant and, therefore, the plaintiff did not do any of those acts which the law or the terms of his contract of sale to defendant required him to do as seller, *e. g.*, to send a *miti khari* notice and, on failure by defendant, to send a delivery chit within the stipulated time, to close the contract at the market rate or exercise any of the other options allowed to him under his contract in the event of his buyer's default. To allow, then, the buyer defendant to say that the first contract of sale by him was not cancelled by the second or cross-contract of sale to him and that he claimed to go to arbitration on the earlier contract would be to put the plaintiff out of Court as regards his cross contract of sale to defendant. The second contract extinguishes the first and merely has the effect of fixing the difference to be paid by the defendant to the plaintiff. The defendant cannot, therefore, any longer claim that the arbitration or any other clause of the earlier contract is outstanding. The performance of the earlier contract is discharged by the later or cross-contract.

That the parties in the present case so regarded the contracts of sale and purchase is clear also from the fact that neither party attempted to demand or give delivery under either of the contracts.

There cannot, therefore, be any arbitration on the adjusted rights and liabilities of the parties. and any argument to the effect that mere non payment amounts to a difference which is referable to arbitration is beside the point, because there is no submission clause outstanding.

It only remains to add that the defendant does not appear to have any substantial defence to the suit and his contention that he is entitled to a reference to arbitration appears to have been made solely for the purpose of delay.

I think that merchants would regard with dismay any re-opening of an adjusted liability in the way the defendant's Pleader presses us.

The appeal must, therefore, be allowed and the order of the lower Court set aside with costs.

CRUMP, A. J. C.—I concur.

Appeal allowed.

(2) 7 Bom. L. R. 611; 30 B. 265.

CALCUTTA HIGH COURT.

APPEALS FROM-ORDERS NOS. 332 AND 333 OF 1916.

February 4, 1920.

Present:—Justice Sir N. R. Chatterjee, KT., and Mr. Justice Panton.

IN No. 332 OF 1916

PROSUNNA CHANDRA CHATTOPADHYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BOIDYA NATH MISTRY AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN No. 333 OF 1916

DWIJENDRA NATH CHAKLADAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BOIDYA NATH MISTRY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1 (u)—Remand—Order purporting to be under rule, but which ought not to have been made—Appeal, whether competent—Case not decided on preliminary point—Appeal—Further investigation necessary—Appellate Court, duty of.

An order which purports to be, and is in form and substance, an order under rule 23 of Order XLI of the Civil Procedure Code is appealable, although

the order ought not to have been made under that rule. [p. 517, col. 2.]

Where a case is not decided on a preliminary point, it is the duty of the Appellate Court to itself decide the appeal; if it considers that further investigation is necessary or that additional evidence should be taken, it may make an order directing this to be done, but it ought not to remand the case for re-decision under Order XLI, rule 23, of the Code. [p. 518, cols. 1 & 2.]

Appeals against the orders of the Subordinate Judge, 2nd Court, Backergunge, dated the 23rd May 1916, reversing the orders of the Munsif, 3rd Court at Ferozepur, dated the 20th April 1914, and remanding the case to his Court.

Babus *Jogesh Chandra Roy* and *Suresh Chandra Talukdar*, for the Respondents.

Babus *Samatul Chandra Dut* and *Biraj Mohan Mazumdar*, for the Respondents.

JUDGMENT.—These appeals arise out of two suits for declaration of title to, and recovery of possession of, two parcels of land.

With regard to one of these parcels, the Record of Rights is in favour of the appellants, and with regard to the other it is against them. With regard to the former, the respondents brought a suit against the appellants. The latter brought another suit against the respondent in respect of the other piece of land. The land claimed by the appellant lies just to the east of the land for which the respondent brought his suit. The appellant claims the land in his suit as part of Jambudwip, while the respondent claims the land as part of Khoyerkati.

A Commissioner was appointed to make a local investigation and he submitted his report. The learned Munsif on a consideration of the report and other evidence adduced by the parties gave a decree to the appellant in respect of the greater portion of the land claimed by him as plaintiff and dismissed the suit of the respondent entirely. The respondent thereupon appealed to the lower Appellate Court and the learned Subordinate Judge, being of opinion that the trijunction point had not been correctly placed and that it was not safe to accept the boundary line obtained by measuring from a certain point mentioned in his judgment and further that a better result was likely to be obtained if the measurement was made from the Chitta, remanded the cases to the Court of first instance for ascertaining the boundary with directions to re-admit the suits and determine them after getting a local investigation made according to the directions given in his judgment and allowing the parties to adduce any additional evidence if they wished to do so. Against that order of remand, the present appeals have been preferred.

A preliminary objection has been taken to the hearing of the appeals on the ground that as the Court of first instance did not decide the cases on a preliminary point, the order of the lower Appellate Court did not come within Order XLI, rule 23, of the Code and that, therefore, no appeal lies against the order, as the only appeal provided by the Code is under Order XLIII, rule 1 (*u*), against an order under Order XLI, rule 23

We have been referred to the case of *Mohendra Nath Chakraburtty* v. *Ramtaran Bandopadhya* (1), in which the learned Judges held that no appeal lies against an order passed by an Appellate Court remanding a case otherwise than under Order XLI, rule 23, Civil Procedure Code. But the question is whether an appeal does not lie in cases where the order purports to be an order under Order XLI, rule 23, although the order ought not to have been made under that rule. On that question we have been referred by the learned Pleader for the appellant to an unreported decision in Second Appeal No. 107 of 1916 decided on the 18th January 1918. [See *Baseemati Debi* v. *Tarit Basani Dassi* (2).] In that case Richardson and Beacheroft, JJ., observed "whether the order was regularly or irregularly made, it appears to be in form and substance an order under that rule. That being so, the order must be treated as an order under rule 23 from which an appeal lies:" and the learned Judges overruled the preliminary objection that no appeal lay against the order.

We think that in the present case the order made by the lower Appellate Court purported to be, and was in form and substance, an order under Order XLI, rule 23, although we think that the Court ought not to have remanded the case under the provisions of that rule. The preliminary objection must accordingly be overruled.

The cases not having been decided on a

(1) 55 Ind. Cas. 96; 23 C. W. N. 1049; 31 C. L. J. 357.

(2) 44 Ind. Cas. 416; 31 C. L. J. 354.

preliminary point, the Court of Appeal below ought to have decided the appeals itself, No doubt if that Court considered it necessary that there should be a local investigation by the Commissioner or that any additional evidence should have been taken to enable it to pronounce judgment, it might have directed a further investigation or taken additional evidence. In the present case, however, it appears from the judgment of the Munsif that the parties did not want any further investigation or to produce any further material. The learned Munsif says: "I was once tempted to pass order for a fresh investigation, although neither party made any the faintest suggestion to that effect. On a most anxious consideration of the evidentiary materials placed before me and the facts and circumstances of these cases, I am disposed to think that any further local investigation will result in nothing but an infructuous expenditure of time and a protraction of these contentious litigations to the immense harassment and pecuniary loss of the parties. The parties in these cases appreciate this position and are anxious for a judicial settlement of their prolonged dispute and resist the suggestion of any further local investigation, which would indeed be an unwelcome infliction upon both parties without in any wise ensuring a chance of furthering the ends of justice, for the materials at the command of the Civil Court Commissioner that was deputed to make the local investigation are for all practical purposes exhaustive and neither party has in contemplation any additional material that might with advantage be supplied to the Commissioner. Neither party calls into question the integrity of the Commissioner or offers to put his report to the test of a cross-examination."

These remarks would seem to be conclusive, but if the lower Appellate Court thinks that the investigation is wrong and there should be a further investigation in order to enable it to pronounce judgment, we think that it may direct such investigation.

Our attention has been drawn on behalf of the appellant to the fact that the Court of first instance upon a consideration of the evidence as to possession came to the conclusion that the appellant had proved his title by adverse possession for 12 years and that the respondent had failed to prove possession within 12 years in the suit in which he was the plaintiff, and that the learned Subordinate Judge has not touched this question at all, and it is contended that had this question been gone into by the lower Appellate Court and decided in favour of the appellant, there would have been no necessity for remanding the cases for further investigation.

It is true that the Subordinate Judge has not touched this question, but he might have thought that a decision on the question of boundary was necessary for determining the question of possession and limitation. He has, however, not said so in his judgment.

In all these circumstances, we think that the order of the Court below should be set aside and the cases remanded to that Court for a decision of the appeals before it. If that Court considers that it cannot decide the cases without a local investigation or that the questions of limitation and of title cannot be decided without such investigation, then a Commissioner may be appointed for the purpose. The Court may also take additional evidence if it considers it necessary in order to enable it to pronounce judgment, but in either case it must be done by the Appellate Court itself, or by directing the Court of first instance to have the investigation made and to take additional evidence, retaining the appeals on its own file.

Costs will abide the result.

Appeals allowed
Cases remanded.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 108 OF 1919.

April 1, 1920.

Present:—Mr. Justice Rafique.

BASTI RAM—PLAINTIFF—APPLICANT

versus

RUSTAM SINGH, MINOR, THROUGH *Mussammat* RAMPOO—DEFENDANT—RESPONDENT.

Bond, suit on, against representative of deceased executant—Decree, form of.

Where, in a suit upon a bond against the representative of the executant, the Court finds the bond to be genuine, it ought not to dismiss the suit on the ground that the deceased has left no assets, but should pass a decree against the assets of the deceased, if any, in the hands of the defendant.

Revision against the decree of the Judge, Small Cause Court, Agra, dated the 23rd May 1919.

Mr. *Lakshmi Narain*, for the Hon'ble Mr. *Narain Prasad Asthana*, for the Applicant.

JUDGMENT.—This is an application in revision from the decree of the Small Cause Court Judge dismissing the claim of the plaintiff. It appears that one *Musammat* Lado executed two bonds in favour of the plaintiff on the 15th of October 1917. She died sometime in 1918 and the suit out of which this application in revision has arisen was brought in 1919 on the basis of the said bonds. The claim was brought against the grandson of *Musammat* Lado as heir of his grandmother.

The learned Judge of the Small Cause Court found the bonds genuine but abstained from passing a decree on them on the ground that *Musammat* Lado had left no assets. The contention before this Court is that the question whether *Musammat* Lado had left any assets ought not to have been tried in the case and should have been left to the execution department, and in any case the plaintiff was not prepared on this point and did not summon evidence. I think the procedure of the Court below is incorrect. If the Court below thought that the bonds had been proved, a decree ought to have been passed against the assets of the deceased, if any, in the hands of the defendant. I, therefore, set aside the decree of the Court below and decree the claim of the plaintiff for Rs. 260, with costs in both Courts against the assets of *Musammat* Lado, if any, in the hands of the defendant.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1522 OF 1918.

December 8, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

GOKARAKONDA NARASIMHA RAO—PLAINTIFF—APPELLANT

versus

GOKARAKONDA PAPANNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 28—Sale-deed, entry in, of property not intended to be sold, effect of, on registration—Sale, validity of—Suit to recover such property—Limitation Act (IX of 1908), Sch. I, Arts. 44, 144.

Where, in order to secure the registration of a deed of sale of immoveable property in a particular district, a piece of property situated in that district is included in the deed but without any intention of conveying that property to the vendee, the registration of the deed in that district is not a valid registration and amounts to a fraud upon the Law of Registration; consequently no valid title is conveyed to the vendee, and the sale-deed is void. A suit to recover such property from the vendee is, therefore, governed by Article 144 and not by Article 44 of Schedule I to the Limitation Act. [p. 522, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Rajahmundry, in Appeal Suit No. 180 of 1917 (Appeal Suit No. 273 of 1917 on the file of the District Court, Godavari), preferred against the decree of the Court of the First Additional District Munsif, Rajahmundry, in Original Suit No. 344 of 1916 (Original Suit No. 482 of 1916 on the file of the Court of the District Munsif, Amalapur).

This second appeal coming on for hearing on the 22nd July 1919, the Court delivered the following

JUDGMENT.—The objection to the sale under section 21 of the Registration Act, based on the vagueness of description of the property sold (see paragraph 4 of the Appellate Court's judgment), is not sustainable. On the question of the validity of the registration of the deed, the Temporary Subordinate Judge's judgment has been so expressed that we are unable to discover whether he meant that in his opinion the parties did or did not intend that property in the one cent of land in R. S. No. 236/2 should pass by the sale-deed.

In the first part of paragraph 5, the Subordinate Judge says "it does appear

that the parties did not really intend to sell or to purchase the said one cent of land." Later on he says that "it cannot be said that it is so patent that the parties intended that the property should not pass in the one cent."

Finally he concludes this paragraph by finding the 1st point in the affirmative, that point being itself worded in a negative form.

We call on the present Subordinate Judge of the Temporary Court to return a fresh finding on the 9th issue in the suit on the evidence on record within six weeks. Seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Rajahmundry submitted the following

FINDING.—The appeal has been remitted by their Lordships of the High Court for a fresh finding on the 9th issue, *viz*, "whether the suit sale-deed is not valid for want of proper registration?"

The question raised by the issue really involves two points:—

(1) Whether the parties to the sale-deed, Exhibit I, did not intend that the property in the 1 cent of land in R. S. No. 236/2 should pass by the document?

(2) If so, whether the registration of the document in the Sub-Registry Office at Amalapur was illegal, being in fraud of the Registration Law and the sale-deed was accordingly not valid?

3. *1st point.*—The 1 cent of land in dispute is not mentioned at all in the body of the sale-deed, Exhibit I, which recites the arrangement of sale as being only in reference to the 15 acres 88 cents of land detailed lower down. The operative part of the sale deed, directing the vendee to enjoy the land with rights of gift and sale, etc., from generation to generation, has reference also to the 15 acres 88 cents of land mentioned previously. The schedule at the end of the document, however, sets forth the 1 cent of land as the 1st item, 3 other lands which make up a total of 15 acres 88 cents being subsequently entered. The 1 cent of land is situate in Amalapur within the jurisdiction of the Sub-Registry Office at that place, while the other lands are at Krapa, within the jurisdiction of the Sub-Registrar of Mummidivaram. The 1 cent is an unascertained part of R. S. No. 236/2, which is admittedly of much larger extent.

4. The plaintiff's 1st witness K. Janakiramayya, who is one of the attestors of the sale deed, affirms that there was no intention to sell the 1 cent of land in question under the sale deed, that it was included in the document for the purpose of registry at Amalapur, and that the entire land No. 236/2 has been in the possession and enjoyment of the 5th defendant's family, *i. e.*, the family of the vendors. The 6th defendant, who was one of the vendors, as D. W. No. 1 no doubt states in his examination-in-chief that the 1 cent was also arranged to be sold and was actually sold; but in his cross examination he deposes as follows:—

"The Krapa land 15 acres 88 cents was arranged to be sold. Krapa is in Mummidivaram Registry. For the purpose of the document being registered at Amalapur, 1 cent of land of Amalapur was added."

As to the subsequent enjoyment of the 1 cent of land, the witness prevaricates by stating at first that it was being enjoyed by the 8th defendant's husband (vendee deceased), and then by saying that it has been kept waste. He also concedes that the vendee never paid taxes on the 1 cent and that his own family members have been paying the same for the entire land. The witness further admits that the situation of the 1 cent of land has never been ascertained and made definite.

5. So far as the evidence of the 6th defendant is concerned, it is prevaricative and unreliable; and if it shows anything at all, it is that the 1 cent of land has been along with the rest of the land in R. S. No. 236/2 in the enjoyment of his own family members, notwithstanding its inclusion in the sale-deed in favour of 8th defendant's husband, and that the 1 cent was added on in the sale deed just for facilitating the registration of the document in the Amalapur Sub Registry Office, which had otherwise to be done at Mummidivaram. The plaintiff's 1st witness is no doubt the maternal uncle of the plaintiff; but he was an attestor of the sale deed and as such cannot be regarded

as a stranger unacquainted with the transaction. His testimony that there was no intention to sell the 1 cent of land and it was included in the sale-deed just for the purpose of registering the document at Amalapur, receives corrboration not only from the peculiar wording of the document indicated above but also from the evidence of the 6th defendant himself. The fact that an insignificant and undefined part of a larger extent of land was included in the sale-deed just for the purpose of registering the document at Amalapur, the entire land continuing in the enjoyment of the vendors themselves, also goes in support of the evidence of the plaintiff's witness. Under such circumstances, I do not think the lower Court was right in rejecting the evidence of the witness on the point in a summary fashion.

6. My predecessor, who heard the appeal originally, was also of the opinion that the parties did not really intend to sell or purchase the 1 cent of land. Later on in the course of his judgment he no doubt stated that it was not so patent that the parties intended that the property should not pass in the 1 cent; but he would seem to have so expressed himself for the purpose of distinguishing the present case from the ruling in *Azmat Ali* v. *Sitla Bux Pal* (1). But with the due deference, I think it should make no material difference whether in a case of this kind the intention not to pass property is patent on the face of the documents or is to be established from other evidence.

7. The learned Vakil for the respondent no doubt argues that though the 1 cent might have been included in the sale deed for the sole reason of facilitating registration at Amalapur, the parties might have done so with intent to pass property therein for that purpose at least: but having regard to all the circumstances of the case adverted to already, I do not think the parties could have had any such limited intent as is sought to be made out by the argument, which seems to be based on an article from a contributor published in 24 Madra Law Times, page 6.

8. Thus, on a consideration of the material evidence in the case I find on the 1st point that the parties to the sale-deed, Exhibit I, did not intend that property in the 1 cent of land should pass by the document.

9. *2nd point.*—In *Harendra Lal Roy Choudhury* v. *Hari Dasi Debi* (2), their Lordships of the Privy Council lay down as follows:—

"Their Lordships hold that this parcel (25, Guru Das Street) is in fact a fictitious entry and represents no property that the mortgagor possessed or intended to mortgage or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the paties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the registration law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta, if the parties merely took the precaution to add as a last parcel, the Government House, Calcutta or any similar item."

Following the aforesaid ruling, their Lordships, Sadasiva Aiyar and Kumaraswami Sastri, JJ., held in *Rama Naik* v. *Nagamuthu Nachiar* (3) that neither the vendor nor the vendee in the case before them having intended that the property included in the sale deed solely for the purpose of facility of registration in an office not having otherwise jurisdiction to register it, should be affected by the sale, the sale-deed was not legally registered. It is no doubt pointed out by the learned Vakil for the respondent that, while in *Harendra Lal Roy Choudhury* v. *Hari Dasi Debi* (2) the property included in the sale deed for facility of registration was either non-existent or did not belong to the transferor, and in *Rama Naik* v. *Nagamuthu Nachiar* (3) the item, though in existence, did not belong to the transferor, in the present case the property is both in existence and belongs to the vendor, but the distinction sought to be made out does not seem to create any real difference in the principle that ought to govern such cases according to the dictum of their Lordships of the Privy Council.

(1) 16 Ind. Cas. 108; 9 A. L. J. 766.

(2) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 403; 12 A. L. J. 774; 1 L. W. 1059; 41 I. A. 110 (P. C.).

(3) 43 Ind. Cas. 515; 22 M. L. T. 516; 7 L. W. 33

10. In the present case the parties to the sale not having intended that property in the 1 cent could be affected by the sale, the inclusion thereof in the document must be held to be a fictitious entry in fraud of the registration law within the meaning of the rulings cited above. I accordingly hold on the 2nd point that the registration of the sale-deed at Amalapur was illegal and the sale-deed was not valid.

11. For these reasons, I find on the issue remitted that the suit sale-deed is not valid for want of proper registration.

This second appeal came on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial

Mr. *K. Kamanna* for Mr. *P. Narayanamurti*, for the Respondents.—There is no fraud. In *Harendra Lal Roy Choudhury* v. *Hari Dasi Debi* (2) not only was the property fictitious, but there was no possession by the mortgagor. Hence fraud was presumed. So also in *Rama Naik* v. *Nagamuthu Nachiar* (3) where the property did not belong to the vendor. In the present case, the property is existent, belongs to the vendor and is in his possession, besides being within the jurisdiction of the Sub-Registrar. It may be that the vendee did not intend to take possession because it was only one cent and is insignificant. Further, what is done for the convenience of both parties is not fraud. The distinction has been pointed out in *Sankaran Nambiar* v. *Narayanan Thirumumpu* (4).

The plaintiff should, in any event, pay the proportionate share of the purchase-money before he is allowed to recover.

The suit is barred under Article 44, Limitation Act.

Mr. *N. Rama Row*, for the Appellant.—The plaint is not for a proportionate share.

The finding is that the one cent of land was not intended by the parties to pass by the sale. There has been a fraud on the registration law and the document is a nullity. It need not be set aside, and the suit is governed by Article 144 of the Limitation Act.

JUDGMENT.—We must accept the finding of the Subordinate Judge that the one cent of land in Amalapur was included in the sale-deed, Exhibit A, purely for the purpose of getting the deed registered by the Sub Registrar of that place without any intention of passing title in it to the vendee. That finding is supported by the evidence and no valid objection has been urged against it. On that finding we must hold, following the case in *Rama Naik* v. *Nagamuthu Nachiar* (3), that the present case falls within the principle enunciated by the Privy Council in *Harendra Lal Roy Choudhury* v. *Hari Dasi Debi* (2). The action of the parties in this case was a fraud on the registration law. The fact that there was land corresponding to the one cent included in the deed, belonging to the vendor is not sufficient to take it out of that principle, as the finding is that it was not intended that the deed should affect the land in any way.

On this view the sale-deed, Exhibit A, must be taken to have not been properly registered and the title to A Schedule properties was, therefore, not validly conveyed to the 8th defendant.

The next question is as to limitation. Article 44 does not apply, as there was no sale at all in law to be set aside. See *Narayanan Chettiar* v. *Lakshmanan Chettiar* (5) and *Pethermal Chetty* v. *Muniandy Servai* (6). The article really applicable is Article 144 but the period required for it has not expired yet. There is thus no bar by limitation.

Plaintiff is, therefore, entitled to have the A Schedule properties also included in the partition. But as pointed out by the respondents' Vakil the sum of Rupees 6,000, the consideration for Exhibit A, was utilised to pay off a mortgage and for other purposes binding on the estate. This was found by the Munsif and the point was not controverted in the lower Appellate Court, as the Subordinate Judge notes. We think an equity arises in favour of the 8th defendant against the plaintiff on that finding

(4) 55 Ind. Cas. 86; 11 L. W. 192; 38 M. L. J. 251; (1920) M. W. N. 205; 43 M. 405.

(5) 29 Ind. Cas. 1; 39 M. 456; 28 M. L. J. 571.

(6) 35 C. 551; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

which we adopt, and on the sale to him being invalidated the plaintiff should pay him a proportionate share of the moneys so utilised, *viz.*, of the sum of rupees 6,000.

This second appeal must be allowed and the decree of the lower Appellate Court must be modified as stated above. Each party will bear costs throughout with regard to A Schedule properties.

M. C. P.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 138 OF 1919.

April 15, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Sulaiman.

BHAGWATI PRASAD *alias* BHAGWAT SAHAI AND OTHERS—JUDGMENT DEBTORS—APPELLANTS

versus

M. MUKAND SARUP—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 54, 90—Execution sale—Publication of sale—Sale, whether vitiated because drum not beaten—Proclamation of sale—Irregularity, whether sufficient to set aside sale—Damage, proof of.

Under rule 54, Order XXI, of the Civil Procedure Code, it is sufficient if a proclamation of sale is announced by beat of drum. A drum need not be beaten at the time of the sale. [p. 523, col. 2.]

Unless the judgment-debtor is able to prove that an irregularity in a proclamation of sale has resulted in material loss to himself, the Court will not set aside the sale on the ground of such irregularity. [p. 523, col. 2.]

First appeal from an order of the Additional Sub-Judge, Aligarh, dated the 5th of May 1919.

Mr. *Peare Lal Banerji*, for the Appellants.

The Hon'ble Mr. *Narain Prasad* and Mr. *Durga Prasad*, for the Respondent.

JUDGMENT.—This is an appeal against an order refusing to set aside an auction sale. The appellant's case is that there was a material irregularity in proclaiming the sale as a result of which he suffered considerable loss, the property being undersold. The two irregularities of which complaint is made are: one, that the drum was not beaten at the time of the sale, and, second, that there was a mistake entered in the sale proclamation to the effect that there was an encumbrance of Rs. 14,000 on the property whereas there was no such encumbrance. As to the beating of the drum, there is no force whatsoever in this plea. There is nothing in the Code that says that at the time of sale the drum shall be beaten. The drum has merely to be beaten at the time of proclamation under Order XXI, rule 54. The complaint is also made that the drum had not been beaten even at the time of the proclamation of sale, but evidence was directed to prove that the drum was not beaten at the time of auction sale. So far as the error in the sale proclamation is concerned, the property was put up for sale in execution of a decree on the basis of a mortgage. It was the only mortgage on the property and it had been turned into a decree. The decree-holder himself filed an affidavit to the effect that there was no other burden on the property except the amount secured by his decree. The Sub Registrar in his report entered as the only encumbrance the mortgage of the plaintiff on the basis of which a decree had been obtained, and in the proclamation of sale the date of the registration was given and the fact that the plaintiff had obtained a decree upon it was also stated. There was really nothing in this transaction to dissatisfy anybody. Even if there had been any irregularity, it would have been upon the appellant to prove that that irregularity resulted in material loss and damage to him. The property was sold for Rs. 17,500. According to the objectors its value was Rs. 30,000. According to the evidence of witnesses they called, its value was Rs. 25,000. The objectors stated that they had one person who was willing to advance Rs. 25,000 on a mortgage of the property; but they abstained from calling him into Court. The decree holder, after the sale, was perfectly willing that the sale should be set aside if his money was paid. Although the sale took place so far back as October 1918, the objectors have made no attempt to pay off the debt. We have no power whatsoever to give any further extension of time. We find that there has been no

irregularity established and no consequential loss. The appeal, therefore, fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 20 OF 1919.

January 20, 1920.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

P. SURYANARAYANA RAO NAIDU—PLAINTIFF—APPELLANT

versus

P. BALASUBRAMANIA MUDALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Sister, unmarried—Residence, right of—Family dwelling house, sale of—Purchaser, position of.

Under the Hindu Law the right of an unmarried sister to reside in the family dwelling house till her marriage is unaffected by the sale of the house in execution of a decree against the last male owner for a debt contracted without family necessity, and she is entitled to resist delivery to the auction-purchaser till suitable arrangements are made for her accommodation. [p. 526, col 1.]

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 327 of 1918.

Messrs. *Venkatasubba Row* and *Radha Krishnayya*, for the Appellant.

Mr. *K. Rajah Aiyar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. He purchased in Court auction sale the plaint house in execution of a decree passed against the defendants Nos. 2, 3 and 4. The defendants Nos. 3 and 4 had no rights in the property, and we may take it that the plaintiff purchased the right, title and interest of the 2nd defendant in the house. The house belonged to the 2nd defendant's husband Ekambara Mudali and then to Ekambara Mudaly's only son, who died a minor. On her minor son's death, the 2nd defendant as his heir became the qualified female owner of the house. The minor left his two sisters, defendants Nos. 6 and 7, unmarried. The money decreed against the 2nd defendant was passed for a personal debt of the 2nd defendant, the mother and the next heir of the last male owner. The plaintiff, purchaser in Court auction, obtained delivery of the downstairs portion, but the upstairs portion of the house now in dispute was occupied by the defendants Nos. 6 and 7, the two unmarried sisters of the last male owner, and they refused to vacate as they claimed a right under the Hindu Law to reside in the house which belonged to their father and their brother till their (the said defendants') respective marriages. Hence the suit brought to eject them on the ground that they had no such rights under the Hindu Law.

The learned City Civil Judge decided this interesting question of Hindu Law against the plaintiff and in favour of the defendants Nos. 6 and 7 and dismissed the suit. Hence this appeal.

So far as the widows of undivided co-parceners are concerned (including a widowed mother), the authorities are very clear that a private sale by the surviving male co-parcener which was not for family necessity or an execution sale held for a decree debt which did not arise out of family necessity, would not entitle the purchaser to oust such widows as the latter were entitled to reside in the ancestral family house till, at any rate, other adequate provision is made for their residence. The question of unmarried girls who were not related to the surviving male co-parcener as direct descendants from him but as sisters or cousins (that is as daughters of deceased undivided co-parceners), seems not to have formed the direct subject of any reported decision. In the case of the wife or widow of the surviving co-parcener, it has been held in *Jayanti Subbiah* v. *Alamelu Mangamma* (1) that the wife cannot set up any right of residence against the purchaser in execution for her husband's debts. I shall presently consider the ratio of that decision. But before leaving this part of the subject, I would finlly remark that the general question was elaborately considered by Sir Barnes Peacock, Chief Justice (with whose judgment, Mitter, J., concurred), in *Mungala Dabee* v. *Dinonath Bose* (2). The very general language of the

(1) 27 M. 45.
(2) 12 W. R (A. C, J) 35 4 B. L. R. (O. C.) 72.

learned Chief Justice's *dictum* is to the effect that the father's widow and "the other females of the family who are entitled to maintenance out of the dwelling selected by the father for his own residence and in which he left the females of his family at his death, cannot be turned out of that residence at least until some other place has been provided for them." If this general *dictum* applies, the unmarried daughters, of the father, being also "females of the family entitled to maintenance" and residence, can resist being turned out of the dwelling selected by their father for his own and their residence. No doubt there is a distinction between the widows of co-parceners and the father's widow on the one side and unmarried females on the other side, because the former are entitled to maintenance and residence till death or re-marriage, whereas unmarried females are entitled to maintenance and residence only until their marriage. But as the learned City Civil Judge points out, the difference in the length of the period and in the circumstances when the right of maintenance and residence ceases cannot affect, on principle, the right to resist the eviction from the family dwelling house so long as the right of maintenance and residence subsists.

Mr. Radhakrishna Iyer for the appellant argued that if every female entitled to maintenance and residence can exercise the right of obstruction to ejectment, it would be very unfair on purchasers from the surviving member of a Hindu family and on purchasers in execution of debts due by such member, and even the wife of the debtor and the unmarried daughters of the debtor might claim to resist the purchaser. I might here remark that even as regards the mother and the co parcener's widow of the debtor the right of residence is curtailed (*a*) by restricting it to cases where the debt for which the property is sold is not contracted for necessity, and (*b*) by the rule that the females cannot claim a right of residence in the whole of the premises if a portion of the house could be set apart for them and would afford reasonably sufficient accommodation, and (*c*) that if other resonable accommodation even outside the family dwelling house is offered, they may be bound to accept such a substitute, at least in certain circumstances.

As regards the wife, I shall now return to *Jayanti Subbiah* v. *Alamelu Mangamma* (1) where Bhashyam, J., delivered the judgment which was concurred in by Benson, J. While affirming the general principle which had been laid down in *Venkatammal* v. *Andyappa Chetti* (3) and *Ramanadan* v. *Rangammal* (4), the learned Judge distinguished the case of the wife of the debtor for whose debt the property was sold on the following grounds (so far as am able to follow his reasoning):—(*a*) the debt contracted by the husband himself is necessarily binding upon the wife absolutely (*b*) on his death without male issue, his estate devolves on her by right of inheritance and so no right of maintenance or residence apart from ownership as heir can be invoked in her favour as in the case of a co-parcener's widow, (*c*) the mother's right may be traced to the father's co-parcenary right just as in the case of the other co-parceners and is not derived from the debtor directly, (*d*) the wife's right of maintenance during her husband's lifetime "is only a matter of personal obligation on the part of the husband quite independent of the possession of the ancestral property by him." The learned Judge also fortified himself by the *dictum* of Kernan, J., in *Venkatammal* v. *Andyappa Chetti* (3) that if the debt in respect of which the sale took place was a debt due by the husband of the woman who claims the right of residence, "No doubt could be entertained that she had no such right." After making the above distinctions, he disallowed the right of the widow of the debtor to resist possession by the purchaser in Court auction. In doing so, he dissented from the decision in *Manilal* v. *Bai Tara* (5). (J. C. Ghose in his very learned work on Hindu Law seems to be inclined in favour of the Bombay decision and against Bhashyam Aiyangar, J.'s opinion).

I shall not lengthen this judgment by elaborately considering whether all the 4 distinctions (*a*) to (*d*) relied on by the learned Judge are tenable. It is sufficient to state that the wife and unmarried daughters of the debtor stand on a different footing from the widows of deceased co-parceners (including the mother) and from unmarried

(3) 6 M. 130; 7 Ind. Jur. 127; 2 Ind. Dec. (N. S.) 369.

(4) 12 M. 260; 4 Ind Dec. (N. S.) 531.

(5) 17 B. 398; 9 Ind. Dec. (N. S.) 258.

sisters. If even the undivided *sons* of the debtor cannot attack the sale in execution of the father's debt (not illegal or immoral), I do not see how unmarried daughters can be allowed to attack it or put forward a right of residence against the purchaser. As regards the wife, she is under even a greater obligation (under the Hindu Law) than the sons, not to question the validity of her husband's debts. The mother and the widows of co-parceners and the unmarried sisters are under no such obligation with respect to the debt of the surviving male owner which was not incurred for family necessity. I need hardly say that if the sale for their brother's debt itself would not deprive defendants Nos. 6 and 7 of their right of residence, a sale for the debt of the brother's next female heir and legal representative (which is the present case) cannot be held to deprive them of such right. The question whether a private sale of a person's ancestral family dwelling house *without necessity* (apart from the question of its being sold in execution of a decree for his debt) or without the purchase money being required to discharge his own antecedent debt can deprive even his wife and unmarried daughters of their right of residence, is a somewhat more difficult question on which it is unnecessary to express a final opinion in this case.

In the result, I would dismiss the appeal with costs.

WALLIS, C. J.—I entirely agree.

M. C. P.

Appeal dismissed.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 4 OF 1920.

April 16, 1920.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

Raja Bahadur Raja BRIJ NARAIN RAI—DEFENDANT—APPLICANT

versus

MANGLA PRASAD RAI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 110—Appeal to Privy Council—Question of general importance, what is.

Where there is a conflict of opinion as to what was intended to be laid down in a decision of the Privy Council, and what was the effect of the observations in that case, the question is one of general importance to justify the grant of a certificate under section 110 of the Civil Procedure Code for leave to appeal to His Majesty in Council. [p. 527, col. 1.]

Application for leave to appeal to His Majesty in Council against a decision of Mr. Justice Tudball and Mr. Justice Rafique, dated the 28th of October 1918, reported as 50 Ind. Cas. 101.

Mr. *Gokal Prasad*, for the Applicant.

JUDGMENT.—The value of the subject-matter of the proposed appeal exceeds Rs. 10,000, but this Court affirmed the decision of the Court below. We have, therefore, to see whether the case involves a substantial question of law. The question of law, which arises is, what constitutes antecedent debt so as to justify a transfer of joint family property by the manager of the family in the case of a Hindu family governed by the Mitakshara Law. This Court has applied in this case the observations of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) as contained in pages 447 and 448. The Madras High Court in the Full Bench case of *Arumugham Chetty* v. *Muthu Koundan* (2) have taken a different view, and so have the Judicial Commissioners of Oudh in the case of *Ramman Lal* v. *Ram Gopal* (3). The Patna High Court has held the same view as that adopted by this Court in the present case and the judgment of the learned Judges of the Patna High Court was passed in the case of *Sukhdeo Jha* v. *Jhapat Kamat* (4). There is thus a conflict of opinion as to what was intended by their Lordships of the Privy Council to be laid down in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) and what is the effect of the observation made by their Lordships in that case. It

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(2) 52 Ind. Cas. 525; 42 M. 711; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

(3) 47 Ind. Cas. 987; 21 O. C. 200; 5 O. L. J. 629.

(4) 54 Ind. Cas. 946; 5 P. L. J. 120; 1 P. L. T. 49; (1920) Pat. 67; 2 U. P. L. R. (Pat.) 39.

is desirable that the question, which is one of general importance, be authoritatively settled. We, therefore, certify that this case fulfils the requirements of section 110 of the Code of Civil Procedure.

Application allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 372 OF 1918.

September 29, 1919.

Present :—Mr. Kemp, A. J. C.

VIRJI AND ANOTHER—PLAINTIFFS

versus

THE KARACHI MUNICIPALITY—DEFENDANTS.

Bombay District Municipal Act (III of 1901), s. 167—"For anything done or purporting to have been done," meaning of—Injunction, suit for—Notice, when not necessary.

The expression "for anything done or purporting to be done" in section 167 of the Bombay District Municipal Act means that the section applies where something has been done, and not where there is an apprehension only that something will be done. A suit, therefore, against a Municipality to restrain an apprehended injury is not bad merely because the notice required by the section was not given: in such a case no notice is necessary. [p. 527, col. 2.]

Mr. *Isardas Oodharam*, for the Plaintiffs.

Mr. *Tolasing Khushalsing*, for the Defendants.

JUDGMENT.—This is a suit against the Karachi Municipality for a declaration that a certain shop on plot 2 C-2, A-27, Napier quarter, is not an unauthorised structure and for an injunction to restrain the Municipality from demolishing it.

The plaintiffs' father, Tulsi Beebar, was prosecuted in the Magistrate's Court on 17th September 1917 for building without the sanction of the Municipality. Tulsi died on 9th May 1918 and the Municipality on 11th May 1918 were about to demolish the building but were met by this suit and consequently desisted from taking any further steps to demolish the unauthorised structure *pendente lite*. The Municipal resolution ordering the structure to be demolished is dated 20th December 1917. It followed a notice from the Municipality to plaintiffs under section 96 of Bombay Act III of 1901. Under these circumstances the defendant Municipality contend that as no notice has been given of the suit under section 167 of the District Municipal Act (Bom. Act III of 1901), the suit must be dismissed.

Shortly, the plaintiffs' reply is that no notice of suit is necessary where the suit is for an injunction.

This question has been agreed to be tried as a preliminary issue of law.

It may be mentioned that the alleged unauthorised structure consists in the conversion without Municipal sanction of a privy and sweeper's passage into a shop.

The point is not really covered by any Bench ruling of this Court. The Municipality, however, contend that the ruling in *Abdul Wahid* v. *Manager Encumbered Estates* (1) on section 80, Civil Procedure Code, applies equally to a case under section 167, Bombay Act III of 1901. This ruling is inconsistent with the ruling in *Fundumal* v. *Mahomed Sharif* (2). In my opinion the ruling in the former case must be confined to one on section 80, Civil Procedure Code, and any observations by the learned Judges as to the construction of section 167 of Act III of 1901 must be considered *obiter dicta*. Further, if *Abdul Wahid* v. *Manager Encumbered Estates* (1) can be taken also as applying to a case under section 167, Act III of 1901, we have here two conflicting Bench decisions which would require the point to be settled by a Full Bench.

Firstly, let us consider the wording of section 167. It lays down that no suit shall be commenced against the Municipality or a servant of the Municipality acting under its orders "for any thing done, or purporting to have been done" in pursuance of the Act without one month's notice. I cannot interpret the words in inverted commas except as meaning that the section only applies where something has been done, and not where there is an apprehension only that something will be done. That seems to me the plain meaning of the words. It does not, therefore, apply to a *quia timet* suit. The resolution of the Committee

(1) 19 Ind. Cas. 838; 6 S. L. R. 250.
(2) 4 Ind. Cas. 1156; 3 S. L. R. 175.

to demolish the building and the attempt to demolish which was abandoned is not an act done which would require one month's notice of suit under section 167. So far the Municipality had done nothing to affect plaintiffs' rights except that they caused plaintiffs grave apprehension that some act affecting their rights would be done. The plaintiffs are suing to prevent the Municipality doing an act, not the consequence of any act the Municipality has done. To construe the section otherwise would enable the Municipality to do the mischief sought to be prevented before a suit could be filed against it. But if my construction of section 167 be incorrect, notice will be necessary under section 167 for a suit for an injunction to prevent an immediate grave injury that is apprehended, because the only suit that can be filed in such a case would be a suit for an injunction. No question of the equitable right to give relief would arise because the section would require notice, and effect must be given to it. In this connection I may observe that the discussion in *Abdul Wahid* v. *Manager, Encumbered Estates* (1) on this point as to the effect of *Colls* v. *Home and Colonial Stores* (3) on *Flower* v. *Local Board of Law Leyton* (4) is, in my opinion, merely academic. *Colls* v. *Home and Colonial Stores* (3) merely lays down that no new rights can be created by equity but I would point out, regarding the discussion on this point by Pratt, J. C., that *Flower* v. *Local Board of Law Leyton* (4) does not to my mind create any new right. The right is the right to an injunction which is not taken away by the necessity of a statutory notice. *Flower* v. *Local Board of Law Leyton* (4) is not, therefore, really affected by the decision in *Colls* v. *Home and Colonial Stores* (3), and as a matter of fact *Flower* v. *Local Board of Law Leyton* (4) is not shown in any of the digests as an overruled or doubted case. It is cited as good law in XXIII Halsbury's Laws of England, paragraph 708.

Flower v. *Local Board of Law Leyton* (4) is a strong case because there the words of the English Statute, 33 and 39 Vic. C. 55, section 264, were "anything done or *intended to be done* or omitted to be done." If section 80, Civil Procedure Code, or section 167, Bombay Act III of 1901, were construable as referring to any intended act, I would hesitate, notwithstanding the decision in *Naginlal* v. *Official Assignee* (5) and *Secretary of State* v. *Gulam Rasul* (6) to say, in India the decision in *Flower* v. *Local Board of Law Leyton* (4) should be followed. In England since *Flower's case* (4), the Statute, 56 and 57 Victoria has been enacted.

That section 167, Bombay Act III of 1901, should be construed as I have held seems to me to be further borne out by the decisions of various High Courts on Local Acts containing the same or similar words: *President of the Taluk Board* v. *Narayanan* (7), *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (8), *Govinda Pillai* v. *Taluk Board of Kumbakonam* (9), *Municipality of Parola* v. *Lakshamandas* (10). See also in this Court the decision of Crouch, A. J. C., in *Mahomed Ali Essaji* v. *Karachi Municipality* (11), which was not overruled by the High Court on this point in appeal. I note also that Kincaid, A. J. C., in an unreported case in this Court considered himself bound by *Fundumal* v. *Mahomed Sharif* (2). It is also to be noted that the Select Committee appointed to consider the old District Municipal Act (Bom. Act II of 1884) considered it unnecessary to alter the wording of the old section 42, because, I surmise, they considered it referred, on a true construction, only to acts done and not merely apprehended.

As to section 80, Civil Procedure Code, the words of that section show that no suit of any kind can be filed against the Secretary of State and that the words "in respect of an act purporting to be done

(3) (1904) A. C. 179; 73 L. J. Ch. 481; 90 L. T. 687; 53 W. R. 30; 20 T. L. R. 475.

(4) (1877) 5 Ch. D. 347; 46 L. J. Ch. 621; 36 L. T. 760; 25 W. R. 545.

(5) 17 Ind. Cas. 876; 37 B. 243; 14 Bom. L. R. 1148.

(6) 34 Ind. Cas 535; 18 Bom. L. R. 243; 40 B. 392.

(7) 16 M. 317; 3 M. L. J. 12; 5 Ind. Dec. (N. S.) 928.

(8) 29 M. 539; 1 M. L. T. 333; 16 M. L. J. 582.

(9) 4 Ind. Cas. 32; 32 M. 371; 4 M. L. T. 209; 19 M. L. J. 333.

(10) 25 B. 142 at p. 150; 2 Bom. L. R. 857.

(11) 20 Ind. Cas. 572; 7 S. L. R. 31.

by him in his official capacity" refer only to public officers and not to the Secretary of State. See *Secretary of State* v. *Kalekhan* (12), *Secretary of State* v. *Rajlucki Debi* (13). This construction is further corroborated by the amendment in section 80 from old section 424, where the words "such public officer" have been substituted in the former section for the word "him" in the latter. See also *Naginlal* v. *Official Assignee* (5) in which, however, the learned Judges seem to have considered that "purporting to be done" covered apprehended as well as past acts.

With great respect to the learned Judges who decided *Abdul Wahid* v. *Manager, Encumbered Estates* (1), I cannot see how the words "any act purporting to be done" can be construed otherwise than as referring to past acts and not an apprehension of future injury. Pratt, J. C, reconciles *Fandunal* v. *Mahomed Sharif* (2) to the view taken in *Abdul Wahid* v. *Manager Encumbered Estates* (1) by the argument that the property in *Fundumal* v. *Mahomed Sharif* (2) had been attached and that was an act done, but it is clear that the learned Judges in *Fundumal* v. *Mahomed Sharif* (2) treated the suit as one to restrain an apprehended injury and their judgment proceeds on that basis.

In two other suits* in this Court on section 167, Bombay Act III of 1901, the Judge in each case considered himself bound by *Fundumal* v. *Mahomed Sharif* (2).

Nevertheless, there is no direct Bench ruling of this Court on section 167, Bombay Act III of 1901, and for the reasons I have stated I consider no notice is necessary under that section of a suit to restrain an apprehended injury. I do not, therefore, consider it proper to refer a question of the construction of section 167, Bombay Act III of 1901, to a Full Bench on account of divergent Bench rulings on the construction of section 80 (old section 424) of the Code of Civil Procedure. I note, moreover, that Pratt, J. C.'s opinion at page 251† [*Abdul Wahid* v. *Manager, Encumbered Estates* (1)] apparently was that the words "purporting to have been done" in section 167 would restrict the operation of that section to past acts.

(12) 16 Ind. Cas. 947; 37 M. 113; (1912) M. W. N. 786; 23 M. L. J. 181; 12 M. L. T. 224.

(13) 25 C. 239 at p. 243.

*Suits Nos. 352 and 522 of 1917.

†Page of 6 S. L. R.—*Ed.*

Again, it has been argued that the use in section 167 of the word "suit" instead of "action" in section 43 of the old District Municipal Act (Bom. Act II of 1884) shows the Legislature intended to include suits for an injunction, that the word "suit" applies to all kinds of suits But the use of this word in section 167 instead of "action" is merely in accordance with the general description of such proceedings as terminate in a decree, and the use of the word "action" employed in England would be the employment of a term not used in the Code. Moreover, both in section 424 of the Code of Civil Procedure of 1882 and in section 80 of the present Code the word "suit" is used.

That the act sought to be restrained in the present case was an apprehended act is clear. What the plaintiffs seek to restrain is the demolition, not any resolutions or orders passed by the Committee which are not sought to be followed by action.

I decide the issue in favour of plaintiffs.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 201 OF 1918-19.

April 3, 1920.

Present:—Mr. Hopkins, S. M., and Mr. Porter, J. M.

SHEIKH MOHAMMAD AND OTHERS—APPELLANTS

versus

JANKI—RESPONDENT.

Appeal, second—Finding of fact, when can be questioned in.

A finding of fact is binding on a Court of second appeal, but when no reasons are given for such finding and no reference is made to the evidence on which it is based, the finding can be questioned in second appeal. [p. 530, col. 1.]

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 21st June 1919, in the case of ejectment.

JUDGMENT.

HOPKINS, S. M.—[*March* 26, 1920.]—The question for decision in the case is whether the respondent Janki shared in the cultivation of the holding in dispute with his

cousin Karia, the last recorded occupancy tenant, at the time of the latter's death. It is admitted that Janki and Karia or their respective fathers were previously separate and had separate holdings. The latter are in fact recorded up to the present time. But the respondent's case is that the respondent subsequently became joint in cultivation with Mangru, Karia's father, and after Mangru's death with Karia himself. The Commissioner's finding on this point is as follows:—

"It is equally clearly proved that at a later date the three branches again joined and although they continued to have their separate *khatas*, yet in reality they shared in each other's cultivation: in view of that evidence I find that appellant was in the lifetime of Karia sharing in the latter's cultivation."

A finding of fact cannot be questioned in second appeal, but it must be a judicial decision reached after a consideration of the evidence. There was evidence on both sides. The Assistant Collector in a reasoned judgment had given his reasons for coming to a decision contrary to that reached by the Commissioner. The Commissioner gives no reasons for differing from the Aesistant Collector or for his own conclusion and does not refer to the evidence on which he relies. In the circumstances his finding cannot be accepted as binding on this Court. In point of fact the only evidence in favour of the respondent's contention is that of a single witness, Durbali. This witness stated that Karia and respondent became joint in cultivation 12 years ago, but he also stated that the holding had previous to this been mortgaged to other persons and that the mortgage was not redeemed until after Karia's death; therefore, on his evidence the respondent cannot have shared in the cultivation of the holding in dispute.

It is contended that the *khataani* of 1319 F. only shows some of the plots as mortgaged but the entry of the mortgage of tenancies in the revenue papers is not obligatory, and if Durbali was wrong in this—he stated clearly that the *whole* land was mortgaged—he is not a reliable witness.

The respondent also relied on a receipt given in the name of Karia and Janki. The appellant stated on oath that this was given after Karia's death and his evidence stands unrebutted. In fact the date is 22nd April 1914=1321 F. and respondent's name was recorded after Karia's death from 1320 F.

In my opinion the Commissioner's finding that the respondent shared in the cultivation with Janki is clearly against the weight of evidence. I would decree the appeal with costs of all Courts and setting aside the order of the Commissioner would restore that of the Assistant Collector.

PORTER, J. M.—I agree.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 439 OF 1919.

January 8, 1920.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Coutts Trotter.

YELLA KRISHNAMMA—PLAINTIFF—APPELLANT

versus

KOTIPALLE MALI—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55—Vendor and purchaser—Registered conveyance—Non-payment of price—Suit by vendee for possession, maintainability of—Decree, form of.

A vendee of immoveable property under a registered deed of conveyance, who has not paid the purchase-money of the property, can maintain a suit for possession of the property without paying for it, or submitting to a decree for payment, or a condition attached to the decree as to the purchase-money which he had agreed to pay. [p. 531, col. 1.]

Subramania Aiyar v. *Poovan*, 27 M. 98; *Rama Aiyar* v. *Vannamamalai Aiyar*, 27 Ind. Cas. 336, not followed.

Nil Madhab v. *Haran Prosad*, 20 Ind. Cas. 325; 17 C. W. N. 1161; 19 C. L. J. 146, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cocanada, in Appeal Suit No. 121 of 1918, preferred against the decree of the Court of the District Munsif, Amalapuram, in Original Suit No. 943 of 1916.

FACTS appear from the judgment.

Mr. *K. Ramamurthi*, for the Appellant:—The lower Courts erred in passing a conditional decree for plaintiff for possession on his paying the sale price. The English Law is otherwise and that law has been followed in

India. The registration of the document perfects the sale and the vendor can separately enforce his claim for the purchase money or his lien or charge on the property for it. The lien is only a statutory and not a possessory lien. Equitable considerations can have no place in giving the plaintiff the statutory relief which he claims. *Subramania Aiyar* v. *Poovan* (1) and *Rama Aiyar* v. *Vanamamalai Aiyar* (2) have not been correctly decided. See *Velayutha Chetty* v. *Govindasami Naicken* (3) and *Kandasami Pillai* v. *Ramasami Mannadi* (4).

The decision in *Nil Madhab* v *Haran Prosad* (5) relied on by the lower Court is clearly distinguishable. That decision was founded on the peculiar facts of that case. There was evidence in that case that the parties intended that the sale was to take effect on a particular contingency happening.

Mr. *A. Satyanarayana*, for the Respondent:—The decisions in *Subramania Aiyar* v. *Poovan* (1) and *Rama Aiyar* v. *Vanamamalai Aiyar* (2) clearly lay down that the Courts are at liberty to pass conditional decrees in such cases. It is highly inequitable that the vendee should take possession without performing his part of the contract. He must first extinguish the vendor's lien or charge on the property.

JUDGMENT.—The short point in this second appeal is whether a plaintiff, who has not paid the purchase money of a property which has been conveyed to him, can maintain a suit for possession without paying for it or submitting to a decree for payment or a condition attached to the decree as to the purchase money which he had agreed to pay. No doubt it seems very reasonable that a man who comes to enforce his right against the property should be expected to do what is just and pay the price. But we think that there is no doubt whatever that the law in this country, following the English Law, is otherwise. Two Benches of this Court in *Subramania Aiyar* v. *Poovan* (1) and in *Rama Aiyar* v. *Vanamamalai Aiyar* (2) have held that, in such cases as the present, the vendee can be compelled to pay the purchase money in extinction of the lien of the vendor before he gets a decree for possession. That must proceed on two assumptions. The first is that the vendor is entitled to a possessory lien in respect of his unpaid vendor's lien, and the other is that you can give relief against the consequences laid down in the Transfer of Property Act as following from a transfer by sale-deeds and conveyances. With regard to the first of these propositions, we think that it is an oversight of the learned Judges to have treated an unpaid vendor's lien which only creates a charge on the property sold as a possessory right exercisable in the face of the claim of the vendee to possession. With regard to the second, the matter was very carefully considered by two learned Judges of this Court, the late Chief Justice and the present Chief Justice, in *Velayutha Chetty* v. *Govindasami Naicken* (3) where they point out that the broad proposition involved is this:—Can Courts give equitable relief to mitigate or suspend the consequences laid down by a Statute, and they came to the conclusion that such a proposition as that the plain words of the Statute could be whittled away by the application of the so-called equitable doctrines, was an absolutely untenable one and they expressed their dissent from the contrary decision in *Baijnath Singh* v. *Paltu* (6). The same principle was really involved in the decision of the Full Bench of this Court in *Kandasami Pillai* v. *Ramasami Mannadi* (4). That was a case where it was part of the terms of a lease-deed or demise that the lessees should discharge a prior hypothecation on the land. It was found that this was not in the nature of a condition precedent but was merely a concurrent covenant with the other obligations of the parties to the document, and it was held by the Full Bench that the creation of a present demise involved the right to immediate possession by the person to whom the demise was made, unless it could be shown that any of the stipulations imposed upon him for performance were in the nature of conditions precedent.

The learned Judge in this case, besides the

(1) 27 M. 28.
(2) 27 Ind. Cas. 336.
(3) 8 Ind. Cas. 364; 34 M. 543; (1910) M. W. N. 637; 9 M. L. T. 108.
(4) 51 Ind. Cas. 507; 36 M. L. J. 313; (1919) M. W. N. 194; 42 M. 203.
(5) 20 Ind. Cas. 325; 17 C. W. N. 1161; 19 C. L. J. 146.
(6) 30 A. 125; A. W. N. (1908) 35; 5 A. L. J. 96.

decisions in Madras which we feel constrained to hold are no longer good law in view of the Full Bench ruling and of the ruling in *Velayutha Chetty* v. *Govindasami Naicken* (3), refers to the case of *Nil Madhab* v. *Haran Prosad* (5) reported in 17 C. W. N. 1161. That case is also reported in 19 C. L. J. 146. We think that the learned Judge clearly misconstrued the effect of the decision because the ground upon which that judgment really proceeds is this:—that in that case there was evidence of an intention that a registered document was not to take effect *ipso facto* at once on execution and was not intended to be performed till something else had been done. Now if there had been evidence in this case that it was the intention of the parties that this sale-deed which is absolutely unqualified on the face of it should only come into effect when in fact the consideration had been paid, no doubt any Court would have the right to give effect to such a contract and to hold that there was such an intention. The section of the Transfer of Property Act which enumerates the respective duties of vendor and vendee is expressly qualified by the words "in the absence of a contract to the contrary." The Calcutta case held on its particular facts that there was a contract to the contrary and that, therefore, clearly the consequence of the Statute did not necessarily ensue.

The appeal must be allowed with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 30 OF 1919.

February 17, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Justice Sir Ernest Fletcher, Kt.

KRISHNA KISHORE DE—PLAINTIFF—APPELLANT

versus

AMAR NATH KHETTRY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Letters Patent (Cal.), cl. 12—Properties situate partly within and partly without ordinary original civil jurisdiction of High Court—Leave to sue, competency of—Jurisdiction, want of—Res judicata *—Mortgage—Sub-mortgagee, remedies of—Suit against mortgagor—Court, proper.*

The Calcutta High Court is not competent to grant leave, under clause 12 of its Letters Patent, to enforce a cause of action in respect of properties situated partly within, and partly without, the local limits of its ordinary original civil jurisdiction, and a decree so far as it affects properties without those limits must be deemed to have been made without jurisdiction. [p. 536, col. 2.]

Where a Court has no jurisdiction over the subject-matter of an action in which an order is made, such order is wholly void and cannot operate as *res judicata* [p. 537, col. 2.]

A sub-mortgagee is entitled to bring a suit against his mortgagor and to realise the dues on his mortgage by sale or foreclosure. It is also open to a sub-mortgagee, but by no means obligatory on him, to frame his suit in such a way as not only to enforce his rights under his own mortgage but to enforce the original mortgage against the mortgagor of his mortgagor. A sub-mortgagee may thus be content to cut off the equity of redemption of his mortgagor or he may at his choice, by a suit properly framed, cut off the equity of redemption not merely of his mortgagor but also of the mortgagor of his mortgagor. [p. 536, col. 1.]

Where the properties comprised in an original mortgage are situated in the Mufassil, the mortgagee by the grant of a sub-mortgage along with a mortgage of property in the town of Calcutta is not entitled to have the forum altered in relation to the enforcement of the original mortgage. As between the mortgagee and the sub-mortgagee, a suit to enforce the security may fittingly be instituted on the Original Side of the High Court at Calcutta. But as the original mortgagor could have been sued by his mortgagee in respect of liabilities arising out of the mortgage transaction only in the Mufassil Court, the mortgagee, by granting a mortgage to a third person of his interest as mortgagee and by including in that document a property in Calcutta, cannot be permitted to prejudice the position of his mortgagor and to render him liable to be sued in a Court other than the Mufassil Court. [p. 536, col. 2.]

Appeal against the following decision of Mr. Justice Greaves, dated the 4th April 1919:—

"This is a suit by the plaintiff to set aside a mortgage decree dated 2nd September 1914 and another decree dated the 24th August 1917 in Suit No. 1083 of 1912 on the ground that the Court had no jurisdiction to pass the decrees that were passed in that suit. In opening the case Counsel for the plaintiff stated that he did not desire to proceed against the infant defendants and accordingly any order that will be passed in the suit will not affect the infant defendants.

KRISHNA KISHORE DE *v.* AMAR NATH KHETTRY.

On the 30th August 1907 a mortgage was executed by defendants Nos. 4, 5, 6 and 9 in favour of defendant No. 3 in respect of an eleven-annas share in two properties situated in the Mofussil in the District of Howrah known as Santoshpur and Mandalika. The mortgage is in the ordinary form of a Bengali mortgage and it states that the defendants Nos. 4, 5, 6 and 9 had borrowed from the 3rd defendant a sum of Rs. 25,000 on a mortgage of their right in the eleven annas share of lots Santoshpur and Mandalika. As is usual in Bengali mortgages there is no grant or conveyance of the eleven-annas share in Santoshpur and in Mandalika. On the 23rd September 1911 the mortgagors redeemed the Mandalika property. On the 13th December 1907 the 3rd defendant mortgaged to the 1st and 2nd defendants his one third share in two houses in Calcutta and also sub-mortgaged to the defendants Nos. 1 and 2 his interest in the mortgage of the 30th August 1907. It appears from the document that Haridas Banerjee, defendant No. 3, assigned to Sunder Dass Khettry and Bholanath Khettry (who are defendants Nos. 1 and 2) or the survivor of them and their or his heirs, executors, administrators and assigns all the said principal sum of Rs. 25,000 due and owing to Haridas Banerjee upon the security of the mortgage of the 30th August 1907 together with all interest thereon and further interest to become due, and the benefit of the covenants, powers and provisions therein contained for securing the same, and all the right, title, interest, claim and demand of Haridas Bannerjee into and upon the premises thereby assigned and every part thereof together with full power to demand, sue for, recover and receive the principal sum of Rs. 25,000 and interest. On the 25th November 1912 defendants Nos 1 and 2 commenced a Suit No. 1083 of 1912 to enforce the mortgage of the 13th December 1907, and they obtained prior to the institution of the suit leave under clause 12 of the Charter. On the 2nd September 1914 a preliminary decree was passed in that suit and nobody appeared except the infant defendants, who appeared by their guardian *ad litem* and submitted their interest to the Court. I should here state that defendant No. 10 is a puisne mortgagee by virtue of a mortgage of the 13th February 1915. On the 20th June 1916 the equity of redemption in Santoshpur was purchased in the name of Jnanendra Kumar Bose as *benamidar* for the present plaintiff, and on the 25th January 1917 Jnanendra executed a declaration that he had purchased the property as *benamidar* for the present plaintiff. On the 24th May 1917 the present plaintiff and defendant No. 10 were made parties in Suit No. 1083 of 1912, and on the 14th August 1917 a decree absolute was made in that suit. I am told by Counsel for the plaintiff, and I accept his statement, that at that time notice was brought to the Court of the facts upon which the present suit is founded but that I declined to stay the passing of the decree absolute on that day and referred the plaintiff to a suit. The present suit is, therefore, brought to set aside both the preliminary decree and the decree absolute passed in Suit No. 1083 of 1912 on the ground that the Court had no jurisdiction to deal with the suit and that there was no jurisdiction in this Court to give leave under clause 12 of the Charter having regard to the circumstances of the case.

The following issues were raised:—

1. Having regard to the prayer (*c*) to the plaint is the suit maintainable in its present form?

2. Is the plaintiff entitled to have the decree of the 2nd September 1914 and the decree of the 24th August 1917 passed in Suit No. 1083 of 1912 and the order of the 24th May 1917 passed also in that suit set aside? and

3. To what relief, if any, is the plaintiff entitled? A further issue was raised, namely, are the Khettry defendants guilty of fraud and collusion as alleged in the plaint? And has the plaintiff any cause of action against these defendants? But the charges contained in paragraphs 15 and 17 of the plaint of fraud and collusion against the Khettry defendants being withdrawn, this issue was not persisted in.

Now, the real question that arises in the suit is whether there was jurisdiction in this Court to grant leave under clause 12 of the Charter so that the suit could extend as well to the Calcutta properties which were comprised in the mortgage of the 13th December

1907 as to the Santoshpur property in Howrah outside the jurisdiction of this Court. The main argument raised before me was this, that some limit must be placed upon the provisions of the clause 12 of the Charter, and that although it may be that the Court has jurisdiction, if leave is given, to entertain a suit in respect of property both in Calcutta and in the Mofussil, such a suit cannot be entertained where, as in the present case, the property sub-mortgaged is in the Mofussil. It is said that the original contract between the parties who entered into the Bengali mortgage of the 30th August 1907, relating as it did only to Mofussil properties, contemplated that any suit to enforce that mortgage should be brought in the District of Howrah, and that it is inequitable on defendants Nos. 4, 5, 6 and 9, who were the mortgagors in that mortgage, that by virtue of the sub-mortgage they should be forced to appear in this Court whereas according to their original bargain they could not have been sued here but only in the Howrah Court. And it was faintly argued before me that upon the construction of clause 12 of the Charter, there is no jurisdiction to give leave where part of the property is situate outside the jurisdiction, it being desired to limit clause 12 of the Charter, so far as leave is concerned, to what are described in that clause as "all other cases." So far as this second point is concerned, I think it is too late in the day now to raise it and that by various decisions of this Court it has been held that the question of leave applies as well to a suit for land where part of the property is situate within the jurisdiction and part without as to "all other cases" referred to in clause 12.

So far as the other point is concerned, there appears to be no direct authority on the point. But it seems to me that by virtue of the mortgage of the 13th December 1907 I can only deal with the question as being a mortgage of Calcutta properties and also of Mofussil properties and that the same principles apply as apply to other cases where leave has been obtained where the suit extends to land outside Calcutta as well as to land in Calcutta and within the jurisdiction of this Court, and I am not prepared to make the limitation which I am asked to make upon the provision of clause 12 of the Charter and to say that that must be read subject to a proviso that leave shall not be given in a case like the present where the property outside the jurisdiction of the Court is comprised in a mortgage by way of a sub mortgage. I think that this really disposes of the main questions that arise in the suit and I do not think it is necessary for me to refer in detail to some of the authorities to which I was referred. As I have already stated, so far as the main point is concerned, there is no express authority and none of the authorities to which I have referred are really helpful with regard to that point.

On behalf of defendants Nos. 1 and 2, a further point was raised. It is said that inasmuch as the plaintiff bought *pendente lite*, he is bound by any order that is passed in the suit, whether that order is right or wrong, and that it is not open to him, as he is a purchaser *pendente lite*, to question the correctness or the validity of any order made prior to his purchase. I do not think that I am prepared to assent to that proposition, because I think that if the plaintiff were right in his present contention, then the leave that was given under clause 12 of the Charter was wrong and the suit was really a nullity.

Two other points were urged but not pressed on behalf of the plaintiff. It is said that credit has not been given for a sum of Rs. 1,651 referred to in the plaint in taking the mortgage accounts. But no evidence was tendered before me upon this point, and it was open to the parties when the account was taken to have urged this contention. They did not choose to urge that contention then, nor have they chosen to adduce evidence on the point before me; under these circumstances, I cannot now go into that matter.

The final point that was raised was with regard to the question of the guardianship of the two minor defendants in Suit No. 1083 of 1912. It is said that they had a certificated guardian, their mother, appointed by the Alipore Court and that under these circumstances she was the proper

person, and not an attorney, to be their guardian *ad litem* in the suit. But a reference to the order of the 20th February 1914 appointing the guardian *ad litem* and to the petition upon which that order was founded shows that it was brought to the notice of the Court that the infants had a certificated guardian and that a letter had been written to her asking her whether she was prepared to appear in the suit as the guardian *ad litem* of the infant defendants and that unless she was prepared to do so, an application would be made to the Court to appoint as the guardian *ad litem* of the infants some officer of the Court. It is in evidence that no reply was made to that letter. It seems to me that it is not now open to the plaintiff here, who has not elected to call any evidence on the point to question the correctness of the order of appointment of the guardian *ad litem* of the 20th February 1914. This disposes of all the questions that arise in the suit, and in the result, the suit fails and must be dismissed with costs on scale No. 2."

Messrs. *M. N. Bose, Pugh* and *H. D. Bose*, for the Appellant.

Messrs. *Sarcar* and *S. C. Chakraburty*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit to declare the invalidity of the decree in a mortgage suit, in so far as such decree affects land situated beyond the local limits of the ordinary original civil jurisdiction of this Court, on the ground that leave under clause 12 could not have been granted and the decree was consequently to that extent made without jurisdiction. The question raised is of first impression, and the facts material for its determination are not in controversy.

On the 30th August 1907 certain persons who may be called the Mookerjees and their trustee, one Bhattacharyya (represented by defendants Nos. 4—9 in the present litigation), executed a simple mortgage in favour of Banerjee (defendant No. 3) to secure the re-payment of a loan of Rs. 25,000 which was charged upon a share of lots Santoshpore and Mandalika, Patni Mahals in sub-district Howrah within the district of Hughli. On the 13th December 1907 Banerjee executed a mortgage in favour of the Khettrys (represented by defendants Nos. 1 and 2) to secure a loan of Rs. 20,000. The properties conveyed and assured by this mortgage included a share of two parcels of land in the town of Calcutta as also the interest of Banerjee as mortgagee under the document of the 30th August 1907. On the 23rd September 1911 the Patni Taluk Mandalika was released and absolutely discharged from the mortgage of the 30th August 1907 upon payment of Rs. 10,000 by the original mortgagors and with the concurrence of all the parties interested. On the 25th November 1912 the Khettrys instituted a suit (No. 1083 of 1912) on the original side of this Court to enforce their security of the 13th December 1907 against Banerjee, the Mookerjees and Bhattacharyya. It is necessary to observe that the suit was brought by the Khettrys, not only against their mortgagor Banerjee, but also against the mortgagors of Banerjee under the transaction of the 30th August 1907. The reason for this was that the Khettrys sought, not merely to enforce their security against their motgagor Banerjee and to cut off his equity of redemption under the mortgage of the 13th December 1907, but also to enforce the mortgage held by Banerjee against the Mookerjees and Bhattacharyya under the deed of the 30th August 1907; this relief they claimed under their derivative title from Banerjee who had granted a mortgage of his interest as mortgagee. The suit was thus in essence a composite suit wherein two distinct reliefs were claimed by the Khettrys, namely, first, to enforce a right of sale of Calcutta properties under the mortgage of the 13th December, 1907, and, secondly, to enforce a right of sale of Mufassil properties under the mortgage of the 30th August 1907. The Khettrys, accordingly, prayed for and obtained leave under clause 12 of the Letters Patent on the assumption that the clause was applicable. The suit was decreed *ex parte* on the 2nd September 1914 and the preliminary decree then passed was made absolute on the 24th August 1917. Meanwhile, the plaintiff De had purchased the right, title and interest of the Mookerjees and Bhattacharyya at an execution sale on the 20th June 1916, and on the 29th July 1918 he instituted the present suit to impeach the validity of the decree in the suit

of the Khettrys in so far as it affected land beyond the local limits of the ordinary original civil jurisdiction of this Court Mr. Justice Greaves has held that the Court was competent to grant leave under clause 12 and that the decree was consequently made with jurisdiction.

It is now well settled by decisions in all the Indian High Courts that a sub-mortgagee is entitled to bring a suit against his mortgagor and to realise the dues on his mortgage by sale or foreclosure: *Ram Shankar Lal* v. *Ganesh Parhsad* (1), *Muthuviira* v. *Venkatachallam Chetti* (2), *Narayan* v. *Ganoji* (3), *Bansi Lal* v. *Durga Prasad* (4). It is also open to a sub-morgagee, but by no means obligatory on him, to frame his suit in such a way as not only to enforce his rights under his own mortgage, but to enforce the original mortgage against the mortgagor of his mortgagor: *Zaki Hasan* v. *Deo Nath Sahai* (5). A sub-mortgagee may thus be content to cut off the equity of redemption of his mortgagor or he may at his choice, by a suit properly framed, cut off the equity of redemption not merely of his mortgagor but also of the mortgagor of his mortragor. This he is able to accomplish by reason of his derivative title. Where a mortgagee transfers his interest by way of mortgage, his mortgagee, that is, the sub-mortgagee, takes it subject to the original mortgagor's right to redeem; consequently, the sub-mortgagee who holds a fragment of the interest of the mortgagee may achieve what the mortgagee might have obtained, namely, to cut off the equity of redemption of the original mortgagor. The form of the decree to be made in such a suit, where two-fold relief is claimed by the sub-mortgagee against his mortgagor and the mortgagor of that mortgagor, is set out in Seton on Judgments (1912) p. 2009 (Derivative Mortgagee v. Mortgagee and Mortgagor) and the Code of Civil Procedure, Appendix D, Form 9. No difficulty arises in a suit of this description when the properties included in the original mortgage as also the additional properties, if any, comprised in the mortgage by the mortgagee are situated within the same jurisdictions. Where, however, as here, the properties comprised in the original mortgage are situated in the Mufassil and the additional property included in the security granted by the mortgagee is situated in the town of Calcutta, an important question of some nicety arises. The original contract of mortgage plainly contemplates a suit in the Mufassil Court for its enforcement. Is the mortgagee, by the grant of a sub-mortgage along with a mortgage of property in the town of Calcutta, entitled to have the forum altered in relation to the enforcement of the original mortgage? We are clearly of opinion that the answer should be in the negative. As between the mortgagee and the sub mortgagee, a suit to enforce the security may fittingly be instituted on the original side of this Court; this is in conformity with the intention of the parties as indicated by the inclusion of the Calcutta property in the mortgage. If, however, the sub mortgagee is not content with relief against his mortgagor alone and claims to have a remedy against the mortgagor of his mortgagor, the situation becomes entirely changed. As he can claim this relief only by virtue of title derived from his own mortgagor in respect of the Mufassil property, he can do neither more nor less than what his mortgagor could have done towards the original mortgagor. The original mortgagor, as we have seen, could have been sued by his mortgagee in respect of liabilities arising out of the mortgage transaction only in the Mufassil Court. The mortgagee, by granting a mortgage to a third person, of his interest as mortgagee and by including in that document a property in Calcutta cannot be permitted to prejudice the position of his mortgagor and to render him laible to be sued in a Court never contemplated by the parties at the time of the mortgage contract. We are of opinion that this view is consistent with a plain reading of clause 12 of the Letters Patent which, so far as it is material for our present purpose, provides as follows:

"The said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or, in all other cases, if cause of action shall

(1) 29 A. 385; 4 A. L. J. 273; A. W. N. (1907) 97; 2 M. L. T. 248.
(2) 20 M. 35; 6 M. L. J. 235; 7 Ind. Dec. (N. S) 25.
(3) 15 B. 692; 8 Ind. Dec. (N. S) 468.
(4) 2 Ind. Cas. 645; 9 C. L. J. 429.
(5) 4 Ind. Cas. 433; 10 C. L. J. 470.

have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court."

In the case before us, the Khettrys, as derivative mortgagees from Banerjee, could enforce the security of the 30th August 1907 against the Mookerjees and Bhattacharyya, just as Banerjee himself might have done, in the Mufassil Court. The Khettrys might also, as the mortgagees of Banerjee, have sued him alone on the original side of this Court and barred his equity of redemption. But the Khettrys plainly could not be allowed, by the inclusion of two claims in one suit against two sets of persons in respect of properties situated, as regards one set in the Mufassil alone, make the composite suit against both sets of defendants maintainable on the original side of this Court. The decisions in *Matigara Coal Co.* v. *Shragers* (6) and *Sarat Chandra Roy* v. *Nahapiet* (7) are of no avail to the Khettrys; they merely show that where some of the mortgaged properties included in the mortgage deed are within and some without the local limits of the ordinary original civil jurisdiction of the Court, the Court has jurisdiction to grant leave to sue and to entertain a suit on the mortgage in respect of all the properties including those situated beyond the local limits. This principle might be of assistance to the Khettrys in a suit by them against Banerjee alone on the mortgage of the 13th December 1907, which included properties in the town of Calcutta as also mortgagee interest in property in the Mufassil. But there is no foundation for the argument that the suit as framed could properly be treated as one to enforce a cause of action which had arisen partly within the local limits of the ordinary original civil jurisdiction; the contention is fallacious, as the causes of action under the mortgage of the 30th August 1907 and 31st December 1907 were distinct and affected different sets of individuals, of whom one set held properties situated entirely in the Mufassil. We do not think it would be right to strain the language of clause 12 of the Letters Patent with a view to cover a case of this description. There is thus no escape from the conclusion that the Court was not competent to grant leave under that clause, and the decree, in so far as it affects properties in the Mufassil, must be deemed to have been made without jurisdiction [*cf.* the judgment of Lord Moulton in *Harendra Lal Roy* v. *Hari Dasi Debi* (8)].

As a last resort, it was faintly argued on behalf of the respondents that the objection as to jurisdiction might and should have been raised in the original suit, and as it was not so raised, the rule of constructive *res judicata* should be applied; in other words, that the parties should be placed in the same position as if the point had been raised, contested and determined in favour of the Khettrys. There is obviously no foundation for this contention. It is an elementary principle that where a Court has no jurisdiction over the subject matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties, and no waiver or acquiescence on their part can make up for the lack or defect of jurisdiction. If any authority were needed to support this proposition, reference might be made to the recent decisions in *Rajlakshmi Dasee* v. *Katyayani Dasee* (9); *Gurdeo Singh* v. *Chandrika Singh* (10) and *Ranjit Misser* v. *Ramdar Singh* (11); where the earlier cases will be found reviewed. But if the decision of the Court is void for want of jurisdiction over the subject-matter, it cannot operate as *res judicata*; in order that a judgment may be conclusive between the parties, the essential pre requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of section 11 of the Civil Procedure Code. In this case, as already stated, the question of jurisdiction was neither raised nor decided; the position might have been different if the question had been raised and decided, for

(6) 13 Ind. Cas. 429; 38 C. 824.
(7) 8 Ind. Cas. 1142; 37 C. 907 at p. 911.

(8) 23 Ind. Cas. 637; 41 I. A. 110; 41 C. 972; 19 C. L. J. 484; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 16 Bom. L. R. 400, 12 A. L. J. 774; 1 L. W. 1050 (P. C.).
(9) 12 Ind. Cas. 464; 38 C. 639.
(10) 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611.
(11) 16 Ind. Cas. 94[illegible]; 16 C. L. J. 77; 17 C. W. N. 116.

where a Court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remains a decree without jurisdiction and cannot operate as *res judicata*.

The result is that this appeal is allowed and the preliminary decree in Suit No. 1083 of 1912 passed on the 2nd September 1914, the decree absolute made on the 24th August 1917 and all subsequent orders made on the basis thereof must be set aside. The consequence will be that Suit No. 1083 of 1912 will stand revived at the stage when leave under clause 12 was granted. The Khettrys as plaintiffs in that suit will be at liberty to amend their plaint if they so desire and in such manner as they may be advised; if the suit is limited as a suit to enforce the mortgage of the 13th December 1907 against Banerjee, it will be tried on the merits. The appellant is entitled to his costs both here and in the Court below including the costs of the order made on the 7th August 1918.

FLETCHER, J.—I agree.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1328 AND 1329 OF 1918.

May 6, 1920.

Present:—Mr. Justice Das.

SURAT NARAIN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NATHUNI RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 40—Commutation of rent—Compromise by some landlords, whether binding on others.

Commutation of rent under section 40 of the Bengal Tenancy Act on the basis of a compromise between the tenants and some of the landlords is not binding on those landlords who were not parties to the compromise.

Appeal from a decision of the District Judge of Mezufferpore.

Mr. *Janak Kishore*, for the Appellants.

JUDGMENT.—The plaintiffs are the appellants. Their suit was for Nagdi and Bhaoli rents. So far as Bhaoli rent is concerned, the defence was that it had been commuted, under section 40 of the Bengal Tenancy Act, into Nagdi rent and that the plaintiffs were not entitled to recover the produce rent. The plaintiffs in answer to this plea relied upon the fact that the order under section 40, Bengal Tenancy Act, was based on a compromise to which they were not parties. The learned Judge in the Court below thinks that this objection is untenable, because in his view the Collector would be justified in commuting the rent at the rate agreed upon between the parties, though some other landlord may not be a party to that petition of compromise. He thinks that the compromise in such a case is simply an admission by some of the landlords as to what would be the proper rent. If the Collector merely acts on that admission, that act cannot be challenged by any other landlord. I am unable to agree with this conclusion. Section 40 provides that an elaborate inquiry is to be held by the officer dealing with the application for commutation. That inquiry was admittedly not held in this case. The tenants say that there was a compromise between the landlord and tenants, but then the plaintiffs were not parties to the compromise. I do not think that any compromise order is admissible in evidence against any person who is not a party to the compromise. The learned Judge says that the compromise is merely an admission by some of the landlords as to what would be the proper rent. Here again I do not agree. Some of the landlords may compromise the matter on grounds other than the ground suggested by the learned Judge. I would allow this appeal, set aside the judgment and decree of the lower Appellate Court and restore the judgment and decree of the learned Munsif. The appellants will be entitled to their costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

Civil Rule No. 410 of 1919.

December 12, 1919.

Present:—Mr. Justice Walmsley.

BHUPATI CHARAN NANDI—Defendant —Petitioner

versus

GOLAM EHIHAR CHOUDHURY of SALKA—Plaintiff—Opposite Party.

Contract Act (IX of 1872), s. 23—Surety-bond, forfeiture of—Agreement to indemnify surety, enforceability of—Public policy.

A contract to indemnify a surety against loss in the event of the surety-bond being forfeited is illegal and cannot be enforced.

Rule against the order of the Judge, Small Cause Court, Howrah, dated the 25th July 1919.

FACTS.—The plaintiff at the request of the defendant executed a bail-bond and stood surety for the appearance of the defendant's man, who was an accused in a criminal case. It was agreed between the plaintiff and the defendant that if the accused failed to appear and there was a consequent forfeiture of the bail-bond, the defendant would make good any loss that might result to the plaintiff on that account. The accused having failed to appear, the bail-bond was forfeited and a sum of Rs. 300, being the amount of the bond, was realised from the plaintiff. Thereupon, on the basis of the aforesaid agreement, the plaintiff brought a suit against the defendant for the recovery of the amount of the bond. The Small Cause Court Judge found that the allegations of the plaintiff were true and decreed the suit. The defendant moved the High Court and obtained the present Rule.

Babu *Haradhon Chatterjee*, for the Petitioner.

Babu *Narendra Nath Choudhury*, for the Opposite Party.

JUDGMENT.—This Rule must be made absolute on the authority of the case of *Prosonno Kumar Chakravarti* v. *Prokash Chandra Dutta* (1). That case followed the decision of Mr. Justice North in the case of *Consolidated Exploration and Finance Co.* v. *Musgrave* (2). The judgment and decree of the Judge of the Small Cause Court are set aside. In the circumstances of the case I make no order as to costs. If the defendant has deposited the decretal amount or any portion of it, he will be entitled to ask for a refund.

Rule made absolute.

(1) 28 Ind. Cas 560; 19 C. W. N. 329.

(2) (1900) 1 Ch. 37; 81 L. T. 747; 48 W. R. 298; 69 L. J. Ch. 11; 16 T. L. R. 13.

PRIVY COUNCIL.

Appeal from the Madras High Court.

April 26, 1920.

Present:—Lord Buckmaster, Lord Dunedin and Sir John Edge.

Sri Sri Sri RAMACHANDRA DEO GARU RAJAH of KALLIKOTA and ATTAGADA ESTATES—Appellant

versus

CHAITANA SAHU, since deceased, and others—Respondents.

Consent decree - Limitation, plea of, waiver of—Appeal, whether lies.

Where a suit is time-barred but the defence of limitation is waived and a decree is passed, such decree is a consent one, and no appeal lies therefrom. [p. 540, col. 2]

Appeal from the decree of the High Court of Madras (Sir John Wallis, C. J., and Coutts Trotter, J.), dated the 29th March 1915, which varied the decree of the Subordinate Judge, Ganjam.

FACTS.—The suit was brought to recover monies alleged to be due on a settlement of accounts. It was found by the Subordinate Judge that the account was false and fraudulent and that the claim, apart from the alleged settlement, was barred by limitation, but it having been stated on behalf of the defendant that he would pay whatever sum was rightly due, an account of the dealings between them was taken from the beginning, and judgment passed for a particular sum. On appeal the High Court (Sir John Wallis, C. J., and Coutts Trotter, J.), whilst not reversing the finding that plaintiffs' claim was barred, proceeded to re investigate the items of account and made certain further allowances in favour of the respondents.

Mr. *Dunne, K. C.* (with him Mr. *Kenworthy Brown*), for the Appellant, submitted that

apart from the fraudulent settlement of accounts the respondents' claim was barred by limitation, and the High Court ought not to have varied the decree of the trial Judge which was granted because appellant consented to it.

Mr. *Parikh*, for the Respondents, submitted that the directions given by the High Court for the drawing up of the account were right, and the amount found due on the account being taken should be allowed to stand.

JUDGMENT.

LORD BUCKMASTER.—Their Lordships think that this appeal can be dealt with in a very few sentences.

The respondents brought an action against the appellant upon an account stated and the learned Subordinate Judge, before whom the case was heard, found that the account stated was a deliberate fabrication and fraud on the respondents' part. It followed that they were compelled to rely entirely upon the items of claims contained in a general account against the appellant. On examination of that account the explanation of why the stated and settled account had been fraudulently prepared became obvious. It was because each one of the items was barred by the Statute of Limitations, the result being that when once the settled account was displaced the plaintiffs had no foothold whatever in the Courts. The defendants, however, considered that they ought not to rely upon the lapse of time to deprive the plaintiffs of the benefit of any item which they were in a position to prove and the case proceeded upon this footing. There can be no doubt that the learned Subordirate Judge before whom the case was tried thoroughly realised the position. He pointed out more than once that the plaintiffs' action must fail, and he concluded by saying that the plaintiffs only got a decree 'owing verily to the defendants' charity and not because of any legal right yet alive." The defendants having, however, consented, the learned Judge made an order for the particular sum, directed that the plaintiffs should pay the costs of the suit and disallowed interest from the plaint to the date of the decree. It might have been thought that the plaintiffs would have been satisfied with such advantage, but they appear to have appealed to the High Court and the High Court have, unfortunately, as their Lordships think, proceeded to re-investigate the items of the account and have made certain farther allowances in favour of the respondents than those which were originally allowed by the Subordinate Judge. In doing this it appears to their Lordships that the High Court misunderstood the true position of the case. In truth the original judgment was a judgment by consent and it could only have been by consent that any judgment for the plaintiffs could have been obtained at all, for, as the learned Subordinate Judge said, the plaintiffs only got any decree owing verily to the defendants' charity. If it were regarded as a consent judgment there could be no appeal; if it were not regarded as a consent judgment it then became necessary once more to examine into the conditions associated with the Limitation Act and it would have followed that the plaintiffs' action would have been dismissed with costs. The truth is that the real substance of the appeal was the question of the fraudulent and fabricated settled account, in which the High Court entirely agreed with the Subordinate Judge, and it is possible that, their attention having been diverted to that main issue, they overlooked what was the true nature and character of the judgment of the Subordinate Judge. However that may be, their Lordships have no hesitation whatever about this case. They think that the appeal ought to be allowed, the judgment of the High Court (except as to costs) reversed and the judgment of the Subordinate Judge restored. The respondents will pay the costs in both the Courts below and of this appeal.

Solicitor for the Respondents.—Mr. *Edward Dalgado*.

Solicitor for the Appellant.—*Solicitor, India Office.*

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 95 OF 1919.

February 24, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Justice Sir Ernest Fletcher, Kt.

RADHA KISSEN KHETRY—PLAINTIFF—APPELLANT

versus

LUKHMI CHAND JHAWAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration Act (IX of 1899), s. 14—Award, suit to impeach, maintainability of.

When an award has been made and filed, and has become enforceable as a decree of Court, a party affected thereby can maintain a suit to impeach it on grounds not included within the scope of section 14 of the Arbitration Act, and to investigate and determine the controversy according to the procedure prescribed by law, especially where the ground of the attack goes to the root of the matter. [p. 549, col. 1.]

Appeal against the decree of Mr. Justice Rankin, dated the 19th August 1919.

FACTS appear from the following judgment of

RANKIN, J.—By a contract in writing No. 113, dated the 2nd August 1918, the applicant agreed to buy from the respondents 16 bales of a certain kind of grey Dhoties at Rs. 56 per pair. These bales were to comprise two sorts distinguished by numbers 736 and 7036. The printed contract is headed Forward Contract but in the writing at the foot of the form are the words "shipment May, June, 1918." The contract contains a submission to arbitration which reads, so far as I am concerned with it, as follows:—"Any dispute or claim under this contract is to be settled by the Bengal Chamber of Commerce."

The goods tendered by the sellers in fulfilment of contract were rejected by the buyer on the ground that each bale did not contain Dhoties having borders of seven particular colours. There is no dispute about this fact, but the sellers say that there is no such stipulation as to particular colours in the contract of sale.

Upon this dispute an arbitration was held under the rules of the Chamber of Commerce and on 5th June 1919 an award was made against the buyer for Rs. 16,076-11-0 with certain interest and costs.

The buyer now seeks to impeach the validity of the award.

The facts upon which the buyer founds are these. He says that these particular goods are a new and not an established line of merchandise in Calcutta and that at the time of the contract they had already arrived. That the contract was made by a broker Idan Chandak, employed by the sellers to dispose of these goods and furnished by them with a shipment sample which is an exhibit in these proceedings. That sample contained a specimen of No. 736 and No. 7036 each with a coloured border. It also contains seven small cuttings each with a coloured border, which cuttings can only be intended to show the colours of the borders. Included among the seven are the same borders as are on the two specimens above mentioned. In the margin opposite to each cutting and under the heading "assortment" are figures which denote the number of pairs having each border. The figures for the seven are 56, 28, 28, 28, 28, 28, 29 which total 225, and there is a note which states that in each bale there are to be 225 pairs of No. 736 and 225 of No. 7036. On the back of the cover is a label which contains the figures 126-136.

The buyer's case is that he bought on or with reference to this shipment sample and intended to obtain the assortment of borders therein so carefully shown. He files an affidavit of the broker, stating that the sample was given to him to explain to intending buyers the assortment of borders as well as the kind of material and that at the time of the sale he told this buyer that the goods would contain the seven different borders illustrated in the sample.

The sellers' case on the merits is that the shipment sample refers in its entirety to the eleven particular bales, whose numbers 126-136 are on the back; that the contract was for 16 bales not 11; that the sale was not of individual bales by separate samples appropriate to that special lot; that this sample was provided to show the material, and that nobody in the piece-goods business could believe for a moment that the buyer did not understand perfectly well that he was not contracting for these particular bales

and could not expect to get exactly that assortment of borders. The sellers point to the contract which is in writing, and they say that it is not a sale by sample at all.

How much substance there is in the discrepancy between the borders on the goods tendered and the borders illustrated in the sample, I do not know. The buyer's chief grievance seems to be that a red border illustrated in the sample in not present, at all events in due proportion. In law the discrepancy is sufficient in any case if the buyer be otherwise in the right.

This being the general nature of the dispute, the sellers called an arbitration in March 1919. It is important to see what was the defence taken by the buyer in his case, dated 23rd May 1919, before the arbitrators. The document, which is exhibited with his affidavit, is divided into two parts: objections to the jurisdiction and defence on the merits. The objections to jurisdiction are five in number and all five are pointless and bad. The only observations which need be made about them are two, first, that they nowhere contain or even adumbrate a suggestion that there was no contract between the parties; secondly, that they do contain an allegation that the re sale on the basis of which the seller's claim for damages is computed was fraudulent. This latter charge is made without any particulars, but I now understand it to mean that the sellers did not have the goods and that the re-sale was only a pretence. The defence as to merits is that already explained; it contains a statement of an express verbal promise by the broker that the borders in each bale would be those shown by the sample, or of an admission verbally made to this effect by the broker in the presence of both parties.

On the 28th May, the buyer's Solicitor by letter to the Tribunal says this:—"My client is desirous of being represented by Counsel before the Tribunal, when it is sitting to decide on the said questions, which are highly technical, and I have no doubt that your Court will avail itself of legal assistance. If you inform me of the date fixed by the Tribunal for hearing, I will appear with Counsel and client and his evidence." The reply of the same date is this:—"With reference to your letter of the 23th May, I am directed by the Court which has been constituted to adjudicate on this dispute to say that they do not require the attendance of either of the parties with or without Counsel or legal adviser. The arbitration will be held at 3 P. M. to-morrow, Thursday, the 29th May."

On the 5th June the arbitrators found against the buyer, who now seeks to set aside the award, on grounds which, in my mind, reduce themselves to two.

The *first* line of attack is one discovered since the arbitration and produced for the benefit of this Court. It is based not indeed upon an allegation that the parties were not *ad idem* but upon an allegation that the contract was as the buyer says, and that the broker made the express verbal representation as to the borders; but that if this be wrong, contrary to the buyer's view, then the parties were not *ad idem*; then there was no submission and then the award falls with the contract.

Now if the buyer desired to impeach the contract on the grounds of fraud, misrepresentation or mistake, he could have brought his suit and had the arbitration restrained on the rule in *Kitts* v. *Moore* (1). If he did not desire to adopt this course, he could prior to the arbitration have claimed that the contract was voidable on those grounds and have elected to avoid it. This would have been a dispute which went to the existence or validity of the submission itself, and on such a dispute the arbitrators could not at all events finally adjudicate so as to bind him at all. Now so far as I know, at no time prior to the award did the buyer ever even elect to avoid the contract on these grounds or any others. He has gone before the arbitrators taking all sorts of objections, but these are on the footing that there was a contract and on the footing that the submission therein contained was valid. Their jurisdiction depended upon what the dispute was and it cannot be ousted now by the buyer seeking to dispute something else.

Having no dispute before them as to the existence of the contract or as to the validity as distinct from the scope of the

(1) (1895) 1 Q. B. 253; 64 L. J. Ch. 152; 12 R. 43; 71 L. T. 676; 43 W. R. 84.

submission, the arbitrators rightly rejected the invalid and unsubstantial pleas to their jurisdiction. If they have properly dealt with the merits, the award cannot in my judgment be impeached at all. Still less will such a case be entertained as a *pis aller*, when the facts to which the buyer swears are that both parties were agreed about what they meant, that the sellers are falsely alleging that both parties meant something different but perhaps both parties may be wrong. Such a case in my judgment calls for and admits of no investigation whatsoever, save a comparison of the buyer's case before the arbitrators with the contentions which he raises now. His statements may be true or false about the merits; they matter nothing for this purpose.

The *second* line of attack is that the award should be set aside under section 14 of the Indian Arbitration Act. On this there are two matters for consideration. First, the allegation that the re-sale on the 25th February 1919 was fraudulent or only colorable on the sellers' part and that the award has, therefore, been improperly procured. Secondly, the fact that the arbitrators did not allow oral evidence and did not permit the buyer to attend by Attorney and Counsel.

The alleged fraudulent re-sale is mentioned in the buyer's case before the arbitrators as an objection to their jurisdiction. What the buyer states as to the facts in his affidavit on this motion is wild hearsay from unnamed sources and is not evidence at all. The one element of fact is that the goods were with the Hongkong and Shanghai Bank, and this circumstance which is not in the least degree suspicious is fully explained by the sellers. It is manifest that the buyer has not now and never has had a tittle of evidence to support his charge. On the measure of damages it does not matter whether the sellers re-sold the Dhoties, wore them, or lost them: unless the alleged figure of re sale was below what the goods should have fetched at the date of the breach, the arbitrators who are experts on such questions would be quite entitled to award the full amount of the sellers' claims. This allegation of fraud was introduced, as the buyer's case shows, for another object altogether, namely, under an erroneous notion that the mere allegation of fraud would oust the arbitrators' jurisdiction and defeat the arbitration clause. If I am now asked to re try the issue on the question whether the award has been improperly procured, I hold that there is no evidence worthy of attention to sustain the charge.

This second use of the allegation failing, learned Counsel for the buyer explained to me a third. He said that he was not so much relying upon having proved in this way that the award was procured by fraud as contending that this part of the buyer's case made it particularly easy to regard as misconduct the arbitrators' refusal to hear oral evidence. Whether this is a more reasonable proposition, I shall consider later.

I pass to the complaint which arises out of the letters of the 23th May exchanged between buyer's Solicitors and the Tribunal.

In the first place the buyer's complaint that he was not allowed to appear by Counsel or Attorney may be dismissed. The matter is clearly covered by Rule XIV of the Chamber of Commerce Rules, which are really part of the arbitration clause in the contract. Assuming that this rule does not deprive the buyer of the right to the proper exercise of a discretion by the arbitrators and that this may be called in question under section 14 of the Arbitration Act, I should require very plain and solid reasons before finding misconduct upon such a matter. These arbitrations exist largely to obviate protracted and expensive litigation and if this be one of the sacred rights of man, this buyer has contracted out of it.

The refusal, after demand made, to hear oral evidence at all is a more difficult and important matter and the buyer's written case must be looked at carefully and as a whole.

The arbitrators' first duty was to examine this. It is not, and is not required to be, a formal pleading and in it the buyer could and did indicate both the facts relied upon and the nature of his evidence. It cannot be that arbitrators are guilty of misconduct in not entertaining any case which is not fairly and clearly raised. I have, therefore, to put

aside altogether any question of there having been no contract, or of the contract having been voidable and having been avoided by election of the buyer. This being so, the fundamental thing for the arbtirators was the fact that this contract was in writing. Apart altogether from the 13th clause, the ordinary rule that it could not be varied or added to by oral evidence was the most plain stepping stone to a decision. The writing says nothing about a sample. It is a sale by description. "Upon a sale of goods described in a written contract, evidence that a sample was exhibited at the time of the sale is not admissible for the purpose of showing either that the seller was entitled to deliver goods according to the sample but not answering to the description or that the buyer was entitled to refuse goods answering to the description because not corresponding to the sample." Leake on Contracts, 6th Edition, page 120; Evidence Act, section 92; *Tye* v. *Fynmore* (2), *Meyer* v. *Everth* (3), *Syers* v. *Jonas* (4) and *Harnor* v. *Groves* (5).

Now on the buyer's case this simple consideration was in my judgment sufficient to decide the only issue raised. If the statements of the broker are to be treated as a verbal warranty, they could only be put in evidence on the footing that they did not add to or vary the contract but were a purely collateral matter. The arbitrators' duty in face of the buyer's case was, simply to hold, first that it was not a collateral matter, and, secondly, that if it was, it had nothing to do with them. Their duty was to decide disputes under the contract and only these. If again the statements of the broker are tendered under the contract as evidence to enable the arbitrators to apply the contract to its proper subject-matter, "Grey Jaconet Dhooties No. 736 (16 *into* 14) and 7036 (17 *into* 15) 39 *into* 2 9 yards 7/16 col," the arbitrators were quite right to ignore such evidence. No one even now contends that the numbers 736 or 7036 import a particular assortment of borders or that such an assortment is conveyed by the words "7/16 col." or that the 16 bales contracted for were the specific bales 126-136 which are eleven only.

No doubt it is still possible for the buyer, if allowed to invent a new case to, suggest a custom in the piece goods trade by which all sales are sales by sample even when reduced into writing so as not to express this term. Such a case was not raised before the arbitrators and if it had been, I think that it is just the sort of point which these arbitrators could validly decide by their own knowledge.

The truth is that the buyer's case was put forward as a case of sale by sample and the arbitrators were bound in law to rule against him on this point.

The whole of the six paragraphs which form the buyer's case upon the merits—they form the buyer's whole case apart from his futile pleas to jurisdiction—are governed and introduced by words which show this plainly (without waiving..... reasons given below). There is not anywhere in the whole case—not in the 5th plea to jurisdiction, for example—a trace of a suggestion that sellers were not able and ready to deliver, apart from the question about assortment of borders.

The evidence proffered is described in paragraph 3 "as evidence of himself and the said Babu Idan to prove that the sale was by the said sample and that it was specifically agreed that goods of 7 different borders in a bale according to the said sample would be supplied."

So far as regards the alleged fraud as to the re-sale, it is clear from the buyer's case that he was not proposing to prove the fraud before the arbitrators at all. He says that it can only be proved before the High Court. He says that he "has recently come to know" giving no indication of the source. The charge of fraud is itself so bald and empty that any tribunal would be well entitled to ignore it: *Wallingford* v. *Mutual Society* (6).

It is put forward as an allegation which merely as an allegation ought to oust the arbitrators, from the case and beyond the function it has and professes to have no other point, sense or purpose.

(2) (1813) 3 Camp. 462; 14 R. R. 809.
(3) (1814) 4 Camp. 22; 15 R. R. 722.
(4) (1848) 2 Exch. 111; 76 R. R. 515.
(5) (1855) 24 L. J. C. P. 53 at p. 56; 15 C. B. 667; 3 C. L. R. 406; 3 W. R. 168; 24 L. T. (o. s.) 215; 100 R. R. 535; 139 E. R. 597.

(6) (1880) 5 A. C 685 at p. 697; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

In these circumstances I have to enquire whether the arbitrators have exceeded their rights under Rule XIII of the Chamber of Commerce Rules. I think they have not. The intention is first that the parties' contentions shall be put in writing; that thereupon the arbitrators shall have jurisdiction to decide whether a formal hearing is necessary. If oral evidence beyond the mere proof of documents of which the factum is not disputed is on the face of the written cases relevant and admissible, I think that upon these rules a refusal to hear such evidence would be very difficult to support, except perhaps upon such questions as market values, as to which the arbitrators may themselves be entitled to act on their own expert knowledge or (under Rule XVII) that of others. I think, however, this case fails to satisfy the condition which I have stated. The letter of 28th May to the Tribunal must be read with reference to the buyer's case and is an offer of irrelevant and inadmissible evidence only, coupled with argument of Counsel. The reply is in terms of Rule XIV and the arbitrators' conduct is in my judgment within Rule XIII as to procedure. I think they were entitled to proceed without a formal hearing and that an award in favour of the sellers was the only possible decision. If the allegation of fraud as to the re-sale had been seriously stated and not *mera palpatio* and if it had been mooted upon the question of the amount of damage, I should at least have remitted the award to the arbitrators to make sure that they had not assessed the damages on the strength of the alleged re-sale, as distinct from merely limiting the figure by the amount admitted to have been received upon re sale. It would be utterly wrong, however, to do so in the absence of these conditions and I see no reason to think that this assessment of damage was not right.

If it was desired to have it set aside either as a nullity by reason of its not being within the scope of a valid submission or under section 14 of the Indian Arbitration Act, the proper course under the rules was to apply by petition to have it taken off the file or to have it set aside. Instead, the buyer commenced a suit on 16th June and brought on a motion for an interlocutory injunction. I will not here repeat what in previous cases I have said about this particular abuse. It is defended sometimes when the submission is attacked, on the ground that the application is not within section 14 or any other section of the Act. This is no valid reason. The award here was filed under the Act before action brought, and became enforceable in execution under the Act as though it were a decree. If it is to be taken off the file as a nullity, the application should be made under the Act which has been abused. In England awards, save by leave obtained on summons, are not enforceable except by an action. It is not usual or necessary, therefore, to apply to set aside an award on the ground of want of jurisdiction in the arbitrators. The old English cases, however, show that this was done where a step could be taken to enforce the award and the interference of the Court was necessary: Russell, 9th Edition, page 369: *Doe d Turnbull* v. *Brown* (7), *Worral* v. *Deane* (8). This under the Indian Arbitration Act is always the position and all applications to set aside an award which has been filed should be made by petition, whatever be the ground.

At the hearing of the motion I declined to entertain it except on the basis that it be treated both as the trial of the action and as a petition under the Indian Arbitration Act. To this Counsel on both sides consented. I pointed out that if any oral evidence became necessary in these cases, it is open to the Court on petition and either by first directing an issue or otherwise to take such oral evidence. Also that it is not by any means intended that such matters should be disposed of without full consideration. What is intended is that they should be disposed of finally with promptness; without unnecessary vexation, delay or expense; and in a proceeding in which the power to remit an award can, if necessary, be properly exercised.

I see no reason in this case to exercise the power of taking oral evidence and I dismiss the motion and the action with costs.

Messrs. *B. Chakravarty* and *A. K. Ghose*, for the Appellant.

(7) (1826) 5 B. & C. 384; 29 R. R. 275; 108 E. R. 143; 8 Dowl. & Ry. 100.

(8) (1833) 2 Dowl. 261.

RADHA KISSEN KHETRY v. LUKHMI CHAND JHAWAR.

Messrs. *S. M. Bose* and *Langford James*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit for declaration that a contract for sale of piece-goods, alleged to have been made between him and the defendants on the 2nd August 1918, was invalid, and that an award made by the arbitration tribunal of the Bengal Chamber of Commerce in their favour on the 5th June 1919 for damages for breach of the said contract was equally void and inoperative. The plaintiff also prayed for a perpetual injunction to restrain the defendants from enforcing the award. The suit was instituted on the 16th June 1919. On the 20th June, the plaintiff applied for an interlocutory injunction during the pendency of the suit and an *ad interim* injunction during the pendency of the Rule on the application. A Rule was issued and an *ad interim* injunction was granted on terms as to security. The Rule for interlocutory injunction was heard on the 25th July 1919. Mr. Justice Rankin, as appears from his judgment, declined to entertain the hearing of the motion except on the basis that it be treated both as the trial of the action and as a petition under the Indian Arbitration Act." He further thought that Counsel on both sides consented to this, and thereafter heard the matter on the affidavits, as he saw no reason to exercise the power of taking oral evidence. On the 19th August, judgment which had been reserved was delivered, whereby the motion and the action were dismissed with costs. The plaintiff has now appealed against this judgment. We have not been invited to consider the propriety of the order in so far as it dismissed the application for interlocutory injunction during the pendency of the suit. The plaintiff has, it was stated, brought into Court the money due on the award and no longer desired an *ad interim* order. The substantial question argued in the appeal is, whether the suit has been properly tried without oral evidence, as if the plaint were a petition under the Indian Arbitration Act.

We have at the outset to consider whether the procedure adopted in the Court below was followed with the consent of Counsel on both sides, for, as Lord Hardwicke held in *Bradish* v. *Gee* (9), it is well settled that a judgment obtained by consent of Counsel acting in Court, in a matter within their authority, cannot form the subject of an appeal. To determine this question, we shall refer to the Minute Book where we find the following entry:

"Friday, the 25th July, 1919.
Before the Hon'ble Mr. Justice Rankin.
Radha Kissen Khettry
v.
Lukhmi Chand Jhawar.

Mr. *James*, for the Defendant.

Mr. *A. K. Ghose*, for the Plaintiff appears with Mr. *Chukerbutty*.

Mr. James—I consent that this motion should be treated as petition under the Arbitration Act.

Mr. Ghose—I have no objection, but to prove fraud Your Lordship will have to hear oral evidence.

Mr. James—Let Mr. Chukerbutty open the motion.

Mr. Chukerbutty opens.

Mr. James reads his affidavits.

Mr. Chukerbutty replies.

Midday Adjournment

Mr. Chukerbutty addresses the Court and refers to cases *Sardarmull Jessraj* v. *Agarchand Mahata & Co* (10), *Gajanand* v. *Shaik Taleb Jalaluddin* (11), *Hurdwary Mull* v. *Ahmed Musoji* (12).

Mr. James addresses the Court on the Rules of Bengal Chamber of Commerce.

The Court—I reserve judgment."

The only matter for consideration before the Court on the 25th July 1919 was, as already stated, the application by the plaintiff for an interlocutory injunction. Mr. Langford James, who appeared on behalf of the defendants, gave his consent that the motion should be treated as petition under the Arbitration Act. Mr. Ghose, who appeared for the plaintiff, did not give his unqualified consent, for while he stated that he had no objection, he expressly added that to prove fraud the Court would have to hear oral evidence. The

(9) (1754) 1 Keny. 73 at p. 76; Ambl. 229; 96 E. R. 920.
(10) 52 Ind. Cas. 588; 23 C. W. N. 811.
(11) 46 Ind. Cas. 173; 22 C. W. N. 535.
(12) 1 Ind. Cas. 371; 18 C. W. N. 68.

case was then opened, the affidavits were read and reference was made to the decisions in *Hurdwary Null* v. *Ahmed Musaji* (12), *Gajanand* v. *Shaik Taleb Jalaluddin* (11) and *Sardarmull Jessraj* v. *Agarchand Mahata & Co.* (10). After the addresses of the Counsel, judgment was reserved. Judgment was delivered, twenty-five days later, on the 19th August. The entries in the Minute Book do not support the statement in the judgment that Counsel on both sides had consented that the hearing of the motion should be treated both as the trial of the action and as a petition under the Indian Arbitration Act. We cannot, in these circumstances, hold that the procedure followed was adopted by consent of Counsel on both sides.

But it is material to add that even if the Minute Book had shown the factum of consent, it could not be treated as consent freely given by Counsel in the exercise of his discretion as an Advocate invested with a general control over the conduct of the case of his client. The learned Judge states in his judgment that the consent (which he thought was given) was accorded only when he intimated that he would otherwise decline to entertain the motion. If Counsel had consented, after the expression of such determination by the Court, the consent could not be deemed free and fair, and might well be regarded as constrained and involuntary acquiescence in a mode of trial which the Court had decided to adopt. The respondents have argued that, even in such circumstances, the Counsel should not yield, but let the Judge dismiss the case and then appeal with a view to obtain a reversal of his order. It may be conceded that this is a possible course for Counsel to adopt. But it is important to observe that whichever course were followed, the ultimate result would make no difference to the respondents. Assuming that Counsel had as a matter of fact consented, if we were to set aside the order on the ground that there had been no free consent, the suit would stand restored. If, on the other hand, the suit were dismissed because Counsel did not agree to adopt the course indicated by the Court, the reversal of the order of dismissal by the Court of Appeal would also result in the revival of the suit. But we need not elaborate this aspect of the matter further, because, as the Minute Book shows that Counsel on behalf of the plaintiff did not consent to the course adopted by the learned Judge, his decree must be set aside, provided it is established that the plaintiff was entitled to have the action tried, not merely upon affidavits but also upon oral evidence. This question must consequently be now investigated.

The plaintiff buyer seeks to set aside the award of the arbitrators on the ground that there was no valid contract between the parties and also imputes fraud to the defendants, inasmuch as they have claimed damages for refusal to accept goods which they never offered and were indeed not in a position to deliver. The case for the defendants sellers is that there was a valid contract made on the 2nd August 1918 for the sale of 16 bales of grey Dhotis, that they delivered the goods according to the contract on the 24th September, that the plaintiff buyer wrongfully refused to accept the goods and then cancelled the contract on the 17th October. They thereupon gave notice on the 22nd February of their intention to re-sell and actually re-sold the goods three days later. They next applied to the Chamber of Commerce on the 7th March for arbitration and notice was served upon the buyer on the 11th March. The buyer, on the 23rd May, repudiated the authority of the Arbitration Tribunal to deal with the matter, but, under protest, submitted to them his own version of the affair. The buyer also applied to the Tribunal for leave to appear by Counsel and to tender oral evidence in support of his case. This request, however, was refused, and an award was made against him on the 5th June. The award was forthwith filed in Court and the buyer instituted the present suit on the 16th June. As regards the alleged contract, the buyer and the sellers are disagreed upon a fundamental point. The case for the buyer is that the sale was with reference to the shipment sample and was intended to include the assortment of borders therein carefully shown. The case for the sellers is that the sample was provided only to show the material, and the buyer could not expect to get

exactly that assortment of borders. In these circumstances, the plaintiff urges that the parties were not *ad idem*, and there was no valid contract between them in fact and in law. The plaintiff further urges that the defendant was not ready to deliver goods according to sample and that the claim for assessment of damages on the basis of a pretended re-sale was fraudulent. It cannot be seriously maintained for a moment that a suit is not maintainable for the determination of this controversy between the parties. Section 9 of the Code of civil Procedure provides that the Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. This is unquestionably a suit of a civil nature, and we have not been able to discover how its cognizance is barred expressly or impliedly. There is no provision in the Indian Arbitration Act which bars this suit. Section 14 empowers the Court to set aside an award where an arbitrator or umpire has misconducted himself or an arbitration award has been improperly procured. Assume for a moment that this authority of the Court may be invoked by way of an application; still the question may arise, whether such remedy is exclusive, or, whether the party affected may not, at his choice, have recourse to a suit as the more preferable course. We need not decide that question, because, in the case before us, the grievance alleged is deeper and broader than what is contemplated by section 14. But it may be observed parenthetically that if the view is taken that where the grounds of attack are completely covered by section 14, an application is the exclusive and not merely an alternative remedy, the adjudication by a Court other than a Chartered High Court will be final and not liable to be challenged by way of appeal, as the Indian Arbitration Act contains no provision for an appeal: *Ripley* v. *Nahapiet* (13). But we need not examine that aspect of the matter further, for here the buyer disputes the very existence of the contract and adds that the claim of the sellers to recover damages is tainted by fraud. This is plainly a matter for investigation in a suit. The learned Judge has taken the contrary view for reasons set out in the following passage of his judgment:

"This award was filed in Court on the 13th June 1919. If it was desired to have it set aside either as a nullity by reason of its not being within the scope of a valid submission or under section 14 of the Indian Arbitration Act, the proper course under the rules was to apply by petition to have it taken off the file or to have it set aside. Instead, the buyer commenced a suit on 16th June and brought on a motion for an interlocutory injunction. I will not here repeat what in previous cases I have said about this particular abuse. It is defended sometimes when the submission is attacked, on the ground that the application is not within section 14 or any other section of the Act. This is no valid reason. The award here was filed under the Act before action brought and became enforceable in execution under the Act as though it were a decree. If it is to be taken off the file as a nullity, the application should be made under the Act which has been abused. In England, awards, save by leave obtained on summons, are not enforceable except by an action. It is not usual or necessary, therefore, to apply to set aside an award on the ground of want of jurisdiction in the arbitrators. The old English cases, however, show that this was done where a step could be taken to enforce the award and the interference of the Court was necessary; Russell, 9th Edition, page 369; *Doe d Turnbull* v. *Brown* (7), *Worral* v. *Deane* (8). This, under the Indian Arbitration Act, is always the position and all applications to set aside an award which has been filed should be made by petition, whatever be the ground."

We are not prepared to adopt this as a correct exposition of the law and to hold that an award which has been filed can be set aside only by application, whatever the ground on which it is impeached. Indeed, the learned Counsel for the respondents has made no attempt to support the proposition. There is no trace in the Indian Arbitration Act of any provision indicating that the Legislature intended to prescribe such a restrictive rule and to

(13) 17 Ind. Cas 902; 6 L. B. R. 88; 5 Bur. L. T. 155.

take away the right of suit. The learned Judge refers to his observations in previous cases; our attention has been drawn to only one such, namely, *Sardarmull Jessrai* v. *Agarchand Mahata & Co.* (10). There, the question primarily under consideration related to the grant of interlocutory injunctions to restrain arbitration proceedings commenced on the basis of a contract which was either denied or impeached on equitable grounds. The earlier decisions reviewed in that judgment do not justify the inference that when an award has been made and filed and has consequently become enforceable as a decree of Court, a party affected thereby cannot maintain a suit to impeach it on grounds not included within the scope of section 14 of the Indian Arbitration Act, for example, such grounds as that the contract was never made or is not enforceable by reason of fraud, mistake or surprise. Nor do the cases of *Doe d Turnbull* v. *Brown* (7) and *Worrall* v. *Deane* (8) lead to that conclusion. Besides, we should not interpret our statutory law, when it provides for a specific procedure, by reference to decisions pronounced under a different system of procedure. We need not decide whether a suit does or does not lie to set aside an award on grounds covered by section 14, which contemplates two classes of cases, namely, first, where there has been legal misconduct on the part of the arbitrator or umpire, and, secondly, where there has been impropriety on the part of the litigant in the procuring of the award, both relating plainly to events between the commencement and termination of the arbitratior proceedings. But where the ground of attack goes to the root of the matter and arises as it were before the constitution of the domestic forum, a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by law. The case before us clearly falls within this category.

The result is that this appeal is allowed and the suit remanded for trial. The appellant will have the costs in this Court; all the costs in the Court below mentioned in the decree and order of the 19th August 1919 will be costs in the suit.

FLETCHER, J.—I agree.

Appeal allowed;
Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 13 OF 1919 20.
March 8, 1920.

Present:—Mr. Hopkins, S. M., and Mr. Harrison, J. M.

CHANDAN SINGH AND OTHERS—APPELLANTS

versus

BHORA LAL AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 58—Ejectment suit—Proprietary title, question of—Appeal, forum of.

In an ejectment suit in which the defendant pleads that he is not holding the land as tenant of the plaintiff but as his own *khudkasht* without liability to pay rent to anybody, a question of proprietary title is raised and an appeal lies to the District Judge, and not to the Commissioner.

Second appeal from the order of the Commissioner, Agra Division, dated the 8th October 1919, in the case of ejectment.

JUDGMENT.

HARRISON, J. M.—(*Feburary* 19, 1920.)—This is a second appeal in a case in which on being sued for ejectment, the defendants-respondents set up the case that they were not holding the land in suit as tenants of the plaintiffs but as their own *khudkasht* without liability to pay rent to any one. The question whether the appeal lay to the Commissioner at all was raised in first appeal before the Commissioner, but he, relying on a High Court decision, *Udit Tewari* v. *Bihari Pande* (1), held that no question of proprietary title had actually been raised in this suit. Apparently, the later Full Bench ruling of the High Court in *Bindeshwari Pande* v. *Gokul* (2) was not brought to his notice. This ruling deliberately overruld that on which the Commissioner relied, and it is desirable to have a settled practice. I would follow a later ruling, as indeed the Board has already determined to do in Selected Decision No. 14 of 1914 [*Maharaja of Benares* v. *Babu Vijai Narain Singh* (3)]. I would, therefore, set aside the Commissioner's decree as having been passed without jurisdiction and would direct him to return the memorandum of appeal of his Court for presentation to the District Judge. In the circumstances I think the parties may fairly bear their own costs in both Appellate Courts. My decision on this case is also supported by

(1) 21 Ind. Cas. 460; 35 A. 521; 11 A. L. J. 812.
(2) 22 Ind. Cas. 964; 12 A. L. J. 251; 36 A. 183.
(3) Sel. Dec. No. 14 of 1914.

a recent decision of the Board which will shortly be published as Selected Decision No. 18 of 1919.

HOPKINS, S. M.—I agree.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 182 OF 1918.

March 26, 1920.

Present:—Mr. Kotval, A. J. C.

GOVIND—DEFENDANT—APPELLANT

versus

DHEKLU—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870, s 7 iv) (c)—Suit for declaration that decree is void, nature of—Prayer for setting aside decree—Court-fee payable.

A suit for a declaration that a decree is null and void and for setting it aside is one both for a declaration and for consequential relief and is governed by clause (*iv*) (*c*) of section 7 of the Court Fees Act. [p. 551, col 1]

Appeal against the decree of the District Judge, Nagpur, in Civil Appeal No. 143 of 1917, decided on the 4th January 1918.

Messrs. *M. B. Kinkhede* and *M. D. Khandekar*, for the Appellant.

Messrs. *M. V. Joshi* and *V. D. Kale*, for the Respondent.

JUDGMENT.—This is an appeal from an order rejecting a plaint under clause (*c*), rule 11, Order VII, First Schedule, Civil Procedure Code.

The relief claimed in paragraph 15 of the plaint is "that the decree absolute obtained by defendant No. 1 on 25th April 1916 be set aside on the ground of fraud and declared null and void against the plaintiff."

The plaint is written upon a ten rupee stamp paper. The defendants raised a prelimimary objection to the sufficiency of the stamp. The lower Court held that the suit is governed by clause (*iv*) (*c*), section 7 of the Court Fees Act, and directed *ad valorem* Court-fees to be paid on the value set upon the claim by the plaintiff for purposes of jurisdiction. The plaintiff failed to supply the requisite stamp and the plaint was in consequence rejected.

It is urged that the suit is governed by clause (*iii*), Article 17, Schedule II, Court Fees Act, which refers to a plaint in a suit "to obtain a declaratory decree where no consequential relief is prayed." The question for decision is whether the decree sought to be obtained is purely a declaratory one or whether consequential relief is also asked or involved in the suit.

The cases relied on by the appellant are *Karam Khan* v. *Daryai Singh* (1), *Shrimant Sagajirao* v. *S. Smith* (2) and *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (3). In *Zinnatunnessa Khatun* v. *Girindra Nath Mukerjee* (3) and *Shrimant Sagajirao* v. *S. Smith* (2) there was not as a matter of fact any prayer for setting aside the decree. The head note in the latter case appears to be incorrect. It appears from the judgment at page 741 that the only prayer was that the decree may be declared null and void. At page 742 it is observed:—

"The suit is analogous to one under section 39 of the Specific Relief Act (I of 1877), merely to have the decree adjudged void, leaving it to the Subordinate Judge to do what he likes with his decree if he so adjudges it void."

In the present case the decree is sought to be set aside so that nothing will be left to be done by the Court passing it. In *Karam Khan* v. *Daryai Singh* (1) a suit for the cancellation of a mortgage-deed was held to be in the nature of a simple declaratory suit. This case has been dissented from in *Samiya Mavali* v. *Minammal* (4) and *Parvatibai* v. *Vishvanath* (5). In the case last mentioned a prayer for an order to have a sale deed cancelled was held to be a prayer for a relief as distinguished from a mere declaration which is not a relief. In the present case both a declaration and a relief are sought: declaration that the decree is null and void and relief that the decree be set aside. In *Deokali Koer* v. *Kedar Nath* (6) it was held that a suit to set aside a decree is not a suit for a declaration within the

(1) 5 A. 331; A. W. N. (1883) 55; 3 Ind. Dec. (N. S.) 317.
(2) 20 B. 736; 10 Ind. Dec. (N. S.) 1061.
(3) 30 C. 788.
(4) 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744.
(5) 29 B. 207; 6 Bom. L. R. 1125.
(6) 15 Ind. Cas. 427; 39 C. 704; 16 C. W. N. 838.

meaning of section 42 of the Specific Relief Act for which alone a Court-fee of Rs. 10 is sufficient. In *Arunachalam Chetty* v. *Rangasamy Pillai* (7) it was held by a Full Bench that a suit for a declaration that a decree passed against the plaintiff is not binding on him is, although it asks for a mere declaration, nonetheless a suit for a declaratory decree with consequential relief within the meaning of clause (*iv*) (*c*) of section 7, Court Fees Act.

We are of opinion that a prayer to set aside a decree is not of a declaratory nature and that the present suit is one for both a declaration and consequential relief and is governed by clause (*iv*) (*c*) of section 7, Court Fees Act. *Ad valorem* Court-fees should, therefore, have been paid. The plaint was rightly rejected. This appeal is dismissed with costs. Pleader's fee Rs. 30.

Appeal dismissed.

(7) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154.

CALCUTTA HIGH COURT.
CIVIL RULE No. 497 OF 1919.
January 28, 1920.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.
ABDUL SHEIKH—DEFENDANT—PETITIONER
versus
MAHAMAD AYAB—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Review, application for, unaccompanied by deposit—Application filed on last day of limitation—Time, extension of, for making deposit, legality of—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 161.

An application for review of the judgment of a Small Cause Court can be entertained only if the applicant complies with the provisions of section 17 of the Provincial Small Cause Courts Act.

Where an application for review unaccompanied by the deposit, or security for the same, was presented on the last day of the period prescribed for making such application and the Court accepted the application and granted time for making the deposit:

Held, that the application was not made in a proper manner and as the order granting time for making the deposit was passed after the period for presenting the application had expired, the application was not entertainable. [p. 552, col. 1]

Babu *Urukram Dass Chakravarty*, for the Petitioner.

Babu *Hemendra Nath Sen*, for the Opposite Party.

JUDGMENT.

SANDERSON, C. J.—This is a Rule which was obtained by the defendant in a suit which was brought in the Small Cause Court of the Subordinate Judge at Berhampore.

The suit was brought by the plaintiff for Rs. 125 and at the first hearing the suit was dismissed, and I assume it was dismissed with costs. Thereafter, the plaintiff made an application for review of judgment. The ground of the application was that he had discovered new evidence which he could not have discovered before by the exercise of due diligence. The learned Judge entertained the application for review, and eventually gave judgment for the plaintiff.

This Rule had been supported on the ground that the plaintiff did not comply with the provisions of section 17 of the Provincial Small Cause Courts Act of 1887. It is clear that under the provisions of Article 161 of the Limitation Act of 1908, the period within which an application for review of a judgment given by a Provincial Court of Small Causes must be made is fifteen days from the date of the decree or order. It appears from the learned Judge's judgment that the application was made on the last day of the fifteen days, allowing the plaintiff one day for taking a copy of the judgment. It is provided by section 17 of the Provincial Small Cause Courts Act that "an applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct." The plaintiff did not comply with the provisions of section 17 but on the following day the Court, I assume upon the application of the plaintiff, made an order that the amount of costs should be deposited within four days. The

amount of costs was not so deposited, and a further order was made on the 2nd of July granting the plaintiff five more days, and eventually the amount of costs was deposited on the 5th of July 1919. The learned Judge has said that in his opinion section 5 of the Limitation Act applies to this, case and applying section 5 he has extended the period for making the application for review up to the 5th of July, the date upon which the amount of costs was deposited. I think it is doubtful whether section 5 of the Limitation Act applies to this case at all, because it seems to me that the application for review was made within time, and consequently it may be urged that section 5 does not apply at all. But assuming for the sake of argument that section 5 does apply, then it is incumbent upon the plaintiff to show that he had sufficient cause for not making the application within the time specified. I fail to understand on what ground it can be said that the plaintiff has sufficient cause for not making his application not only within the proper time but in the proper manner by depositing the amount of costs or giving security for the same at the time of making the application. The learned Judge seems to have thought that the plaintiff may have been misled by the orders of the Court. So far as I understand the dates, there was no order of the Court made until after the period within which the application should have been made and in a proper manner in accordance with the provisions of section 17 of the Provincial Small Cause Courts Act.

For these reasons in my judgment the Rule should be made absolute, and the order granting a review of judgment should be set aside and the application for review dismissed. The defendant must have the costs of this Rule, hearing fee one gold *mohur*, and also the costs of the application for review.

WALMSLEY, J.—I agree.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 359 AND 1729 OF 1918.

October 21, 1919.

Present :—Mr. Justice Spencer and Mr. Justice Krishnan.

SINGARAJU VENKATASUBBARAMANIAM AND OTHERS—DEFENDANTS—APPELLANTS IN S. A. No. 359 OF 1918
ALLADI SREERAMULU AND ANOTHER—DEFENDANTS—APPELLANTS IN S. A. No. 1789 OF 1918

versus

Unde Rajah Raje Sri Raja VELUGOTI GOVINDA KRISHNA YACHENDRALAVARU BAHADUR RAJAH OF VENKATAGIRI AND OTHERS—PLAINTIFFS—RESPONDENTS IN BOTH.

Landlord and tenant—Agraharamdars, *liability of, to pay* jodi *to* zemindar—*Madras Estates Land Act (I of 1908), ss.* 3 (11), 61—Jodi, *whether rent*—*Interest by way of damages, award of*—*Pleadings*—*Defence setting up new case, whether can be advanced in appeal.*

Where a village is held by *agraharamdars*, they are jointly and severally liable to the *zemindar* for the whole of the *jodi* due on the entire village; the fact that they have split up the village into separate holdings will not relieve them of this liability, because any arrangement among themselves to enjoy the land in shares and pay the *jodi* proportionately is not binding on the landlord, unless he consents to it. [p. 555, col. 2.]

A defence not raised in the lower Court and which sets up a new case, cannot be advanced in a Court of Appeal. [p. 554, col. 2; p. 556, col. 1.]

Jodi is not rent as defined in section 3 (11) of the Madras Estates Land and interest thereon cannot be claimed under section 61 of the Act. [p 554, col. 2.]

In a proper case interest may be awarded by way of damages, even though it is not claimable under the Interest Act. Mere non-payment on the due date, however, is not sufficient to justify such an award. [p. 555, col. 1; p. 556, cols. 1 & 2.]

IN S. A. No. 359 OF 1918.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, in Appeal Suit No. 56 of 1916 (Appeal Suit No. 297 of 1914, District Court), preferred against the decree of the Court of the Additional District Munsif, Nellore, in Original Suit No. 8 of 1913 (Original Suit No. 74 of 1912, Principal District Munsif's Court, Nellore).

IN S. A. No. 1789 OF 1918.

Second appeal against the decree of the District Court, Nellore, in Appeal Suit No. 247 of 1917, preferred against the decree of the Court of the Temporary Subordinate Judge,

Nellore, in Original Suit No. 37 of 1916.

FACTS appear from the judgment.

Mr. *T. R Vencatarama Sastry* (with him Mr. *M. Patanjali Sastry*), for the Appellants. —All the Agraharamdars are not jointly and severally liable for the Jodi. There is no custom proved in support of such a claim.

There was an arrangement among the Agraharamdars whereby each of them was paying his proportionate share. That was recognised by the Zemindar for a long lime. He cannot now be allowed to recede from that position. The decisions laying down that the liability to pay Jodi is joint and several were based on the then prevalent view that Jodi was a charge on the land. It is now settled that Jodi is not a charge on the land in favour of the Zemindar in the absence of contract or custom, and consistently with the present state of the law, there is no reason for holding that the liability attaches to all Agraharam tenants as joint and several.

As the present Agraharamdars had purchased lands in the village, their liability arises only from privity of estate and they are liable only for the share rateably chargeable on their lands. See *Kamala Nayak* v. *Ranga Rau* (1), *Kunhi Sou* v. *Mulloli Chathu* (2).

The Zemindar's claim for interest is not sustainable. There is no custom proved to enforce the payment. It does not arise under the Estates Land Act as the relationship between Zemindar and Agraharamdar is not that of landlord and tenant. The Interest Act will not apply as no written demand was made. And there are no special equities in favour of the award in the form of damages. Non-payment on the due date will not be a ground for an equitable claim.

Messrs. *S. Subramanya Aiyar* and *S. Ramachendra Aiyar*, for the Respondents.—The liability of the Agraharamdars to pay Jodi has always been treated as joint and several. See *Zamindar of Ramnad* v. *Ramamany Ammal* (3), *Ramayya* v. *Subbarayudu* (4), *Subhanadri Appa Rao* v. *Gopalkrishnamma* (5).

(1) 1 M. H. C. R. 24.

(2) 17 Ind. Cas. 933; 38 M. 86; 23 M. L. J. 695; 12 M. L. T. 605.

(3) 2 M. 234; 4 Ind. Jur. 442; 1 Ind. Dec. (N. S.) 435.

(4) 13 M. 25; 4 Ind. Dec. (N. S.) 728.

(5) 16 M. 34; 5 Ind. Dec. (N. S.) 731.

The finding of fact which cannot be disturbed in second appeal is that the liability is joint.

The arrangement among the Agraharamdars themselves to pay the Jodi in a particular manner will not create an estoppel against the Zemindar. It is not shown that the Zamindar did not receive the payments on account or that he gave up his right to proceed against them all jointly. The Jodi was fixed at a particular figure for the whole village. See *Subhanadri Appa Rao* v. *Gopalkrishnamma* (5) and *Zamindar of Ramnad* v. *Ramamany Ammal* (3). Unless facts constituting an estoppel are proved, these private arrangements will not affect the Zemindar's right.

Whether Jodi is or is not a charge on the land is not relevant for the purpose of the question at issue. The joint liability is not based on the existence of a charge but on contract.

The position taken up by the appellants' Vakil that, as assignees, the Agraharamdars are only liable for their proportionate shares of the Jodi was not taken in the lower Courts. The case was tried on the footing that the defendants were joint Agraharamdars. A new point cannot be taken in second appeal as its recognition would necessitate further enquiry.

I claim interest by way of damages. See *Muhammad Abdul Ghaffur Rowther* v. *Hamida Beevi Ammal* (6).

JUDGMENT.

SPENCER, J.—The question for our decision in these appeals is whether the lower Courts were right in holding that the defendants who appeal are jointly and severally liable for the Jodi on their Agraharam or whether they are only liable for the payment of shares of the total amount of Jodi proportionate to the extent of the holding of each defendant. I agree with my learned brother, whose judgment I have had the advantage of reading, that the answer depends mainly on an issue of fact as to the terms prevailing between the Zemindar and the Agraharamdars, but there are besides certain judicial decisions in which it has been recognised that Agraharams are ordinarily held on a single and indivisible tenure.

(6) 52 Ind. Cas. 505; 42 M. 661; 25 M. L. T. 242; 36 M. L. J. 456; (1919) M. W. N. 484.

In *Elliaya* v. *Late Collector of Salem* (7) it was found that joint liability for Teervai was a well-understood condition attached to the holdings of Agraharam tenants; and in this matter the High Court treated the decision of the lower Courts as final. In *Zamindar of Ramnad* v. *Ramamany Ammal* (3) the grant of a Maganam or division of a Zemindari was contrasted with Agraharams or Dharmasanam villages which are granted to several persons on a single rent. In *Ramayya* v. *Subbarayudu* (4) the jural relation of Agraharamdars was stated to be not that of co-parceners but that of joint owners of an Agrahara village.

Subhanadri Appa Rao v. *Gopalakrishnamma* (5) was another case in which an argument was put forward that, as the holders of an Agraharam had divided it and were holding it in separate shares, they were each only liable for a part of the Jodi proportionate to their shares. This Court held in first appeal that the defendants were jointly and severally liable to the Zemindar's claim and observed that any division among themselves to which the Zemindar was not a party could not affect his right to look to all the lands of the village for his Jodi.

In the present appeals the lower Appellate Courts, the Subordinate Judge in Second Appeal No. 359 and the District Judge in Second Appeal No. 1789, have found as a fact that the demand of the Jodi was fixed for the entire Agraharam as a unit in a lump sum. In support of this finding they refer to the D. C. B. accounts and the prevalent system in the village of periodical exchange of holdings, which would make it difficult for the Zemindar to collect Jodi from the Swasthayamdars separately.

The position of mere transferees of portions of the Agraharam village would be different. There would be no privity of contract between them and the Zemindar; and the privity of estate occasioned by their occupation of land within the Zemindari would not create a liability out of proportion to the quantum of estate occupied by them [*Vide Kunhi Sou* v. *Mulloli Ohathu* (2) and *Stevenson* v. *Lambard* (8)]. But for the defendants to escape liability on the ground that they are only transferees or assignees of portions of the Agraharam from the original Agraharamdars it was necessary for them to set up such a special case at the trial. They did not do so. The plaint speaks of them all as Agraharamdars, and the written statement speaks of their ancestors and their partners but not of their assignors or vendors. Only the 19th defendant in Original Suit No. 8 of 1913 pleaded that he was a purchaser, and he was exonerated in the lower Appellate Court on the ground that he purchased the land in his enjoyment after the date when the arrears claimed by the plaintiff fell due on it. The joint and several liability of the defendants is not based on the assumption that the Jodi is a charge on the Agraharam, as suggested in ground No. 4 of the Appeal Memorandum in Suit Appeal No. 359 of 1918, but on contract.

It has been held that Jodi is not a charge upon a Shrotriam or an Inam, except where the grant is by Government and the Jodi is collected as land revenue under the Madras Revenue Recovery Act (Act II of 1864), when section 2 of the Act comes into play and makes it a first charge upon the land and its produce. See *Subbaraya Goundan* v. *Ranganatha Mudaliar* (9). Jodi due upon an Inam or Agraharam situated in a Zemindari estate is not rent of ryoti land which becomes a charge on the holding under section 5 of the Madras Estates Land Act. There is no charge in the present case, but the defendants are jointly and severally liable on their contract as Agraharamdars on the findings as to the terms of that contract.

As regards the plaintiff's claim for interest, which is the subject of the Memorandum of Objections in Second Appeal No. 359 in the plaint, it is stated to be claimed at Re. 1 per cent. per mensem "under rent law and damages."

It has been found that there is no established custom to pay interest in this Agraharam and that there have been no notices in writing demanding interest.

As Jodi is not "rent" as defined in section 3, clause 11 of the Madras Estates Land Act, Act I of 1908, interest cannot be claimed under section 61 of that Act.

(7) 3 M. H. C. R. 59.
(8) (1802) 102 E. R. 490; 2 East 575; 6 R. R. 511.
(9) 32 Ind. Cas. 971; 30 M. L. J. 387; (1916) 1 M. W. N. 216; 3 L. W. 273; 40 M. 93.

In cases where neither the Interest Act, Act XXXII of 1839, nor the rent law apply and where there is no contract, express or implied, to pay interest Courts of Equity sometimes award interest in the form of damages [see *Abdul Goffur Rowther* v. *Hamida Beevi Ammal* (6)], but there is no equity in the present case for allowing the plaintiff interest when he has allowed the Jodi to fall into arrears without making any demand for interest.

These second appeals are dismissed with costs of 1st respondent and the memo. of objections is dismissed with costs of appellants.

S. A. No. 359 of 1918.

KRISHNAN, J.—The only question raised for decision in this second appeal is whether the Agraharamdars, the defendants, are jointly and severally liable to the Raja who owns the Zemindari for the whole of the Jodi due on the entire Agraharam village or whether they are only separately liable, each of them for the proportion of the Jodi properly chargeable on the share of the village owned by him.

The village has been enjoyed in $86\frac{1}{2}$ Swasthyams or shares, but how it came to be so divided there is nothing to show. The lower Appellate Court has found on the evidence that the Agraharam was always treated as a single unit by the Raja and his predecessors and that the plea of the defendants that they, the landlords, have by their course of conduct split it up into parts and have recognised the several holdings of the various defendants as separate and independent is not established. This is a finding of fact which we must accept in second appeal, especially as it is justified by the evidence. Though payments were accepted from individual Agraharamdars from time to time by the Zemindar's agent of the share of the Jodi payable by each on his individual holding, such payments were always treated as made on account towards the total Jodi payable on the village and receipts were given and accepted accordingly. The re-distribution of the lands among the Agraharamdars once in 12 years without reference to the Zemindar is a strong indication that the holding of the Agraharam lands in shares by them had nothing to do with the Zemindar. The Jodi was fixed for the whole village as a single amount. All these would show that the Agraharam was held as a single estate on a single rental by the Agraharamdars. That they are usually held as single holdings on single rents and where there are several tenants in an Agraharam they are jointly liable for the whole rent, has been recognised by this Court in *Elliayav.* *Late Collector of Salem* (7), *Zamindar of Ramnad* v. *Ramamany Ammal* (3) and in *Subhanadri Appa Rao* v. *Gopal Krishnamma* (5). As pointed out in the last case, any arrangement made between the Agraharamdars to enjoy the lands in shares and pay the Jodi proportionately is not binding on the landlord unless he consents to it. He would be entitled to get his Jodi as a whole from all persons who are bound by the original contract of letting. No doubt the original parties in this case must have died out long ago, but their heirs and descendants who enjoy the Agraharam, will equally be bound and they would, therefore, be liable jointly and severally for the Jodi.

It was urged by Mr. Venkatarama Sastry for the appellants that the cases above cited, recognising the joint liability of the whole body of Agraharamdars, proceeded on the view that the Jodi was a charge on the lands, which was the then prevalent view, and that as it is now settled by the ruling in *Subbaraya Gounden* v. *Ranganatha Mudaliar* (9) that in the absence of a contract or custom to that effect, Jodi is not a charge on land in favour of the Zemindar, they should not be followed. The joint liability to pay the whole rent personally is not, however, based on the existence of any charge but on contract, and no doubt only persons bound by the contract will be subject to it.

Mr. Venkatarama Sastry then contended that persons who had become Agraharamdars by purchase of lands in the village will not be liable on contract but only on the ground of privity of estate and so far as they are concerned, their personal liability will be restricted to the share of Jodi rateably chargeable on their lands. The authorities cited by him, *Gamon* v. *Vernon* (10), *Stevenson* v. *Lambard* (8)

(10) (1678) 83 E. R. 532; 2 Lev. 231.

and *Kamala Nayak* v. *Ranga Rau* (1) and the observation in *Kunhi Sou* v. *Mulloli Chathu* (2), do establish the position that an assignee from a lessee of a part or share only of the leased property is personally liable for his proportionate share of rent on the ground of privity of estate. But so far as I can see, only question of privity of estate was not raised in this case in the lower Courts. None of the appellants before us nor any of the other defendants except the 15th defendant, who has been exonerated, pleaded that he was an assignee and, therefore, not liable for the whole rent. The case proceeded on the footing that they were all joint Agraharamdars and the only plea put forward to make the liability several was that the landlord had recognised their separate holdings by his conduct. As already stated, that plea was found against. I do not think we can properly allow the plea that the defendants or any of them are only assignees to be raised for the first time in second appeal, as it would require a fresh trial on facts. I would disallow the plea and accepting the findings of fact by the lower Appellate Court dismiss the second appeal with costs of the 1st respondent.

The memo. of objections by the Zamindar raises the question of interest on arrears of Jodi found due. It was claimed in the plaint as payable by "rent law" and as damages; subsequently it seems to have been also claimed as payable by custom. The lower Courts have found that no such custom has been proved. The Estates Land Act does not apply to this case as the relationship between the Zamindar and the Agraharamdars is not that of landholder and ryot. The Interest Act, Act XXXII of 1839, does not apply as no demand was made in writing for interest. The only ground that remains is the claim by way of damages, and it was pressed before us that interest should be awarded by way of damages for non-payment on due date. No doubt in a proper case interest may be decreed by way of damages even though it is not claimable under the Interest Act. That was so laid down in the recent ruling of this Court in *Abdul Goffur Routher* v. *Hamida Beevi Ammal* (6), where the previous decisions are all considered. But no proper ground has been shown in this case to award interest as damages; mere non-payment on due date is not in my opinion sufficient to justify such an award. Plaintiff has shown no equity in his favour for it. In fact he does not seem to have relied on it as a ground of claim in the lower Appellate Court, where custom was the main ground urged. I would, therefore, dismiss the memo. of objections also with costs of the appellants.

S. A. No. 1789 of 1918.

This second appeal has not been separately argued. Following the judgment in Second Appeal No. 359 of 1918, this second appeal is also dismissed with costs of 1st respondent.

M. C. P.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 3 OF 1919.

January 14, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Justice Sir Ernest Fletcher, Kt.

MOHAMED KALIMUDDIN—PLAINTIFF—APPELLANT

versus

A. B. STEWART AND OTHERS—DEFENDANTS—RESPONDENTS.

Association—Membership, expulsion from—Procedure—Duty of association.

Where an association, which is empowered to expel members for misconduct, decides to expel a member after making a fair inquiry into the truth of the facts alleged against him and after notice to him that his conduct is about to be inquired into and giving him an opportunity of stating his case, and its decision is arrived at in good faith with a view to the common interest of the association, its decision cannot be successfully challenged in a Court. [p. 562, cols. 1 & 2.]

Tribunals which exercise a punitive jurisdiction on an alleged charge of misconduct, whereby a man may be deprived of his property, must act in accordance with the ordinary rules of justice and fairplay and fairly listen to both sides. In order to determine whether a tribunal of this character in the exercise of *quasi*-judicial powers has given a decision which cannot be successfully challenged, the Court has to investigate whether they have observed the rules of natural justice and also the particular statutory or other rules, if any, prescribed for their guidance. [p. 562, col. 2.]

MOHAMED KALIMUDDIN *v.* STEWART.

The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with to his disadvantage, without having a fair and sufficient notice of what is alleged against him and an opportunity of making his defence, and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions are satisfied, a Court of justice will not interfere with the decision. [p. 563, col. 1.]

Appeal against the decision of Mr. Justice Rankin, dated the 26th November 1918.

FACTS appear from the judgment of

RANKIN, J.—The plaintiff sues in this action the members of the Committee of the Calcutta Stock Exchange Association for the purpose of having it determined that the proceedings of the Committee which took place on 27th September 1916 and 2nd December 1916, and by which he was expelled from the Association, were invalid, and for relief accordingly. The defendants have dropped all questions as to any errors there might be in the exact persons who ought to have been sued.

It appears that some days before the 15th September 1916 the plaintiff, who was a broker and a member of the Association, had a certain verbal conversation or negotiation with a representative or representatives of a firm called Ram Kissen Surajmull as to the proposed sale by the plaintiff to this firm of 100 ordinary Empire Jute Mills shares. The plaintiff says that this negotiation was held in the presence of a considerable number of persons at a busy time of the day, but that in fact in the end no bargain was concluded. Ram Kissen Surajmull alleged that the verbal contract for sale of these shares was concluded, and the plaintiff, not having made delivery, Surajmull complained to the Committee of the Stock Exchange by a letter of 15th September 1916, which is in evidence in this case. The complaint having been received, the matter came before the Committee at three meetings: 27th September, 2nd December 1916, and 12th January 1917. I am satisfied that the minutes of those meetings, though not nearly so full as is to be desired, are correct so far as they go. Now, by the rules of the Stock Exchange produced before me it appears that there is but one rule, and that a simple one, under which the Committee could exercise any jurisdiction over the plaintiff in such a matter, and it is clear law that there is no inherent or implied jurisdiction on the part of an association such as this to expel any member; an leaving out all words which have no bearing upon this case, rule 10 provides that the member shall cease to be such on the happening of any of the following events: (*a*) On the Committee being of opinion that he has failed to deliver in due course securities sold; (*b*) On his being found guilty in the opinion of the Committee of conduct justifying his expulsion.

For purposes of this case I may confine myself to (*a*), because I think that the attempt to put any case at all upon clause (*b*) merely burdens the defendants' case. I am quite satisfied that no charge under clause (*b*) was even mooted at the meeting of 27th September, and I find in the result that apart from the trial on the 27th September there was, and purported to be, no trial at all. I confine myself, therefore, to clause (*a*) of the rule. Now it is to be noticed that the jurisdiction given by rule 10 is not given as a jurisdiction for the settlement of disputes or as the establishment of a domestic Court of arbitration. Though the matters specified in rule 10 probably comprise everything that can well become matter of dispute so far as ordinary Stock Exchange business is concerned, the only jurisdiction to enquire into and to determine them is the jurisdiction to come to a finding upon which the membership of the party against whom it is pronounced, shall cease. The *ultima ratio* is the only *ratio*. Putting aside the provision in rule 4 that 5 members shall form *quorum* (on which nothing in this case turns), no regulations have been proved or even suggested by which a procedure is laid down for the Committee. There is no rule as to the giving of a written notice to the parties concerned. There is no rule requiring a definite length of notice. There is no rule as to what information any notice must contain. Still less is the committee hampered in the exercise of its single and drastic power by the requirements of any special majority. The only thing it can do is to expel, and subject to the law of the land, it can do that as it likes. Now, it is quite clear in a case of this sort, where there is no contention that the rules of the society are themselves unreasonable, that

the law will jealously consider, first, whether the rules have been strictly obeyed; secondly, whether the decision has been *bona fide*; and thirdly, whether the proceedings have been conducted according to the principles of natural justice; and in this last matter there is included as part of the requirement of natural justice the requirement of a reasonable notice to the party complained of as to what he is going to be tried about. Now, the plaintiff in this case complains, not of breaches of any procedure rules of the association (for such rules there are none), but of the general and paramount principle of law that such a jurisdiction must be exercised *bona fide*, and in accordance with natural justice. Turning to the plaint for particulars I find that paragraphs 7 to 12 of the plaint disclose the following specific allegations and no others—that on the 27th September the Committee heard the complainants and their witnesses, but did not, and would not, allow the plaintiff to cross-examine in spite of his request, or to call evidence on his own behalf although his witnesses were present. Paragraph 10 charges that the Committee acted in bad faith. paragraph 11, as I read it, is meant to allege that the plaintiff's expulsion was determined on this meeting of 27th September, and paragraph 12 intimates no fresh complaint of the Committee's procedure when referring to the meeting of the 2nd December. The meeting of January 12th is not referred to as a meeting at all, though the plaintiff was present thereat as he himself told me in the box. The case then with which the plaintiff comes into the Court is simply this; that the Committee at the meeting of 27th September decided upon his expulsion without allowing him to cross-examine the witnesses against him or to call evidence on his own behalf; and speaking for myself, if this were proved, I for one should have little difficulty in holding the charge of *mala fides* proved.

When the case was opened to me by plaintiff's Counsel the only issue offered by him or settled by me was as follows, and this was accepted by both sides :—

"Whether the action of the Committee on 27th September 1916, and 2nd December 1916, or one or other of these dates was contrary to natural justice in respect of the absence of an opportunity to the plaintiff to cross-examine or to call witnesses on his behalf."

When the plaintiff came to give his evidence, however, he alleged two further facts as matters of complaint against the conduct of the Committee at both meetings, but more particularly at the first meeting. The first complaint was that he had no notice or no sufficient notice of the meeting. The second was that he never knew until after the third meeting of the 12th January that the Committee had decided against him at the first meeting and ordered him to make delivery by the 6th October. Having regard to the charge of *mala fides* and to the fact that the question of notice might have a bearing upon the question as to whether the plaintiff had a real and proper opportunity of producing evidence and of cross-examination, I did not think it necessary or advisable to shut out this evidence of new grounds of complaint. It was proved before me in the course of the case, however, that the one person who could give any proper or valuable evidence for the defendants as to these new grounds, was the gentleman who at the time acted as secretary to the association, and that as he was serving with His Majesty's forces, his evidence could not, without some time and difficulty, be obtained. In these circumstances I drew the attention of learned Counsel for the plaintiff to the position thus created when the question of insufficient notice was referred to by him in his reply. He very properly and frankly explained that the first time he had heard of this ground of complaint was when the plaintiff gave his evidence in the box and after the opening of the case and settlement of the issue. On being put to his election whether or not he would ask leave to amend his pleadings so as to enlarge his case, and upon being told by me that such leave, if granted, would only be granted upon terms as to costs, he elected not to ask for such leave but to go on with his case, as it was. The two new grounds are both of them in the same position; the only difference between them being that on the evidence I am fully satisfied, without further evidence from the defendants, that the second ground is utterly unfounded in fact. Neither ground is now open to the plaintiff.

I come now to the meeting of 27th September, and to the question whether the plaintiff was refused leave to cross-examine the complainant's witnesses. In answer to his own Counsel when examined-in chief, the plaintiff gave the following answers:—

"Did any question of cross-examination arise?—No."

"Did you want to put any question to anybody?—I said that their statement was incorrect; and asked the committee to take the evidence of my witnesses, and that I was in a position to prove it."

Now, that is the only piece of evidence given by the plaintiff on the subject so far as I can find. In my opinion this statement of the plaintiff's is not true. I find it proved that he did in fact cross-examine the witnesses for the complainant as is deposed to by the committee members called for the defence, but it is enough to say that reading the plaintiff's own evidence by itself, there is not a tittle of evidence that the right of cross examination is demanded by, and refused to, the plaintiff. When challenged to enumerate his grievances in cross examination, the plaintiff does not include this as one. The witnesses summoned, Sham Lal Laha, Girendra Nath Roy, and the evidence of the Chairman, Mr. Berridge, taken before this Court in June, leave me no room for doubt that the committee was most anxious to be fair to the plaintiff. The mere fact as to what they did to give him time to comply with their decision showed that they were willing to be not only fair, but considerate. The plaintiff himself disclaimed the suggestion that the committee were inimical to him and the plaintiff's own Counsel withdrew in his reply the suggestion that there was any malice towards the plaintiff. In these circumstances it is not easy to see how the Court can be invited to believe that this committee of representative brokers allowed themselves to deprive the plaintiff of what every one knows to be essential to the very semblance of a fair trial. It gives me a very bad impression of the plaintiff's case when I find that if I look back to the letter of 19th January 1917, in which, the plaintiff having just been excluded from the Exchange and having taken legal advice, his Attorneys put forward his case for the first time, the allegation that "he asked for an opportunity to cross-examine the complainant to falsify the complaint, we were informed that he was not given a chance" is the only specific allegation in that letter. It is highly improbable—there is no evidence in support of it—the untruth of it has been plainly established before me.

The next complaint is that the defendant was not allowed to call witnesses on his own behalf. The plaintiff's evidence in examination-in-chief is on pages 4, 5 and 6 of the short-hand notes; in cross-examination his story is the same, and it is often repeated. Pressed in cross-examination for the names of the witnesses whom he wished to call, he gave four names, one of which is Raghubir Chobey. When re-called into the witness-box at a later stage and asked by me what these four witnesses were to give evidence about, he answered that they were not witnesses who were present at the time of the alleged contract, but were to prove that he had taken an oath in the name of the Koran, an episode which I find described on page 3 of the notes. I find it proved by the defendants that the plaintiff's story here again is utterly untrue. It is quite true that the defendants' evidence is not so precise or so clear as I should have been entitled to expect. The reason is that no proper record of what happened at the meeting in the way of calling and examining witnesses was made at the time, and the defendants' witnesses have nothing whatever to assist their recollection of what took place some two years ago. The committee certainly would be well advised to record such matters if only as a protection to themselves, but still I find as a fact that he did call witnesses; that he could have called, and did call, as many witnesses as he liked; that one of the witnesses actually called by him was the very Raghubir Chobey, whose name the plaintiff mentioned. No charge could be more clearly a charge of malice and bad faith against the members of the committee than to say that in a dispute as to the existence of a verbal bargain, evidence was offered by one side and that evidence was summarily

shut out and judgment then given against him. Take away the suggestion of malice, and the charge becomes practically incomprehensible. Business men may be amateur lawyers; they may be summary in their methods or have inaccurate notions of procedure, but to shut out *all dependent evidence* in a case such as this was would not occur to one man in a thousand or even one dishonest man in a hundred. The evidence of Mr. Somers for example according to what happened at this meeting was extremely hazy. He would hardly pledge himself to any precise and particular fact, but I am quite sure, having seen Mr. Somers in the box, that if anything such as the plaintiff alleges had taken place, Mr. Somers would have noticed it and would have remembered it for a very long time. I am quite sure that he would not have forgotten what was contrary to all his ideas of fairplay, and I am quite satisfied the evidence of Mr. Somers, however vague, is strongly in support of the defendants' case upon an issue such as this. I have seen three members of the committee in the box; I have had some opportunity of gauging the account given by the Chairman in June. I am convinced not only that they were honest, not only that they were reasonable, but that they were conscientiously determined that the plaintiff should have fairplay. My opinion on this is confirmed when I look at the plaintiff's Attorney's letter of 19th January, the letter in which the refusal of leave to cross examine is alleged. There is not a word in that letter of this yet more crude injustice, the refusal of leave to call his own witnesses. The letter of 9th February is equally without a reference. Whatever else might have been left to be covered by general expressions, this at least any Attorney would have put in the forefront of his case, and most with caustic comment. I think I should be doing less than justice to the members of the committee if I failed to say that I do not think that the plaintiff's evidence as to the way in which their business was conducted at the meeting of the 27th September has any degree of credibility at all; that I accept the evidence of the defendants' witnesses as vindicating the committee and every member of it from the allegations upon which this action has been brought.

Now, the committee tried the issue between the plaintiff and complainant once and only once; they decided against the complainant on the 27th September. Their decision was, and could be only one thing in substance, *viz.*, that he had failed to deliver in due course securities sold. In justice, or perhaps in mercy to the plaintiff, instead of putting forward at once the formal expression of their finding in such a way that the plaintiff would necessarily be expelled, they delayed giving such expression to it in order to give him a chance. He was given till the 6th October to deliver, and, as we know, he did not deliver. The next meeting was the 2nd December. It is common ground that at the meeting of the 2nd December the case was not reheard. The question, and only question, then was whether the plaintiff had availed himself of the indulgence accorded to him to enable him to evade the necessity for formal expression of the finding come to at a previous meeting, and to evade the penalty which was attached thereto. It is quite clear that his own statements at the second meeting showed that he had thrown his chance away. The plaintiff now alleges that not even at this meeting did he know—not indeed till after the 12th January did he know—what the finding of the Committee of the 27th September had been. I disbelieve this altogether. I think that that is a farrago of sheer untruth. I am satisfied that what happened at the meeting was that the plaintiff was obstinate, that he was reasoned with, and was warned. Unfortunately he was reasoned with and warned in vain. Not only so, but it appears from the evidence of Sham Lal Laha that a kindly suggestion of settlement was pressed both on the plaintiff and complainant. Even at this late stage the matter might have been settled by agreement between them. Nothing was done. The matter came again before the meeting of the 12th January, and not till then when it was evident that the plaintiff had done nothing, and was permanently minded to do nothing—were the full consequences of the decision of

27th September carried into effect. The committee did their best to save him, but he would not be saved.

I must add a word as to another issue which has been abandoned. That is the issue that plaintiff was entitled to take some advantage of the fact that the complainants were an insolvent firm, and had no right to be members of the association. It turned out before me that the complainants were adjudicated insolvents on 27th November 1912, but that they were discharged prior to the proceedings about which I am now concerned, *viz*, on the 24th March 1916, so that this point also has failed. Finding as I do that the committee's proceedings were not unfair, that they have been attacked as to their *bona fides* most unjustly, the plaintiff's case is disproved in every point. I do not think it my duty to examine into the question whether any more points could possibly have been taken by way of objection to the proceedings. But I may add that if there are any more of these cases, the committee would be well advised to bear in mind what I have said as to the true construction of rule 10, to remember that a tribunal which is slack about keeping a full record of its proceedings will always find itself in trouble; that they should be as full, formal and accurate as possible in all matters of recording their proceedings giving notice as to complaints and decisions. I leave it to them to obtain advice from others as to the application in detail of these criticisms.

The action must be dismissed with costs.

Messrs. *A. N. Chaudhuri*, *B. C. Ghose* and *S. N. Dutt*, for the Appellant.

Messrs. *L. James* and *Ameer Ali*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit for declaration that the proceedings of the committee of the Calcutta Stock Exchange Association expelling him from its membership were void and inoperative. Mr. Justice Rankin has dismissed the suit, on the ground that the plaintiff has failed to establish that the proceedings were vitiated by illegality.

The tenth paragraph of the Rules and Regulations of the Association contains the following provisions: "Cessation of membership:—A member shall cease to be such on the happening of any of the following events: (*a*) Subject to the present existing regulations regarding adjudication on time bargain contracts, on the committee being of the opinion that he has failed to pay in due course for securities delivered or to deliver in due course any difference in respect of any bargain or fail to pay any money due by him in any way arising from any Stock Exchange transaction, either directly or indirectly, or that he has become or been adjudicated a bankrupt: (*b*) On his being found guilty, in the opinion of the committee, of conduct justifying his expulsion."

On the 15th September 1916, Ramkisen Dass Soorajmull reported to the Honrary Secretary of the Calcutta Stock Exchange Association that on the 6th September they had purchased from Mahomed Kalimuddin (the present appellant) 100 ordinary Empire Jute Mills shares at Rs. 37-4-0 per share, delivery for one week's time from the date of sale, and that he had failed to deliver the shares due. As this was a matter which could be dealt with by the committee under clause (*a*) of rule 10, a meeting of the committee was held on the 27th September 1916, when the following resolution was recorded: "Dealt with a complaint of Ramkishen Soorajmull against Kalimuddin Khan with regard to an alleged transaction; the committee being of the opinion that the transaction actually did take place, the Honorary Secretary was instructed to inform Mahomed Kalimuddin that he must deliver the shares to the complainant within 6th October." The matter was next considered at a meeting held on the 2nd December 1916, when the following resolution was recorded: "Further, a letter was received again from Ramkissen Dass Soorajmull complainant against Mahomed Kalimuddin. It was resolved that the decision of the committee arrived at on the 27th September must be enforced or Mahomed Kalimuddin be expelled." Finally, on the 12th January 1917, the committee recorded the following resolution: "Received a further complaint from Ramkissen Das Soorajmull against Mahomed Kalimuddin and it was resolved that in view of the decision of the committee arrived at on the 27th September and again confirmed at a committee meeting

on December 2nd, at both of which meetings the latter attended, was duly informed of such decision, the Honorary Secretary was instructed to notify him that under the Rules of the Association his membership had ceased and thereby warned not to enter the rooms of the committee." This decision was intimated to the plaintiff on the same day; and he thereafter instituted the present suit on the 7th September 1917.

Mr. Justice Rankin states in his judgment that when the case was opened by the plaintiff's Counsel, the only issue offered by him was as follows and this was accepted by both sides:—"Whether the action of the committee on 27th September 1916 and 2nd December 1916 or one or other of these dates was contrary to natural justice in respect of the absence of an opportunity to the plaintiff to cross examine or to call witnesses on his behalf." At the trial, however, two further facts were stated as matters of complaint against the conduct of the committee at both meetings, namely, first, that he had no notice or no sufficient notice of the meeting: and secondly, that he never knew, until after the third meeting of the 12th January, that the committee had decided against him at the first meeting and ordered him to make delivery by the 6th October. The learned Judge held that if the plaintiff desired to rely upon these two grounds, the plaint must be amended, and expressed his willingness to grant leave to amend on terms as to costs. The plaintiff, however, elected not to ask for such leave and to go on with the case as it was. Consequently the substantial question in controversy which has been decided is that formulated in the case as opened by the Counsel for the plaintiff. The learned Judge has held that the story of the plaintiff cannot be accepted as true. We have considered the whole evidence which has been placed before us and commented upon by the learned Advocate General, and we have arrived at the conclusion that the decree made by the Court below should not be disturbed.

The rules applicable to cases of this character are well settled and are based on the principle that the committee empowered to expel a member must make a fair enquiry into the truth of the alleged facts, after giving notice to the member concerned that his conduct is about to be enquired into and giving him an opportunity of stating his case to them. The leading decisions on the subject are the judgments of Sir George Jessel in *Labouchere* v. *Earl of Wharncliffe* (1), *Russell* v. *Russell* (2) and *Dawkins* v. *Antrobus* (3). The first case emphasizes the importance of fair enquiry after notice to the member concerned and opportunity given to him to meet the charge. In the second case Sir George Jessel referred with approval to the decision of Kelly, C.B., in *Wood* v. *Woad* (4) and observed as follows "I must say it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than Judges who have judicial functions to perform. The passage I mean is this, referring to a Committee; they are bound in the exercise of their functions, by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

In the third case, stress was laid on the aspect that a power of expulsion must be exercised *bona fide* and not from any indirect or improper motive, and this view was approved by the Court of Appeal. These and other decisions were reviewed by Astbury, J., in *Cassel* v. *Inglis* (5), where the rule was stated to be that tribunals which exercise a punitive jurisdiction on an alleged charge of misconduct, whereby a man may be deprived of his property, must act in accordance with the ordinary rules of justice and fairplay and fairly listen to both sides. The essence of the matter thus is that, in order to determine whether a tribunal of this character, in the exercise of *quasi*-judicial powers, has given a decision which cannot be successfully chal-

(1) (1880) 13 Ch. D. 346 at p. 350; 41 L. T. 638; 28 W. R. 367.

(2) (1880)14 Ch. D. 471 at p. 478; 49 L. J. Ch. 268; 42 L. T. 112.

(3) (1881) 17 Ch. D. 615 at p. 622; 44 L. T. 557; 29 W. R. 511.

(4) (1874) 9 Ex. 190 at p. 196; 30 L. T. 815; 22 W. R. 709.

(5) (1916)2 Ch. 211 at p. 229; 85 L. J. Ch. 569; 114 L. T. 935; 32 T. L. R. 555.

lenged, the Court has to investigate whether they have observed the rules of natural justice and also the particular statutory or other rules, if any, prescribed for their guidance: *Andrews* v. *Mitchell* (6). The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with to his disadvantage, without having a fair and sufficient notice of what is alleged against him and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions are satisfied, a Court of justice will not interfere with the decision.

Now, in the case before us, the first meeting of the committee was held on the 27th September 1916. There is no doubt upon the evidence that the plaintiff was present on that occasion, brought forward witnesses, and cross examined the witnesses who were produced by his opponent. An objection could have been raised by him that he had no notice or sufficient and precise notice; but that was not the position taken up by him. He did not complain that he had not such notice and was placed at a disadvantage because he did not know what was alleged against him. On the other hand, the evidence makes it clear that he knew what the case against him was; *viz.*, that the complainant alleged that there had been a breach of the contract entered into with him on the 6th September 1916 for the sale of 100 Empire Jute Mills shares to be delivered within a week. He denied the existence of the contract. The committee came to a different conclusion; and thereupon it was within the competence of the committee to make an order forthwith for his expulsion. This, however, they did not do. They instructed their Honorary Secretary to inform the appellant that he must deliver the shares to the complainant within the 6th October. The Advocate General has contended that by this the committee really made a new contract between the parties and that the plaintiff has been expelled from the association not because of his failure to carry out the original contract, but because of his failure to carry out the order of the committee. We are of opinion that there is no force in this contention, and the action of the committee cannot be successfully impugned on this ground. The order of the committee recorded on the 12th January shows that the plaintiff had attended both the previous meetings and that he had been duly informed of their decision. The oral evidence also shews that the plaintiff was present at the meeting held on the 2nd December 1916. It has been argued, however, there is no satisfactory evidence to show that the decision of the committe, dated the 22nd September, was ever communicated to the plaintiff. But the plaintiff did not take up this position on the 2nd December. He did not urge that he was willing to abide by the decision of the committee and that he had failed to deliver the shares to the complainant on or before the 6th October, because he had no intimation of their order. On the other hand, the evidence shows that he took up a determined attitutde not to abide by the decision of the committee. Ultimately, on the 12th January 1917, the committee came to the conclusion that the plaintiff must be expelled. This expulsion in substance was by reason of his failure to carry out his contract with the complainant; and the leniency which the committee had shown to the plaintiff unquestionably did not vitiate the proceedings.

The result is that the judgment of Mr. Justice Rankin is affirmed and this appeal dismissed with costs.

FLETCHER, J.—I agree.

Appeal dismissed.

(6) (1905) A. C. 78; 74 L. J. K B. 333; 91 L. T. 537.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 19 OF 1917.

December 3, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

A. C. GANAPATHIYA PILLAI AND ANOTHER—PLAINTIFFS—PETITIONERS Nos. 2 AND 3—APPELLANTS

versus

GOPALA AIYER AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 88, 89—

GANAPATHIYA PILLAI v. GOPALA AIYER.

Civil Procedure Code (Act V of 1908), s. 48, O. XXXIV, r. 5—Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Mortgage-decree—Application for order absolute—Repeal of ss. 88, 89, Transfer of Property Act, before expiry of time fixed for payment—Prior application within three years, dismissal of—Final decree, application for, whether necessary—Limitation.

A mortgage decree having been passed on 10th December 1908, the decree-holder applied on 2nd December 1911 for an order absolute for sale. That application having been dismissed for default, the decree-holder again applied for an order absolute on 29th April 1914:

Held, that the decree-holder had a right to make the application for order absolute on 29th April 1914 and that the right was not barred by Article 182 of Schedule I to the Limitation Act or by section 48, Civil Procedure Code. [p. 566, cols. 1 & 2.]

Per *Sadasiva Aiyar, J.*—A decree passed under section 88 of the Transfer of Property Act gave a vested right to the decree-holder to apply in execution for an order absolute and the repeal of the said section by Order XXXIV, Civil Procedure Code, could not take away this right. [p. 555, col. 1.]

Per *Spencer, J*—The application of 2nd December 1911 was a step-in-aid of execution: but if it were deemed necessary, owing to the introduction of Act V of 1908 while the suit was pending, that the decree-holder should apply for a final decree, the applications of 1911 and 1914 might be treated as applications under Article 181 of the Limitation Act for a final decree, the second application being treated as a continuation or revival of the first. [p. 566, cols. 1 & 2.]

Appeal against the order dated the 25th September 1916, of the District Court, Tanjore, in Appeal Suit No. 328 of 1915, preferred against the order of the Court of the District Munsif, Tiruvadi, in Second Appeal No. 102 of 1914, in Execution Petition No. 292 of 1914, in Original Suit No. 206 of 1907.

FACTS appear from the judgment.

Dr. *S. Swaminathan*, for the Appellants.—The lower Court should not have applied the provisions of Order XXXIV, Civil Procedure Code, to the case. The mortgage decree was passed in 1908. The first application for order absolute was in 1911, within three years of that date. The second application was in 1914 also within three years and in time. The repeal of sections 88 and 89 of the Transfer of Property Act before the time fixed for payment, *i.e*, March 1909, could not affect the vested right acquired by the decree holder to apply in execution for an order absolute.

As there is no preliminary decree in the case, the decree holder cannot apply for a final decree.

The present application is not barred by Article 182 of the Limitation Act or section 48, Civil Procedure Code.

In any event the decree-holder should be permitted to treat his applications of 1911 and 1914 as applications for final decree.

Messrs. *A. Venkatrayaliah* and *L. Venkatanarasiah*, for the Respondents.—The sections 88 and 89 of the Transfer of Property Act having been replaced by Order XXXIV, Civil Procedure Code, before the time fixed for payment, the proper course for the decree-holder was to apply for a final decree. He had no right to apply for an order absolute.

See *Nimmala Mahankali* v. *Kallakuri Subba Rao* (1).

JUDGMENT.

SADASIVA AIYAR, J.—The decree-holders are the appellants. Their application was under section 89 of Act IV of 1882 for an order absolute. The application was made in 1914 within three years of a previous application of December 1911 for the same relief, the right to obtain that relief under the decree of December 1908 having accrued in March 1909. That application was dismissed by the Munsif on the grounds:—

(*a*) that Article 181 (old Article 178) applied to the application for an order absolute under the ruling in *Rungiah Goundan & Co.* v. *Nanjappa Row* (2);

(*b*) that, therefore, it was barred as made after three years from March 1909;

(*c*) that the decree-holders had no right to apply for an order absolute but could apply only for the passing of a final decree according to the provisions of the new Civil Procedure Code.

The District Judge confirmed the order of the District Munsif on only the ground (*c*), namely, that the decree holder had no right to apply for an order absolute but only for a final decree and such an application was barred under Article 181.

Following the reasoning of the decision in *Balaji Rao* v. *Harirama Chetty* (3), which approves of the decision in *Mahommad Husain* v. *Abdul Kareem* (4), I would hold that the

(1) 41 Ind. Cas. 268; 32 M. L. J. 455.
(2) 26 M. 780; 13 M. L. J. 412.
(3) 32 Ind. Cas. 39.
(4) 29 Ind. Cas 237; 39 M. 544; 17 M. L. T. 424.

decree passed in December 1908 under section 88 of Act IV of 1882 gave a vested right to the decree-holder to obtain an order absolute in execution proceedings and that he could, therefore, apply under section 89 of Act IV of 1882 for such an order.

Though sections 83 and 89 of the Transfer of Property Act had been repealed before the time allowed to the judgment-debtor for making the payment (March 1909), the vested right of the decree-holder to apply in execution for an order absolute on the expiry of the time granted to the judgment-debtor for payment cannot be taken away by the said repeal [see section 6 of clauses (*c*) and (*e*) of the General Clauses Act]. If his right to apply under section 89 is held to have been taken away by the new Code, he cannot also obtain a final decree under Order XXXIV, rule 5, as a final decree presupposes a preliminary decree under Order XXXIV, rule 4, and the decree of December 1908 was not a preliminary decree (see *Malikarjunadu Setti* v. *Lingamurthi Pantulu* (5)).

The result would be that the decree-holders have got a final decree under section 88 of Act IV of 1882 but can neither get an order absolute nor a final decree to make it executable.

The respondents' learned Vakil relied on the case in *Nimmala Mahankali* v. *Kallakuri Subba Rao* (1). I am not quite sure whether I have been able to correctly understand the language of that judgment and the facts, though I have carefully gone through the records (including the printed papers and the judgment). The District Munsif's judgment in that case was passed in September 1908, but the case went up to the High Court in second appeal and the judgment and the decree in second appeal were passed on 29th July 1910. That decree is referred to in *Nimmala Mahankali* v. *Kallakuri Subba Rao* (1) as "the final decree on second appeal." It is doubtful on the language whether the learned Judges meant that it was the decree which was passed finally by the High Court in the litigation or whether there was at first a preliminary decree and the High Court afterwards passed a final decree on 29th July 1910. But a perusal of the records shows that they intended the former.

The next question is whether the High Court's decree of 29th July 1910 must (like the District Munsif's decree in that suit) be taken to have been passed under section 83 of Act IV of 1882 or as a preliminary decree under Order XXXIV, rule 4 (1) of the new Civil Procedure Code. After the best consideration I have been able to give to the question, I think that the learned Judges treated it as a preliminary decree passed by the High Court under the new Code and then they applied Article 181 to the application for a final decree. They yet held, however, that the application of 1914 to pass the final decree following the preliminary decree of 1910 was not barred because they say "it was conceded" (evidently by the Vakil for appellants) "that if time accrued from the date of the appellate decree the present application would not be barred by limitation." What facts, such as an acknowledgment by the judgment-debtor of the existence of the right to apply made within three years or an acknowledgment that the application of 1914 could be treated as a renewal of previous application made within three years of July 1910, led the appellant's Vakil to make that concession does not appear from the records.

I think that I can say with some confidence that the learned Judges could not have considered the High Court's decree of 1910 as one passed under section 88 of Act IV of 1882, as they applied Article 181 not Article 182 to the application of 1914 and one of the learned Judges who decided *Nimmala Mahankali* v. *Kallakuri Subba Rao* (1) (Mr. Justice Sadasiva Ayyar) was a party to the prior decision in *Mahammad Husain* v. *Abdul Kareem* (4), which clearly held [following *Abdul Majid* v. *Jawahir Lal* (6)] that notwithstanding *Rungiah Goundan & Co.* v *Naniappa Row* (2) Article 182 (old 178) and not Article 181 (old Article 178) applied to an application made

(5) 25 M. 244; 12 M. L. J. 279.

(6) 23 Ind Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. L. 44; 1 L. W. 483 (P. C.).

for the passing of an order absolute under section 89.

In the result I would set aside the decisions of the lower Courts and hold [following *Mahammad Husain* v. *Abdul Kareem* (4) which decided that applications for an order absolute can be renewed at intervals of not more than three years till 12 years expire that the decree-holders' application of 1914 to pass an order absolute under section 89 is legally sustainable and competent and that it is not barred. An order absolute is, therefore, directed to be drawn up by the District Munsif in favour of the decree holder, following the terms of section 89 of Act IV of 1882. The 1st respondent will pay the plaintiffs' costs throughout, such costs being also a charge on the mortgaged property to be added to the decree amount.

SPENCER, J.—In this case there was an application for an order absolute for sale within three years of the passing of the decree under section 88 of the Transfer of Property Act, namely, on December 2nd, 1911.

When that application was dismissed for default, the dismissal of the application did not have the effect of causing the suit to be dismissed or of making the decree already passed null and void. Within three years of that date, *viz*, on 29th April 1914, a fresh application was made quoting section 89 of the Transfer of Property Act, although by that time the provisions of the Transfer of Property Act for enforcing mortgages had been superseded by the provisions of Order XXXIV of the new Civil Procedure Code.

Under the authority of the Privy Council in *Abdul Majid* v. *Jawahir Lal* (6) an application to make an order absolute in a suit upon a mortgage for sale governed by the Transfer of Property Act falls within the purview of Article 179 of the Limitation Act of 1877, and this was followed in *Mahammad Husain* v. *Abdul Kareem* (4) [see also *Balaji Rau* v. *Hariramu Chetty* (3)].

The application of 2nd December 1911 being a step-in-aid of execution within the meaning of Article 182 of the Limitation Act of 1908 (corresponding to Article 179 of the Limitation Act of 1877), the present application is not barred either by Article 182, Limitation Act, or by section 48, Civil Procedure Code.

If, however, it be held that on account of the date fixed for payment in this case falling on 10th March 1909 after the Code of 1908 came into force, the decree-holder should apply for a final decree under Order XXXIV, rule 5, instead of applying for an order absolute, then I consider that such an application being an application in the suit, it is open to the plaintiff to continue the suit until the stage of final decree is reached, provided that the suit is not meanwhile dismissed for any cause. [see *Lakshmi Achi* v. *Subbarama Aiyar* (7)]. In this view I consider that the preliminary decree holders might be permitted to treat both their applications of 1911 and 1914 as applications under Article 181 for a final decree and to treat the 2nd as a continuation or revival of the first application.

I agree that the appeal should be allowed with costs and that the case should be sent back to the District Munsif's Court for passing the necessary orders.

M. C. P.

Appeal allowed.

(7) 29 Ind. Cas. 142; 39 M. 488; 2 L. W. 403; 28 M. L. J. 491; (1915) M. W. N. 327; 17 M. L. T. 385.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION SUIT No. 1143 OF 1918.

April 23, 1919.

Present:—Mr. Justice Greaves.

Srimati PADMABUTI DASSI AND ANOTHER—PLAINTIFFS

versus

BONOMALI SEAL—DEFENDANT.

Lunacy Act (XXXIV of 1858), proceedings under—Order of Judge and deposition of lunatic, whether admissible in subsequent suit against lunatic—Hindu Law—Inheritance—Mental affection, whether disqualification.

Although the order and the report made by a Judge in a proceeding in lunacy under Act XXXIV of 1858 do not fall within either sections 40, 41 or 42 of the Evidence Act, yet in a subsequent suit against the lunatic they are admissible in evidence under other provisions of the Act. But the deposition of the lunatic taken in the lunacy

proceeding would not be admissible in evidence unless he is examined in the subsequent suit, for it is admissible only to contradict any evidence which he gives in the subsequent suit. [p. 569, cols. 1 & 2.]

According to Hindu Law mental affection, to disqualify a person from inheriting, must be of such a nature that a man is thereby debarred or incapable of performing the funeral rites and offering the proper funeral oblations.[p. 569, col. 2; p. 570, col. 1.]

Mr. *N. N. Sircar* (with him Mr. *I. B. Sen*), for the Plaintiffs.

Mr. *Langford James* (with him Mr. *S. Ghosh*), for the Defendant.

JUDGMENT.—This is a suit to recover (1) Nos. 35 and 35, Blackburn Lane, (2) No. 44, Mechua Bazar Street, (3) a two-thirds undivided share in No. 1, Old China Bazar Street, and (4) the sale-proceeds of Nos. 11, 12 and 13, Ram Mohun Ghose's Lane, under the following circumstances. One Ananta Ram Seal died on the 4th March 1907 intestate possessed of the premises in suit, leaving a son the defendant Bonomali Seal. Bonomali had a son Durga Charan, who died on the 13th July 1918 without issue but leaving two widows, the plaintiffs. On the 2nd April 1908 Sreemutty Debjani Dassi petitioned this Court for an enquiry as to whether Bonomali Seal was or was not of unsound mind and incapable of managing himself and his affairs. On the 6th April 1908 an order was made on this petition which was entitled "In the matter of Lunacy Act XXXIV of 1858 and In the matter of clause 17 of the Charter and In the matter of Bonomali Seal a lunatic" by Woodroffe, J., directing an enquiry to be held before him as to whether (*inter alia*) Bonomali Seal was or was not of unsound mind and incapable of managing himself and his affairs and the time during which he had been of unsound mind. Woodroffe, J., on the 27th April 1908, found and reported (*inter alia*) that Bonomali Seal was of unsound mind and incapable of managing himself and his affairs and that he had been of unsound mind for about fifteen years, and on the same day Srimati Debjani Dassee and one Kartick were appointed Committees of his person and estate. I should state that the report found that Bonomali Seal was entitled to the premises in Suits Nos. 11, 12 and 13, Ram Mohun Ghose's Lane, being then unsold and the whole of No. 1, Old China Bazar Street, being stated to belong to him.

Under the circumstances set out above the plaintiffs contend that as Bonomali was of unsound mind when his father died, he was incapable of inheriting and that the property in suit passed to Durga Charan as whose heirs they claim it.

The following issues were raised, (1) Is the suit barred by limitation as to the sums as mentioned in page 7 of the plaint? (2) Are the plaintiffs estopped from asserting that Bonomali is not entitled to the estate? (3) Was Bonomali excluded from inheritance by reason of insanity? Was his mental condition such as to exclude him from the inheritance? (4) In the event of the plaintiffs' claim succeeding, what is the suitable maintenance and residence to which the defendant is entitled?

The following evidence was given before me. Binode Behari Adhya on behalf of the plaintiffs stated that he was a medical practitioner and an M. B. of the Calcutta University and that he had known Bonomali since his marriage with Debjani which was prior to 1907. He stated that Bonomali was not in a sound state of mind in 1907 and that some years after his marriage he became of unsound mind and that at the time of Ananta Ram's death he was not of sound mind and had hallucinations, stating that various people owed him money and that the Government was his rent collector, and that he could not get from him any proper reply as from a reasonable man. In cross-examination he stated that for two or three weeks he specially observed Bonomali for the purpose of giving evidence in the lunacy proceedings, but that before he observed him for the purpose of the lunacy proceedings he only attended him once and that for fever. That Bonomali performed his father's Sradh and that Bonomali used occasionally to come to his house and used to state that his 50 sons were beheaded last night but that his main hallucination was as to money. The next witness Net Behary Dass Sen stated that he first knew Bonomali 10 or 12 years ago and that ever since then he had noticed him to be insane, that he carried bunches of keys about and talked like an insane person and abused little boys who asked him how he was, threatening to send 10,000 troops to punish

them. He stated that his state of mind was the same all along both before and after his father's death. In cross-examination he stated that he was a store-keeper in the Bengal Secretariat at Rs. 16 a month and that he was not a friend of the family, but that he used to sit on the ledge of the house and talk to Bonomali and that he found him talking at random. The witness appears to be a chance witness and I am not inclined to attach much importance to his evidence. Satish Chandra Das, the father of the 1st plaintiff, stated that he had known Bonomali for the last 25 or 26 years and that before his daughter's marriage with Durga Charan, Bonomali used to come to his house and used to write that Lord Curzon was his Collecting Sircar and that the Maharajah of Burdwan owed him a crore of rupees and that Government had granted him 10,000 troops, and that in Ananta Ram's lifetime he was not fit for the ordinary intercourse of life and that he thought poison was mixed with his food. That in conversation after the first few moments he began talking about his hallucinations.

On behalf of the defendant Apurba Charan Chakravarti stated that he was Ananta Ram's priest and that he knew Bonomali and had been priest of the family for over 40 years. He stated that Bonomali performed the Sradh ceremony after Ananta Ram's death and that he also performed the Chandrayan (expiation) ceremony and offered Pindas on the 10th day, and that he was the priest on those occasions. He also stated that Bonomali performed the Nandi Mag on the occasion of Durga Charan's marriage and also performed his father's annual Sradh and could talk like an ordinary human being and could pronounce the Mantras. In cross examination he stated that he was satisfied if a person performing the Sradh merely repeated the Mantras after him, and that Bonomali did repeat the Mantras when he told him. He stated that under the Shastras a mad man was not competent to perform the Sradh and that Bonomali was of sound mind at the time of his father's death and for 2 or 3 years after, and that he never observed any signs of insanity except talking to himself when alone, which began some 8 years or so ago, and that in 1908 he did not notice that his state of mind was other than normal and that he noticed no change in his mind after his father's death.

The next witness Manik Lal Dey stated that he was present at Ananta Ram's Sradh ceremony which was performed by Bonomali and that Bonomali's hallucinations were only as to money and that in all other matters he was quite reasonable. In cross-examination he stated that from 1907 upto his son's death in 1918 he was in much the same state, but that he got a little worse after his son's death and that he was invited by Bonomali personally to Durga Charan's wedding, and in re-examination he stated that Bonomali on the occasion of his son's wedding did some of the entertaining of the guests. Ashutosh Mullick stated that he had known Bonomali for some 30 years and that Debjani was his niece. He stated that Bonomali was all right at the death of Anant Ram but that he suffered from hallucinations as to money matters, alleging that money was owing to him but that when he was not under these hallucinations he talked like an ordinary sane man. That he carried his father's corpse to the burning Ghat, performed the Mukhagni and the Sradh and received and talked to the guests at the dinner two days after the Sradh, that Bonomali invited him to his son's wedding and that upto 1910 and 1911 he was all right and that there was nothing wrong about him. He stated that he came to know that something was wrong with him when he stood surety for Debjani, the Committee. Jyotish Chunder Mukerjee gave formal evidence.

The remaining witness Debjani was called by my direction at the plaintiffs' request. In answer to plaintiffs' Counsel she stated that Bonomali was a mad man now but that he was not so when Ananta Ram was alive, and that his present condition was the same as after Ananta Ram's death and that he had been a mad man or like one for the last 11 or 12 years, but that in Ananta Ram's lifetime he was not a mad man but became such after Ananta Ram's death when he began to talk much—she also stated that Durga Charan was 13 or 14 when Bonomali's brain became deranged.

This concludes the oral evidence and I now have to decide how far the proceedigs before Woodoffe, J., are admissible in evidence. The plaintiffs contend that as against Bono-

mali they are conclusive and tender in evidence the orders, the report and the evidence of Bonomali who was examined before Woodroffe, J. The defendant contends that they are not admissible, urging that the orders are not judgments *in rem* and in any case are not evidence of the grounds upon which they were made, that the report is merely the judgment and is not admissible and that Bonomali's evidence can only be taken as admission against him under section 145 of the Evidence Act upon which he might be examined.

I think there is no doubt that in English Law the proceedings before Woodroffe, J., would even as between third parties be evidence of the lunacy, although not conclusive and liable to be traversed. See *Hill* v. *Glifford* (1) and *Harvey* v. *Rex* (2). In the last case, which was an appeal to the Judicial Committee from the Supreme Court of Ceylon, where it was argued that orders in lunacy made in England were not admissible in evidence in the Ceylon Courts and that these Courts were justified in paying no attention to them, Lord Lindley in delivering the judgment of the Board states as follows :—

"The orders are not conclusive evidence of anything except their own existence; but being made by a competent tribunal in a matter within its jurisdiction they cannot be rejected as inadmissible, or as no evidence of the truth of those facts recited in them which are essential to their validity. They are admissible as *prima facie* evidence and if uncontradicted they ought to be regarded as sufficient evidence of those facts, not only in this country, but in all His Majesty's dominions."

The question, therefore, which I have to decide is whether I am debarred by the Indian Evidence Act from admitting the proceedings before Woodroffe, J., in evidence. I am of the opinion that they do not fall within either sections 40, 41 or 42 of the Evidence Act, but that they are admissible under other provisions of the Act. I accordingly admit the orders and the report, but not the evidence of Bonomali who was not called before me and whose evidence would, I think, only be admissible to contradict any evidence he might have given before me had he been called.

I now come to deal with the issues. So far as the 1st issue is concerned, I am of opinion that the sums referred to in paragraph 7 of the plaint are not barred by limitation. It is suggested by the defendant that Article 62 of the Limitation Act applies and that as the moneys were received in 1914 and that as the plaintiffs claim through Durga Charan, their claim as to these moneys is barred. I do not think that these moneys, however, fall within Article 62. Durga Charan, at the time the moneys were received, had made no claim to the estate and the estate at the date of their receipt was in Bonomali's possession through his Committee. Consequently I do not think that they can be said to be moneys received by the defendant to the plaintiffs' use (or to Durga Charan's use) within Article 62. The Article applicable would, I think, be Article 120 and under this Article the claim is not barred. So far as the 2nd issue is concerned, I do not see that any question of estoppel arises or how by reason of Durga Charan having signed the accounts on his mother's behalf, Bonomali can be said to have changed his position. I now come to the 3rd issue which is the real issue in the case. The conclusion which I have come to upon the evidence is that Bonomali's state of mind at the time of his father's death was not dissimilar to his state of mind upon the 27th April 1908, that is to say, that he suffered from hallucinations and was not normal, but I should be inclined to think that after his father's death there was some increase in his malady. I think that probably at Ananta Ram's death he was incapable of managing his affairs like an ordinary man or of transacting business. At the same time I think it is abundantly established upon the evidence that he performed his father's Sradh and the usual ceremonies connected with the death. Under these circumstances the question which I have to decide is whether his condition was such at his father's death as to make him incapable of inheriting according to Hindu Law. I think, that it was not. Mental affection to disqualify a person from inheriting must, I think, be of such a nature that a man is thereby

(1) (1907) 2 Ch. D. 236 at p. 244; 76 L. J. Ch. 627; 97 L. T. 266; 23 T. L. R. 601.

(2) (1901) A. C. 601 at p. 611; 70 L. J. P. C. 107; 84 L. T. 849; 17 T. L. R. 601.

debarred or incapable of performing the funeral rites and offering the proper funeral oblations; *Dwarkanath Bysak* v. *Mahendranath Bysak* (3), *Surti* v. *Narain Das* (4), Mayne's Hindu Law and Usage, 8th Edition, page 834. There is no evidence before me that Bonomali, being incapable of performing these duties, was allowed to perform them with a view of defrauding another of the inheritance; there is not only no such evidence but the fact sworn to by the priest and by others that he did perform them and was capable of so doing. This being so, I answer the 3rd issue in the negative. The fourth issue does not arise. In the result the suit fails and must be dismissed with costs on scale No. .2.

Suit dismissed.

(3) 9 B. L. R. 198 at p. 209; 18 W. R. 305.
(4) 12 A. 530; A. W. N. (1890) 110; 6 Ind. Dec. (N. S.) 1082.

PATNA HIGH COURT.
STAMP REFERENCE IN FIRST CIVIL APPEAL
No. 59 OF 1918.
August 6, 1917.
Present:—Mr. Justice Roe.
DIP CHAND RAI AND OTHERS—
APPELLANTS
versus
CHHETRU LAL AND OTHERS—
RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (v), Sch. II, Art. 17 (vi)—Suit for partition—Property in possession of defendant—Court-fee payable.

Plaints in all suits for partition should be carefully examined. Where it is patent that the defendants are in possession of any part of the property to be partitioned and have denied the plaintiff's title thereto, the suit is obviously a suit to recover possession of that part of the property at least, and a Court-fee *ad valorem* on the share claimed in that part must be levied. [p. 571, col. 1.]

Appeal from a decision of the Subordinate Judge, Bhagulpore.

FACTS.—The plaintiffs brought a suit for partition of the joint family property and prayed for the following reliefs :—

(1) It might be declared that a certain Sulehnama was not binding upon them and it could not prejudicially affect their interest in the joint family property and that in any event it could not affect any property other than the properties in dispute at the time of the Sulehnama; and that in the latter event the plaintiffs were entitled to have their shares made up from other properties in due course of partition.

(2) All the ancestral properties and joint properties and all the joint debts might be ascertained and the share of the plaintiffs therein be defined and declared.

(3) A partition of all the immoveable properties might be made by metes and bounds and the plaintiffs be allowed their shares.

(4) A division of the moveable properties be made and the plaintiffs be given their shares in each in such manner as to the Court might seem fit and proper.

The plaintiffs, however, stated in the plaint that a considerable portion of the property was in the immediate possession of the defendants and that they had set up adverse title thereto.

They stamped the plaint with a Court-fee of Rs. 10 only, treating the suit as one for partition. Being aggrieved by the decision of the Subordinate Judge, the plaintiffs preferred an appeal to the High Court. They stamped the memorandum of appeal also with a Court-fee of Rs. 10 only. The Stamp Reporter submitted that the Court-fee paid should have been *ad valorem*. The Taxing Officer, agreeing with the Stamp Reporter, referred the matter to the Taxing Judge.

Mr. *Hassan Imam* (with him Mr. *Nirsu Narain Singh*), for the Appellants.

JUDGMENT.—The first relief sought is a declaration that a Solenamah is void. On this the fee of Rs. 10 need not be paid for the immediate consequence of the declaration will be that the plaintiff will obtain an eight pies share more than is given him in the Solenamah. On this an *ad valorem* fee must be paid [see *Midnapur Zemindary Co.* v. *Secretary of State for India*(1)]. This *ad valorem* fee will be merged in some cases with another *ad valorem* fee due on that part of the suit which is in effect a title suit in the guise of a partition suit. Mr. Hasan Imam contends that even though the defendants may have denied in their written

(1) 40 Ind. Cas. 96; 21 C. W. N. 834; 44 C. 352.

statement the plaintiffs' title to some of the property of which partition is sought, the whole suit will bear a Court fee of Rs. 10 as a partition suit, and to support this contention quotes *Bidhata Rai* v. *Ram Chariter Roy* (2). This case and *Tara Chand* v. *Afzal Beg* (3) and *Shashi Bhushan Bid* v. *Jotindra Nath Roy Chowdhury* (4) are authority only for the proposition that where the plaintiff alleges that he is in possession of his undivided share in the property in suit, a Court-fee of Rs. 10 only is required. The distinction between this class of case and cases in which the partition suit is merely a title suit in disguise has been clearly drawn in *Kirty Churn Mitter* v. *Aunath Nath Deb* (5), *Balvant Ganesh* v. *Nana Chintanon* (6) and *Wali-ullah* v. *Durga Prasad* (7). Plaints in all suits for partition should be carefully examined. Where it is patent that the defendants are in possession of any part of the property to be partitioned and have denied the plaintiff's title therein, the suit is obviously a suit to recover possession of that part of the property at least, and a Court-fee *ad valorem* on the share claimed in that part must be levied. Paragraph 6 of the plaint clearly states that there is considerable property in the defendants' immediate possession, and that the defendants have set up an adverse title therein. On these properties *ad valorem* fees must be paid. The plaintiff has not specified these properties, but it will be clear from the Khewats of the recent surveys in the Santhal Pergannas, Monghyr and Bhagalpore what is the exact nature of the dispute between the parties. The Registrar should call upon him to produce these Khewats. With the Khewats he must file a statement showing the value of the relief sought, calculated according to the calculations set forth above. Wherever a plaintiff has failed to value the actual relief sought he may be required to place a value on it, and if he fails to do so the Registrar will be justified in taking the value of the relief sought as the full value of the property in dispute. If he fails to produce the Khewats and statements of value within such time as the Registrar thinks reasonable, the Registrar will fix such Court-fees as seem obvious to him to be right. In this particular case it is obvious that the Court fee *ad valorem* should not be calculated on more than one fourth of the values given in Schedule B, Part I, (*a*) to (*g*). In Schedule B, Part I (*b*), the plaintiff clearly states that he is in possession of more than his one fourth share. On this he need pay nothing. The mortgage deeds and bonds and money-lending business specified in Schedule II are all in the names of the defendants, Chetu, Kripal, Pitambar, Baikunth, Hazauri and Basuki Rai. The value of the relief sought in regard to them must be calculated at one-third of the value set on them, less the value, Rs. 82,000, set on the plaintiff's business *i. e.*, if the defendants' business is worth less than Rs. 2,46,000, the total business is worth less than Rs. 3,28,000 and the plaintiff is in possession of more than his one-fourth share and need pay nothing. On anything in excess of Rs. 2,46,000 the relief sought is one third of the excess. In Part II (*f*) to (*i*) the plaintiff says he is in possession of more than his share and need pay nothing. On the cash (*j*) he must pay on a quarter share. On the decrees (*k*) he must pay on a quarter share if they are in the names of the defendants. If he produces the Khewats, he need pay on an eight pies share only on the properties for which he has already been recorded for three annas and four pies.

Order accordingly.

(2) 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 33.
(3) 13 Ind Cas. 185; 34 A. 184; 8 A. L. J. 139.
(4) 10 Ind. Cas. 463; 38 C. 681; 15 C. L. J. 443.
(5) 8 C. 757; 11 C. L. R. 95; 4 Ind Dec. (N. S.) 488.
(6) 18 B. 209; 9 Ind. Dec. (N. S.) 647.
(7) 28 A. 340; 3 A. L. J. 181; A. W. N. (1906) 38.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 39 OF 1919.

February 9, 1920.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Justice Sir Ernest Fletcher, Kt.

RAM KISSEN JOYDOYAL—DEFENDANT—APPELLANT

versus

POORAN MULL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 54—Injunction, suit for—Injunction, when can be granted—Appeal—New point, whether can be raised at hearing.

RAM KISSEN JOYDOYAL v. POORAN MULL.

Where a suit is in essence one for a perpetual injunction with prayers for declarations ancillary thereto, the plaintiff must establish that the injunction is required to prevent the breach of an obligation, and unless he does so, the injunction claimed cannot be granted, more especially if equally efficacious relief can be obtained by any other usual mode of proceedings. [p. 575, cols. 1 & 2]

A point not taken in the trial Court, nor raised in the memorandum of appeal, may be urged at the hearing of an appeal if it goes to the root of the matter and raises the question of the competency of the Court to grant the relief claimed. [p. 574, col. 1.]

Appeal against the decision of Mr. Justice Greaves, dated the 29th April 1919.

FACTS appears from the following judgment of

GREAVES, J.—In this suit the plaintiffs seek for a declaration that they did not enter into a certain contract No. 128 with the defendants, dated the 13th December 1916, and that it is not binding on them and for an injunction restraining the defendants from proceeding to arbitration thereon before the Bengal Chamber of Commerce pursuant to a clause contained in the contract. The only issue which arises in the suit is whether the plaintiffs are liable on this contract. The evidence is as follows. On behalf of the plaintiff Hari Bux, who is a partner of Puranmull (the firm named being Choonilal Gobordhone Das) stated that his firm did not know the defendant firm before they received their letter of the 24th May 1917 which is contained in Exhibit G, that his firm were commission agents and had no transaction in hessians to which the contract relates. He denied that his firm asked anybody to enter into any contract on the 13th December 1916 or that they received any bought and sold note or any confirmation letter in respect of the transaction, and he denied that certain initials shown him in a peon book of Messrs. Pugh and Co. were signed by his firm or by any one belonging to the firm or that the initials *Oh* and *Ga* in the defendants' peon book were in the handwriting of any one in his firm. In cross examination he stated that one Tansook Roy, a broker who was living in the same house with him, told him in November 1916 that he had done a hessian transaction for him, that he told Tansook Roy that he had never ordered him to do this and that Tansook Roy told him two or three days later that he had arranged about the contract and sold to another party and that he signed his firm's name on a cheque drawn in favour of his firm by Bagatram Sew Protap at Tansook Roy's request but that he made no other payment. He denied having seen one Ramgopal of the firm of Ramgopal Bahitram prior to the 31st May 1917. On behalf of the defendants Ramgopal, a member of the firm of Ramgopal Bahitram, stated that he sold to the plaintiff firm 2 lbs of "B" Twills in November 1916, the contract being entered into by Tansook Roy Pursoram, and that he went to the plaintiffs for payment against delivery order and met Hari Bux who gave him a cheque and Rs. 75 in cash and that he made an entry in his cash-book. With regard to the transaction in suit he stated that he was the under broker and that he had an entry in his books under date the 13th December 1916, that he received instructions from Nitamul of the defendant firm to sell the goods referred to in the contract and that he met the broker Tansook Roy and made the bargain, through him, but that as he did not trust him absolutely he went to the plaintiff's Gadi, and met Hari Bux who accepted the bargain and that he told the defendants that the sale had been effected to the plaintiffs. He further stated that in May 1917 he went to see Hari Bux at his Gadi and that there was some talk as to a settlement. In cross-examination (Q and A 93) he stated that Tansook Roy did not come to the defendant firm with an offer from the plaintiffs, and in Q and A 122—125 he stated that in transactions such as the one in suit it was usual to have bought and sold notes and confirmatory letters from both sides and receipts for the bought and sold notes, but that in this transaction the defendants had told him that there was no confirmatory letter from the plaintiffs.

Nitamull, a son of one of the partners in the defendant firm who looks after the business of the firm on his father's behalf, stated that prior to the contract in suit he gave an offer to Ramgopal and that he reported that he had sold the goods to Choonilal Goberdhone Das through Tansook Roy and that they made an entry in their books. He stated that on the 13th or 14th

December he got the contract but that he subsequently sent it to the Bengal Chamber of Commerce and had not got it back. That on the 28th December 1916 he sent a paper to the plaintiffs' Gadi and subsequently saw the peon book which had been sent with the paper, that on the 2nd or 3rd May Hari Bux came to his firm's Gadi and suggested settling for the April loss for Rs. 600.

Ram Kishore, a Durwan in the employ of the defendants, stated that he knew the plaintiffs' Gadi from taking a letter there from the defendant firm about Christmas 1916. He stated that he handed the letter over and that after that the initials appearing in the peon book were put, and that he was asked from whom the letter came and stated that it came from the defendants.

Haripada Bose, Messrs. Pugh and Co.'s despatching clerk, gave evidence as to the despatch of two letters of the 30th April and the 18th May and Jitendra Nath Dutt, an assistant in Pugh and Co., produced press copies of these letters and Shamlal and Ranjar, peons of the firm, gave evidence as to taking letters to the plaintiffs' Gadi. The material documentary evidence consists of Exhibit 2 A, the defendants' entry of the contract in their Sowda book, which states that the sale was effected through the broker Tansook Roy and of two entries in the books of Ramgopal Bahitram, one being in the cash book as to the B Twills transaction, purporting to show receipt of a cheque and Rs. 75 in cash from the plaintiffs, and the other being in their brokerage book of the transaction in suit.

It is, I think, clear upon the evidence that the broker Tansook Roy did enter into the contract in suit, and what I have to decide is whether he did so under authority from the plaintiffs and on their behalf or if not, whether the plaintiffs came to know of the contract and subsequently ratified and accepted it. Unfortunately Tansook Roy has disappeared and could not be called, and it is not established to my satisfaction that he had authority from the plaintiffs to enter into this contract on their behalf. Ramgopal was not a satisfactory witness and I am not prepared to accept his evidence on any point, and it is noticeable that his name is not mentioned in the evidence on the motion to restrain the arbitration before the Bengal Chamber of Commerce, the defendants stating in their affidavit that Tansook Roy came with an offer from the plaintiffs which they accepted and which is a different story to that now put forward. Nitamull struck me as really knowing very little about the matter and I cannot accept his evidence as reliable. The only thing, therefore, to connect the plaintiffs with the transaction is the defendants' letter of confirmation of the 28th December 1916, which I think upon the evidence was delivered at the plaintiffs' Gadi and, I think I must hold, was received by them, but I do not think that this is sufficient by itself to make them liable. I think, therefore, that I must make the declaration which I am asked to make and I accordingly declare that the plaintiffs did not enter into the contract No. 128 of the 13th December 1916 and that the same is not binding on them, and I restrain the defendants from proceeding with the arbitration in respect of the contract before the Bengal Chamber of Commerce and the defendants must pay the costs of this suit on scale No. 2, which will include reserved costs, if any.

Messrs. *N. Sarkar*, *Langford James* and *S. C. Bose*, for the Appellant.

Messrs. *H. D. Bose* and *R. N. Mitter*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the defendant in a suit for a perpetual injunction to restrain arbitration proceedings before the Bengal Chamber of Commerce Tribunal of Arbitration. The plaintiffs instituted this suit for declaration that they did not enter into the contract No. 128 with the defendant dated the 13th December 1916, that the contract is not binding on them and that they are accordingly entitled to an injunction to restrain the defendants from proceedings to arbitration pursuant to the usual arbitration clause contained in the contract. The defendants traversed all the material allegations in their written statement. The only issue raised in the Court below was whether the plaintiffs were liable on the contract. Mr. Justice Greaves, on the evidence adduced, came to the conclusion that the plaintiffs did not enter into the

contract and that the same was not binding on them; he accordingly granted an injunction restraining the defendant from proceeding with the arbitration before the Bengal Chamber of Commerce.

On the present appeal, it has been argued that the plaintiffs, on the face of the plaint, were not entitled to the relief claimed by them. This point was not taken in the Court below and does not appear to have been raised in the memorandum of appeal presented to this Court. On behalf of the respondents, it has been argued that the point should not be allowed to be raised for the first time here. We cannot accede to this contention, because although the question cannot strictly be deemed as one of jurisdiction in the sense of competency of the Court to entertain the suit, still the objection goes to the root of the matter and raises the question whether the Court was competent to grant the relief claimed by the plaintiffs. If the Court was not competent to grant the injunction claimed by the plaintiffs, it is manifest that the decree for injunction should not be allowed to stand, merely because the point was overlooked and neither raised in the Court below nor mentioned in the memorandum of appeal presented to this Court. That the Court of Appeal cannot avoid the decision of a pure question of law of this character, which does not depend on the determination of a question of fact, and, which, besides, disputes the authority of the Court to make an order of a certain description, is clear from the decisions of the Judicial Committee in *Meenakshinaidoo* v. *Subramaniya Sastri* (1) and *Connecticut Fire Insurance* v. *Kavanagh* (2).

In the plaint the plaintiffs asked for the following reliefs: "For a declaration that the plaintiffs did not enter into the said alleged contract and the same is not binding on them, for a declaration that there was no submission to arbitration by the plaintiffs and for an injunction restraining the defendant firm, its servants and agents from proceeding with the said arbitration before the Bengal Chamber of Commerce Tribunal of Arbitration." It is plain that this is not a suit for a mere declaration of title without consequential relief, within the meaning of section 42 of the Specific Relief Act. Consequently, no question arises as to the scope of that section, as explained in the judgment of Sir Lawrance Jenkins, C. J., in the case of *Deokali Koer* v. *Kedar Nath* (3). The suit is in essence one for a perpetual injunction and the prayers for declaration are merely ancillary thereto. Thus the fundamental question for determination is, whether the Court was competent to grant the injunction sought for by the plaintiffs.

Now, as was pointed out by Sir Arthur Wilson in the case of *Tituram Mukerji* v. *Cohen* (4), "The right to an injunction, depends, in India, upon Statute and is governed by the provisions of the Specific Relief Act." We must, therefore, examine the provisions of Chapters IX and X of the Act. Chapter IX is headed 'Of Injunction generally.' Section 52, the first of the sections contained in Chapter IX, states that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. Section 53 next defines the injunctions as of two classes. The second paragraph, which is devoted to perpetual injunctions, lays down that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. The defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act, which would be contrary to the rights of the plaintiff. This provision consequently defines the mode in which a perpetual injunction can be granted and its restraining effect on the defendant when it has been granted. The next Chapter is headed 'Of perpetual injunctions' and opens with section 54, which defines when perpetual injunctions can be granted. The first paragraph of the section lays down that, subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by

(1) 14 I. A. 160, 11 M. 26; 5 Sar. P. C. J. 54; 11 Ind. Jur. 393; 4 Ind. Dec. (N. S.) 18.

(2) (1892) A. C. 473 at p. 480; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21.

(3) 15 Ind. Cas. 427; 39 C. 704; 16 C. W. N. 838.

(4) 33 C. 203; 32 I. A. 185; 2 C. L. J. 403; 9 C. W. N. 1073; 15 M. L. J. 379; 7 Bom. L. R. 920; 3 A. L. J. 59; 8 Sar. P. C. J. 908 (P. C.)

implication. The next two paragraphs deal with two distinct classes of cases, namely, first, the case when the obligation arises from contract, and secondly, the case when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property. In the former class of cases, the principle is formulated that the Court shall be guided by the rules and provisions contained in the Second Chapter of the Statute. In the latter class of cases, it is stated that the Court may grant a perpetual injunction in five specific categories of events. Mr. Bose, for the respondents, has not seriously contended that the prayer for injunction in the present litigation can be brought within the scope of section 54. This is fairly clear from the opening and controlling paragraph of the section, which provides that in order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent a breach of an obligation. The term 'obligation' is defined in section 3 to include every duty enforceable by law, so that when a legal duty is imposed on one person in respect to another, that other is invested with the corresponding legal right. The first paragraph of the section thus establishes the broad and general rule that given the breach of an existing legal right which is vested in the applicant, the breach thereof may be restrained by injunction. This is an elementary principle, for as Lord Kingsdown said in *Imperial Gas Light and Coke Co.* v. *Broadbent* (5) when a plaintiff applies for an injunction to restrain a violation of an alleged right, if the existence of the right be disputed, he must establish that right before he gets the injunction to prevent the recurrence of its violation. We accordingly invited the learned Counsel for the respondents to formulate the precise obligation of which there had been a breach in the case before us. But he was unable to show that there was any legal right in the plaintiffs which had been violated or had been threatened with violation by the defendant. Consequently, it is plain that no injunction can be claimed under section 54. Mr. Bose was thereupon constrained to invoke the aid of the second paragraph of section 53; he argued in substance that the right to an injunction must be determined by reference to the provisions of section 53 and that the provisions of section 54 should be treated as merely illustrative. We are of opinion that there is no foundation for this contention. Sections 54 and 56 must be read together, as supplementing each other. The former defines the circumstance under which perpetual injunctions may be granted; the latter enumerates the cases where an injunction must not be granted. It would, in our opinion, be an erroneous construction of the Statute to hold that the right to an injunction should be determined independently of the provisions of sections 54 and 56, by reference to the terms of section 53. As we have already stated, the injunction in this case cannot be claimed under the provisions of section 54. We are further of opinion that the injunction claimed should not be granted in view of the provision of clause (*i*) of section 56, which lays down that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding (except in case of breach of trust). In the case before us, the respondents allege that they did not enter into the alleged contract. If that case is well-founded, the arbitration proceedings before the Bengal Chamber of Commerce, even if they result in an award, can only terminate in an award which would be a nullity and could not possibly affect the rights of the plaintiffs; if the arbitrators make an award in favour of the defendant (which itself is doubtful), the plaintiffs will have ample opportunity to protect themselves by an appropriate proceeding. We are clearly of opinion, on all these grounds, that the injunction claimed cannot be granted.

Reference was made on behalf of the appellant to the decision in *North London Railway Co.* v. *Great Northern Railway Co.* (6), which was followed by Rankin, J., in *Sardarmull Jessraj* v. *Agar Chand Mahata & Co.* (7) in support of the view that when the contract is denied, the Court will not grant an interlocutory injunction to restrain arbitration proceedings which, according to the applicant, would be null and futile. On behalf of the respondents, reliance was placed on the earlier decisions of Sir George Jessel in the cases of *Beddow* v. *Bed-*

(5) (1859) 7 H. L. C. 600 at p 612; 29 L. J. Ch. 377; 5 Jur. (N. S.) 1319; 11 E. R. 239; 115 R. R. 295.

(6) (1883) 11 Q. B. D. 30; 52 L. J. Q. B. 380; 48 L. T. 695; 31 W. R. 495.

(7) 52 Ind. Cas. 588; 23 C. W. N. 311.

dow (8), *Malmesbury Railway Co.* v. *Budl* (9) and *Aslatt* v. *Corporation of Southampton* (10), which were all reviewed in the case of *North London Railway Co.* v. *Great Northern Railway Co.* (6). It is not necessary for us to deal with these cases, because, as we have already pointed out, the authority of the Court to grant an injunction in the present case depends on the true construction of the provisions of the Specific Relief Act.

The result is that this appeal must be allowed and the suit dismissed. We direct that the plaintiffs-respondents do pay to the defendant-appellant the costs of this appeal as also the costs of hearing for two days in the trial Court.

FLETCHER, J.—I agree.

Appeal allowed.

(8) (1878) 9 Ch. D. 89; 47 L. J. Ch. 588; 36 W. R. 570.
(9) (1876) 2 Ch. D. 113; 45 L. J. Ch. 271.
(10) (1881) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2247 OF 1919.

May 1, 1920.

Present:—Mr Justice Wilberforce.

GHANISHAM DAS—DEFENDANT—APPELLANT

versus

MUBARIK—PLAINTIFF—RESPONDENT.

Mortgage—Construction of document—Deed stipulating for redemption on payment of mortgage-money and charging property with liability for principal and interest—Redemption, sum payable on.

Where a mortgage-deed stipulates for redemption of the mortgaged property on payment by the mortgagor of the mortgage-money, and states that the property is mortgaged for the principal and interest, the mortgagor can only redeem on payment of the principal sum and the interest due thereon.

Second appeal from the decree of the District Judge, Mianwali, dated the 25th July 1919, affirming that of the Munsif, 2nd Class, Bhakkar, District Mianwali, dated the 9th May 1919.

Lala *Har Gopal*, for the Appellant.

Mr. *N. C. Mehra*, for the Respondent.

JUDGMENT.—Plaintiff sued for redemption of a mortgage deed on payment of nothing and also for a decree for Rs. 32. The defendant claimed Rs. 194-13 0. The first Court gave him a decree accordingly. The lower Appellate Court held that the mortgage was redeemable on payment of the principal mortgage-money only and that now nothing was payable. Against its decision the defendant mortgagee has preferred a second appeal.

The lower Appellate Court referred to a decision which is apparently *Bhag Mal* v. *Talia* (1), to the effect that *zar i-rahn* or *zar-i-marhuna* means the principal mortgage-money only. To the same effect is *Aulia Khan* v. *Kanshi Ram* (2) and *Lok Chand* v. *Hazar Khan* (3). None of these judgments, however, has any connection with the present case. In the mortgage-deed itself the mortgagor begins by stating that when he pays the mortgage-money *zar-i-rahn*, he will redeem the house. He then goes on to say that with the mortgage-money he will also pay the costs of repairs. He concludes by stating that the property is mortgaged for the principal and interest and that his person will also be liable. These concluding words entirely differentiate this case from those relied upon by Counsel for the respondent, as there is an explicit agreement that the mortgaged property is liable also for the interest.

I, therefore, accept this appeal and set aside the decision of the lower Appellate Court and as there are many grounds of appeal not disposed of, I remand the case under Order XLI, rule 23, for their disposal. Costs will be costs in the cause and Court-fee on appeal will be refunded.

Case remanded.

(1) 6 P. L. R. 1907; 44 P. W. R. 1907.
(2) 17 Ind. Cas. 677; 45 P. R. 1913; 25 P. W. R. 1913; 145 P. L. R. 1913.
(3) 41 Ind. Cas. 59; 93 P. R. 1917; 107 P. W. R. 1917.

CALCUTTA HIGH COURT.

APPEAL No. 20A OF 1914.

June 9, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir John Woodroffe.

J. M. LUCAS—APPELLANT

versus

OFFICIAL ASSIGNEE OF BENGAL—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), Part VIII, ss 103, 104—Charge, notice of Form of charge—Prosecution, duty of—"Alleged creditor," undue preference to, whether offence—Transfer for valuable consideration—Good faith—Criminal proceedings, postponement of, to civil proceedings.

Where in a proceeding under Part VIII of the Presidency Towns Insolvency Act, the charge framed against the insolvent does not correspond with the notice issued to him, his conviction thereunder cannot be maintained. [p. 577, col. 2.]

Where an insolvent is charged with purposely withholding books, it is the duty of the prosecution to establish that such books do in fact exist: mere suspicion cannot be allowed to pose as proof. [p. 578, cols. 1 & 2.]

In order to constitute the offence of undue preference under section 103 (*b*) of the Presidency Towns Insolvency Act against an insolvent, the payment must be to a creditor, and not to an "alleged creditor." [p. 579, col. 1.]

Where an insolvent transfers property, and the question is whether in so doing he acted in good faith, the fact that there was valuable consideration for the transfer adequate to the occasion would negative the inference that there was an absence of good faith in spite of the fact that the transfer was in favour of a relative. [p. 581, col. 2.]

Though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until the determination of civil proceedings in which the same issues are involved. Criminal proceedings lend themselves to the unscrupulous application of improper pressure with a view to influencing the course of the civil proceedings, and beyond that there is the mischief of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a Civil Court. [p. 582, cols. 1 & 2.]

Appeal from the order of Chitty, J., dated the 24th March 1914.

Mr. *Langford James*, for the Appellant.

Mr. *A. Avetoom* (with him Mr. *K. N. Chaudhuri*), for the Respondent.

JUDGMENT.

JENKINS, C. J.—On the 21st February 1912 J. M. Lucas was adjudicated an insolvent on his own petition under the Presidency Towns Insolvency Act, 1909. He was examined as to his conduct, dealings and property, and later, proceedings under Part VIII of the Act were instituted against him.

A notice was served on him under section 104 professing to set forth the substance of certain offences, and calling on him to shew cause why charges should not be framed against him. Nine charges were framed; on three he was acquitted, on six he was convicted and on each of these he was sentenced to rigourous imprisonment for four months. The sentences were directed to run concurrently. From these convictions and sentences Lucas has appealed.

The charges fall under two general heads, the withholding and falsifying of books of account, and the making away with property.

As it is objected on the part of the appellant that in one important particular the charge does not correspond with the notice, it is necessary to examine the terms of the notice so far as they relate to it. The first charge in the notice is that Lucas withheld the following books, (1) cash and ledger books of the insolvent's business to the end of April 1909, and (2) the ledger books from the month of May 1909 to the 14th of February 1912. The second charge is that Lucas kept a false cash-book from the 1st May 1909 to the 14th February 1912, which had been filed by him with the Official Assignee.

The other charges as to books contained in the notice call for no mention. The actual charges framed in pursuance of this notice make no mention of the ledgers, but charge Lucas (*a*) with having withheld production of the cash book or books from 1st July 1896 to the 30th of April 1909, (*b*) with having kept a false cash-book from 1st May 1909 to the 14th February 1912, being the cash-book filed by him with the Official Assignee, and (*c*) with having withheld production of the cash-book or cash-books from 1st May 1909 to 14th February 1912. But the notice did not set forth the substance of any offence regarding these last books, in fact it made no reference to them. This charge, therefore, is not framed in pursuance of the notice and cannot be maintained. So the conviction and sentence under charge (C) must be set aside. Charge A is that Lucas has purposely withheld the production of the cash-book or cash-books of his business from the 1st July 1896 to the 30th of April 1909, and that he did this fraudu-

lently with intent to conceal the state of his affairs and to defeat the objects of the Presidency Towns Insolvency Act.

These cash-books are not forthcoming and the charge as framed implies that the books still exist and have not been destroyed.

There is no evidence that they still exist, and the only evidence before the Court is that they were destroyed in the autumn of 1909. In dealing with this part of the case the learned Judge ascribes to Lucas a variation in his story as to the destruction of the books; but I do not so read the insolvent's statement. His story is that in the autumn of 1909 the books were burnt because of their condition. It may be a convenient excuse, but it cannot be called an improbable story, and it is, moreover, confirmed to this extent by Mr. Cuyper, his landlord at that time, that he deposes to having seen books burnt by Lucas.

The learned Judge regards this witness as most unsatisfactory; this was because his answers were rambling and indefinite, not because he appeared to be deliberately saying what was not true.

The record does not disclose the rambling and indefinite character of his answers and I say this after having read his deposition more than once. The learned Judge acquits Mr. Cuyper of the appearance of deliberate falsehood; absolutely no reason is given why he should have deposed falsely, and no suggestion of falsehood was made in the argument before us.

Mr. Cuyper says he saw books burnt at a date he is able to fix approximately by reference to the time at which Lucas left the premises and he gives this date as a month or two before November 1909. The learned Judge does not say this was not true and I see no reason for disbelieving it.

The judgment seems to suggest that the calling of Mr. Cuyper was an afterthought: but this is not the fact. Throughout Lucas had declared that Mr. Cuyper could confirm this story as to the burning of books in the autumn of 1909.

After all said and done, we must not lose sight of the fact that this is a criminal trial, and that it lies on the prosecution to prove its case beyond reasonable doubt.

To establish that books are being purposely withheld, it must be shewn that they exist. No serious attempt has been made to establish this, but suspicion has been allowed to pose as proof. And in dealing with this charge it must not be forgotten that it relates to books from 1896 to 1909, whereas the insolvency was not till 1912: and nothing has been placed before us that points to any reason for withholding these books if in fact they exist. This has been from no want of effort on the part of those assisting the prosecution, for a most searching enquiry has been made of those with whom Lucas dealt, and Radhakishen Agarwalla has been especially active in rendering assistance, and has naturally brought to bear all the knowledge possessed by him as the insolvent's broker. I hold charge A not proved.

Charges E and G have been treated together, and yet they involve considerations that are widely different.

The first charges Lucas that he fraudulently with intent to diminish the sum to be divided among his creditors had made away with a stock of shellac of the approximate value of Rs. 6,502-4-9 on or about the end of January or the beginning of February 1912.

The second charges Lucas that he on or about the month of January or February 1912 for the purpose of giving undue preference to one of his alleged creditors, to wit, George Edmund Pereiro, made away with a stock of shellac of the approximate value of Rs. 6,502-4-9.

Each charge, therefore, relates to the making away with shellac of the same approximate value: each refers to the months of January and February, though, for some reason not explained to us, there is a closer definition of the time in the first than in the second of these two charges. It was conceded in argument that the more precise description of time ought to apply to both charges, and the two charges have been treated as relating to the same shellac.

At this point, however, the charges diverge: the first complains that the making away was fraudulent, and that the intention was to diminish the sum to be divided amongst the creditors: the second refrains from alleging that the making away was fraudulent, but charges that it was for the purpose of giving preference to an alleged

creditor. Why it was not charged in that the making away was fraudulent was not explained to us: section 103 (*b*) requires it, and without it no offence under the Act is charged. In strictness, therefore, the second of these charges is bad in form. But that is not its only vice. It is only a creditor that can be unduly preferred, and yet Pereiro is only described as an "alleged" creditor. This is not a verbal criticism, for the Official Assignee has declined to admit Pereiro as a creditor. So that we have this extraordinary position, that we are asked by the Official Assignee to send a man to prison for giving an undue preference to a person who according to the Official Assignee is not a creditor. Mr. Avetoom found it difficult to make up his mind whether to press charge E or charge G but he evidently had a preference for the latter though he felt the difficulty that he was unable to say Pereiro had been proved to be a creditor.

Nor does this end the catalogue of difficulties in which the Official Assignee has involved himself by failing to keep clearly in view what had to be proved. It is not proved that Lucas made away with any stock of shellac of the approximate value of Rs. 6,502 4 9. The case sought to be made is that the shellac found its way into the hands of Pereiro, and this the prosecution endeavour to make out by piecing together a statement of Lucas, letters written by him and railway receipts. But this patchwork of evidence falls wholly short of the required proof: the letters might have been useful as evidence of a fraudulent intention had the transaction been proved: Lucas' statements negative the absence of valuable consideration; and of the railway receipts, the only one which is connected by evidence with Pereiro and at the same time relates to shellac, is Exhibit Z 2.

This connection consists in the fact that the receipt purports to bear Pereiro's signature and Radha Kishen, who professes to know the writing of Pereiro a little, deposes that the signature is his. How he acquired this knowledge does not appear. But treating as sufficient proof of Pereiro's handwriting this statement of Radha Kishen whose familiarity with English did not permit of his giving evidence without the aid of an interpreter, we are not carried much further. This receipt Exhibit Z 2 relates to a consignment of goods, not to Calcutta where Pereiro was, but to Mirzapur with which he is not shown to have had any connection; and the shellac is not of the approximate value of Rs. 6,502 4 9, but is only 3 maunds odd the value of which, we have been told, would be under Rs. 300.

There is absolutely nothing to show that the goods came into the possession of Pereiro: if we are to indulge in speculation, then I would be disposed to say that it is more likely that Pereiro had no real connection with the goods but that the goods were consigned in his *benamee* name, as the Official Assignee has himself reported.

The prosecution for the purpose of this charge have relied largely on a debit entry of Rs. 5,750 in the impugned cash-book C. C. That entry, however, purports to record a payment of Rs. 5,750, and nothing else, and if the entries on the credit side of the account be correct that amount must have been received, as otherwise there would not have been funds sufficient to meet the payments. Yet no endeavour has ever been made to show those payments were not made; on the contrary it is the subject of another charge that one payment, that to Mr. Mangey of Rs. 2,380, was in fact made.

It is true that on the credit side of this cash account are shown sums, as for instance, amounts paid to Pereiro, which may arouse suspicion. They might well have been investigated; but they have not, and it would be obviously unfair at this stage for the first time to use them against Lucas without affording him an opportunity of explaining them.

Charge H is the really substantial charge in the case, and but for the hope of recovering the property to which it relates, I very much doubt whether these criminal proceedings would have been launched. It avers that Lucas, on or about the 26th of September 1911 fraudulently with intent to diminish the sum to be divided amongst his creditors, transferred his properties Nos. 40, 41, 41/1, 41/2 and 42, Elliot Road, into the name of his mother-in-law. The terms in which the transfer is described

is suggestive of a *benamee* transaction, more especially when contrasted with terms of the notice.

That a transfer was made the insolvent does not dispute, but he emphatically denies that it was done fraudulently or with the intent charged. The Elliot Road property prior to this transfer belonged to Lucas but he had mortgaged it to the Phoenix Assurance Co., Ld., to secure a present advance of rupees one lac made and further advances to the extent of an additional Rs. 40,000 demandable on the completion of certain buildings.

At the date of the transfer Rs. 10,000 of the rupees one lac had been re-paid, but a further sum of Rs. 10,000 had been advanced so that the equity of redemption was still burdened with the indebtedness of rupees one lac. This equity of redemption the insolvent purported to transfer to his mother-in-law Mrs. Zemin on the 26th September 1911.

A deed was executed and registered and in form the transfer has been effected.

The consideration is expressed to be a sum of Rs. 50,000 and Mrs. Zemin also undertook and has since incurred certain pecuniary obligations.

This sum of Rs. 50,000 is said to be made up of Rs. 30,000 paid at the time and a past debt of Rs. 20,000 which was released.

The first point to be considered is whether the Rs. 30,000 was paid. It no doubt was a large sum for Mrs. Zemin to possess, but it is proved beyond the possibility of doubt that she possessed it. It represented a legacy of £2,000 left to her.

In anticipation of the arrival of this sum from England and its investment in the purchase of this property, Messrs. Morgan and Co. had actually prepared the instrument of transfer which was subsequently executed. Counsel for the prosecution emphatically announced that he made no imputation against this firm of attorneys in this transaction. It is further conclusively proved that Rs. 25,000 of this Rs. 30,000 was paid into Lucas' banking account. But the Official Assignee was not to be defeated by this: he instructed his Counsel to say that this payment of Rs. 25,000 was a blind: that the amount was re paid to Mrs. Zemin.

This is the case that was actually put forward for our acceptance and when I reflect on what has been actually established before us, I am at a loss to understand how the prosecution could have ventured to place such a case before the Court with a view to securing the conviction of the insolvent on this serious criminal charge.

It points to a disregard of materials within the control of the Official Assignee.

The Rs. 25,000 is shown to have been paid into the Mercantile Bank: of that there is no doubt, and even Counsel for the prosecution had to admit it.

Of this amount a sum of Rs. 10,000 is shown to have been paid by cheque to M. C. David, a creditor and one of the Official Assignee's own witnesses in this proceeding. A sum of Rs. 2,500 is shown to have been paid to the Mercantile Bank, yet to the last the Official Assignee persisted through his Counsel that this was not a genuine payment, though he actually had in his possession the *hundi* which was discharged by it.

Mr. James who represented the insolvent assured us this was so: we directed this and certain other *hundis* to be produced before us and true enough there was the *hundi* which proved conclusively that the Rs. 2,500 was a genuine payment.

Another item was Rs. 10,000 drawn in favour of self: this at any rate the prosecution maintained must have been re-paid to Mrs. Zemin. Here again there was not only a complete absence of proof, but the insolvent asserted before us that the amount was drawn to meet certain *hundis* now in the Official Assignee's possession. We sent for these *hundis* and they were brought into Court and completely confirmed what the insolvent had said. These payments were traced beyond all doubt by means of the G. C. Book whose genuineness has not been attacked.

By the *hundis* thus brought before us it was also conclusively proved that the Rs. 5,000 which had not been paid into the Bank had been similarly utilized.

In this matter then not only has the Official Assignee failed to prove the serious charge made by him, but it has been abundantly shown that there was no foundation for that charge. He ought to have known this, for he had in his

possession materials which disproved his own case and had he asked the insolvent for an explanation, it would have been forthcoming as readily before him as it was before us. Had these materials been placed before Chitty, J., they could not have failed to influence his opinion on this charge.

And now I will deal with the balance of Rs. 20,000 and in dealing with it, it is difficult—I doubt whether it would be right—to forget how baseless the Official Assignee's persistent imputations have been in regard to the Rs. 30,000.

This sum of Rs. 20,000 is made up of Rs. 8,000 and Rs. 12,000.

It is proved that Mrs. Zamin received a legacy for £ 500 which was paid her by cheque, and this represents the major part of the Rs. 800. It is shown to have passed into Lucas' account.

Lucas declares that this as well as the Rs. 12,000 was paid him by Mrs. Zamin. The instrument of transfer treats Rs. 50,000 as paid, and this is made up of the Rs. 30,000 and Rs. 20,000.

It was prepared under the circumstances I have described, and the receipt was witnessed by Mr. R. M. Chatterjee, then of Messrs. Morgan and Co.

It is admitted that Mr. Chatterjee would not have been a party to any fraud, but it is argued that if there had been an advance of two separate sums and this had been told to the attorneys there must have been a recital to that effect. But I do not agree with this, and for the purpose of these criminal proceedings I see no sufficient reason for not accepting Lucas' statement, more especially in view of the striking manner in which the accuracy of his statements regarding the Rs. 30,000 has been established. And I would here point to the fact that the Official Assignee's report actually treats the Rs. 20,000 as received from Mrs. Zamin.

It is true that Lucas' letters of the 19th January and the 5th February lend some support to the view that he regarded the property as his own. They no doubt create suspicion, but they are susceptible of explanation and I think it is equally pertinent to remark that in the letter of the 13th February he treated himself as a beggar with nothing left.

The narative disclosed by Lucas' letters shows that to the last he was fighting strenuously against failure, and I find it difficult to suppose that if he still had the property as his own, he would not have attempted to raise money on it.

But yet he never did after the 26th September. There is nothing improbable in his attempting to get money at that date; he was in urgent want of it, and when he got the Rs. 30,000, he had to utilize it in meeting his obligations as I have already shown.

At the same time it probably would have imperilled his credit if he had proclaimed abroad his desire to part with this property. This was averted by a sale to Mrs. Zamin.

It was true he only got Rs. 30,000 in cash from her, but still that was a substantial sum.

I do not forget that the lady was his mother-in law, but she parted with hard cash. There was valuable consideration, and if that was adequate to the occasion, the Court will, in ordinary circumstances, be slow to hold there was no good faith.

But if the transfar was in good faith and for valuable consideration, then it would not be liable to avoidance.

This brings me to the adequacy of the consideration.

We have two valuations by Messrs. Mackintosh Burn and Co. a firm of the highest standing. On the 24th of August they reported that the property could be readily sold for Rs. 1,50,000. On the 24th March 1911 they reported that the property could be readily sold and the amount that might be realized on a forced sale after the building of the two additional houses would be Rs. 1,90,000.

At the date of the transfer these two houses had not been built. The property was then subject to a mortgage of one lac, responsibility for which Mrs. Zamin undertook; she paid Rs. 30,000 in cash; she released a debt of Rs. 20,000; on the 2nd May 1912 she paid the Bengal Stone Company Limited Rs. 28,000 on account of payment for works done at 40, Elliot Road: and on the 12th September 1912 she paid Rs. 3,482 9-0 for plumbing and other work. In addition to this she paid Rs. 1,000 in round figures for flooring and incurred

a liability to the Bengal Stone Company for Rs. 10,000. Mr. James also contends that she is entitled to claim Rs. 500 for interest. In confirmation of the assertion that she took over the Bengal Stone Company's debt, there is the fact that this company has not submitted a proof in the insolvency.

It is claimed that these several payments and obligations constitute a consideration in excess of Rs. 1, 90,000 and in the circumstances, I am certainly not prepared to hold that the charge in relation to the Elliot Road property is made out.

The last charge is that Lucas, on or about the 15th February 1912 with the purpose of giving undue preference paid to one Mrs. Mangey, alleged to be a creditor, the sum of Rs. 2,380.

The circumstances on which this charge is based are assuredly venial, if any contravention of the Insolvency Law merits that description. In fact, the learned Judge declared that, as an offence, it might possibly, if it stood alone, be leniently dealt with; and Counsel for the prosecution recognized the justice of this remark. I, therefore, need not labour this point. The charge, as drawn, is now admitted to be bad: fraud is of the essence of this offence, but it is not alleged: to constitute the offence the payment must be to a creditor, even that is not stated as a fact. In the circumstances, I think, we ought not to permit an amendment of the charge at this stage and from this it follows that the conviction and sentence cannot stand.

We, therefore, set aside the conviction and sentence on each charge and find the insolvent not guilty and direct his acquittal.

Though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until determination of civil proceedings in which the same issues are involved. It is too well known to need elaboration that criminal proceedings lend themselves to the unscrupulous application of improper pressure with a view to influencing the course of the civil proceedings, and beyond that there is the mischief illustrated by this case of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a Civil Court.

Costs of the insolvent of both the Courts (as of a hearing) will be paid by the Official Assignee out of the estate in his hands. The Official Assignee will retain and pay his own costs (as of a hearing), as between attorney and client, out of the said estate. There will be liberty to apply.

WOODROFFE, J.—I agree.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 77 OF 1919.

May 8, 1919.

Present:—Mr. Mittra, A. J. C.

Musammat AJODHI AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 44, 162, 288—Penal Code (Act XLV of 1860), s. 202—Evidence Act (I of 1872), s. 32 (2)—Witness not produced in Court of Session, effect of—Statement made in course of gossip, admissibility of—Omission to give information of commission of offence—Statement to Police, manner of proving.

Section 288 of the Criminal Procedure Code has no application to the evidence of a witness not produced and examined in a Court of Session. [p. 583, col. 2.]

A statement made by a person in the ordinary course of gossip and not in the ordinary course of business is not a statement to which the provisions of section 32 (2) of the Evidence Act would apply. [p. 584, col. 1.]

Under section 44 of the Criminal Procedure Code it is the duty of a person who witnesses the commission of an offence to give information thereof to the nearest Magistrate or Police Officer, and, if he fails to do so, he renders himself liable to prosecution under section 202 of the Penal Code. [p. 584, col. 1.]

Although section 162 of the Criminal Procedure Code forbids the obtaining of signatures to a statement taken down in writing by the Police, there is no prohibition to evidence being given of a statement recorded in writing by the Police, provided it is otherwise relevant, nor can the provisions of the section be evaded by the Police recording as the first information report a statement obtained after the commencement of the investigation. [p. 584, cols. 1 & 2.]

Criminal appeal against the order of the Sessions Judge, Saugor, dated the 12th March 1919.

AJODHI v. EMPEROR.

Mr. *G. L. Subhedar*, for the Appellant.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—*Musammat* Ajodhi, aged twenty-five, and her deceased husband's younger brother, Pyare, aged twenty-five, both Dangis by caste, have been convicted of the murder of their newly born illegitimate daughter on the 16th October 1918 at Rangir and sentenced to transportation for life by the Sessions Judge, Saugor. They were also found guilty under section 318, Indian Penal Code, of concealing the fact of the birth by secretly disposing of the body, but for this offence no punishment has been awarded as it merged in the greater offence.

The prosecution case is that the child was born alive and was immediately killed and the body buried by Pyare and Ajodhi. The defence on the other hand is that the child was born dead and was buried at once by a midwife called Janki who attended at the confinement, at which Pyare was not present.

The body was found by the Sub-Inspector on the 26th October buried in a shed attached to the house where the appellants lived. It was so far decomposed that the doctor was unable to say that the child was bornalive. The medical opinion is, however, to the effect that the child was practically a full term child.

The only witness examined at the trial of the case to prove that the child was born alive is *Musammat* Saraswati, P. W. No. 2, the wife of the village Kotwar. She states that she saw *Musammat* Janki, a midwife, go to the house of Ajodhi and that after she had been there an hour, she heard the cry of a new born infant. The witness followed Janki to her own house and questioned her, who denied that a child had been born. Saraswati, however, never contradicted Janki by telling her that she had heard the cry of an infant. The witness never told anybody in the village about it, not even her own husband, though the fact of the pregnancy was pretty well known. It was only after the arrival of the Police upon the scene that this wife of the village Kotwar, who lives in one of the several neighbouring houses, came out with this story. The fact that she was not able to give the lie to Janki somewhat weakens the value of her testimony.

Musummat Janki died before the inquiry before the Magistrate, but a statement made and signed by her in the course of the Police investigation was taken down by witness Jamna Prashad, P. W. No. 4, in the presence of the Sub Inspector. This is Exhibit P 1. This statement has been copied by the Police and treated as the first information. Janki had also made a statement to her paramour Daolat, who was examined as P. W. No. 5 before the Committing Magistrate to depose to that statement. The defence admitted that Daolat has since disappeared and has become untraceable.

The questions which I have now to decide are whether the three statements of witnesses not examined in the Sessions Court are admissible and have been properly proved.

It may be as well to dismiss the suggestion of the Standing Counsel that Daolat's statement before the Committing Magistrate could be treated as evidence under section 288, Criminal Procedure Code. That section has no application to the evidence of a witness not produced and examined in the Court of Session.

Under section 33 of the Evidence Act the evidence of Daolat before the Committing Magistrate is relevant for proving the truth of the facts which it states, the witness being untraceable. The accused had the right and opportunity to cross-examine him, though in point of fact he was not cross-examined. As the portion of the record containing the deposition of Daolat purporting to be signed by the Committing Magistrate was produced before the Court of Session, the statement has been sufficiently proved under section 80 of the Evidence Act.

Section 33, however, contemplates that the evidence given before the Committing Magistrate was itself relevant evidence. We have, therefore, to see whether so much of the deposition as relates to declarations made by the deceased Janki to the witness is relevant or not.

Janki's statement to her paramour is to the following effect: a female child was born but accused Pyare pressed the child's throat and killed her; a sum of money

Rs. 4 in cash, and some grain had been given to Janki, who was enjoined by accused Pyare to keep the matter secret.

The statement recorded in Exhibit P-1 is practically to the same effect. It only contains more details.

The lower Court thought that these statements were admissible under section 32, clause 2, as statements made in the ordinary course of business by a midwife. There is, however, nothing but a fancied resemblance between the case and Illustration (*b*) to section 32 and the leading case of *Higham* v. *Ridgway* (1). The only point of similarity is that there is an accoucheur here as in the other two cases.

A statement made by a midwife to a paramour is in the ordinary course of gossip, not in the ordinary course of her business as a midwife. It is not shown or suggested that it is the usual routine practice of a midwife or the particular midwife to report births to the Police. In fact, no report was made and none of the statements was elicited till after the body was found. Section 32, clause 2, has, therefore, no application.

I think, however, this statement is relevant under section 32, clause 3, as the statement, if true, would have exposed Janki to a criminal prosecution. According to that statement she witnessed a murder. Under section 44 of the Criminal Procedure Code it was her duty to give information forthwith to the nearest Magistrate or Police Officer of such murder. For ten days she had made no report. She was, therefore, guilty of an offence under section 302, Indian Penal Code, for intentionally omitting to give information which she was legally bound to give.

Daolat's deposition relating to the declaration made by Janki is, therefore, relevant.

Section 162 of the Criminal Procedure Code lays down that no statement made by any person to a Police Officer in the course of an investigation shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence. The only exception is in favour of dying declarations under section 32, clause 1, of the Evidence Act. Therefore, the written record made by the Police cannot be used as evidence. But that section does not prevent evidence being given of a statement, recorded in writing, provided it is otherwise relevant. The operation of the section, however, cannot be evaded by the Police choosing to record as the first information a statement obtained after the investigation has commenced: *King-Emperor* v. *Bhut Nath Ghose* (2).

The statement recorded by Jamna Prashad was made in the presence of the Police in the course of the investigation and equally comes within section 162.

But if the writing is not to be used as evidence, there is nothing to prevent the witnesses who have heard the statement deposing to the facts contained in the writing, after refreshing their memory under section 159 of the Evidence Act. Jamna Prashad, instead of being asked merely to prove the execution of the document by the deceased Janki, should have been made to give oral evidence of the statement after refreshing his memory by looking at Exhibit P-1. Similarly the Sub-Inspector, who made a contemporaneous record in the case diary, should have been asked to state what Janki had told them. This is a defect in procedure to which no exception was taken by the learned Counsel for the appellant, and on my pointing this out to him, he asked that the statements in the documents may be regarded as having been duly and legally proved, as he did not wish that his clients should be put to the expense of a further inquiry.

I have held all the statements to be relevant, but it is always best to remember that the most difficult question for decision is the weight to be attached to the evidence. Here we have in the first place the uncross-examined testimony of a woman who, upon her own admission, was not above accepting a small bribe to hush up a murder. Her paramour admits that he received an additional bribe of Rs. 10 (ten). He also happens not to have been cross-examined, as the accused had no Pleader in the Magistrate's Court. I do not think it safe to accept such uncross-examined and tainted evidence as sufficient for the charge of murder. It must be pointed out, in fairness to the learned Sessions Judge, that he

(1) (1808) 10 East 109; 10 R. R. 285; 103 E. R. 717.

(2) 7 C. W. N. 345.

has accepted Janki's declaration only to the extent that the child was born alive. He, however, argues that it was upon the accused to explain how the live child came to die, and as they offered no explanation at all they must be held to have caused its death. In this he is wrong. The prosecution must not only prove, either by direct or circumstantial evidence, that the child was born alive but also that the child was murdered. The lower Court relies upon the fact that the appellants denied at the village Panchayat that any child was born and they persisted in this denial before the Police.

In paragraph 17 of his judgment the learned Sessions Judge writes :—

"Further it is clear from the statement of Manzur Hussain (Sub-Inspector) that he found the place of burial of the body by watching Ajodhi and Pyare and noticing that they were constantly looking in one particular direction."

In the next paragraph the learned Sessions Judge writes :—

"This circumstantial evidence is very much against the defence story of the child being born dead. If, as they say, every one knew of the pregnancy, they would certainly have at once made public the fact that the child was born dead and not raised all this suspicion against themselves if there was nothing to conceal."

So far as I know, this sort of evidence has not hitherto been regarded by any Jury as proof of murder.

The conduct of the accused is not, however, inconsistent with their innocence on the charge of murder, if there has been in fact a secret disposal of the body to avoid giving greater publicity to a scandal. The fact that a midwife was called in—and it is not shown that she was of a disreputable character—tends to show that no murder was intended when the midwife was invited. The prosecution theory that there would have been no murder of an illegitimate *male* child appears to me to be farfetched.

Even if Saraswati's evidence is accepted and the facts mentioned in the lower Court's judgment are taken into consideration, I am bound to say that the prosecution has failed to make out the charge of murder.

The burial inside the shed is undoubtedly a secret disposal of the body with intent to conceal the birth. This was also the view of the Assessors. An offence under section 318 has undoubtedly been committed, and I have now to see whether either of the appellants is guilty under that section. Janki's statement is not merely relevant as to the murder but also as to the disposal of the body. These two facts are connected together as part of the same transaction and upon the principle laid down in *Higham* v. *Ridgway* (1), the whole of the statement so connected together is relevant, though, by not reporting the secret disposal, Janki did not render herself liable to a prosecution under section 202, Indian Penal Code. Daolat is silent as to the disposal of the body. Janki's statement shows that the mother left the cattle shed after the delivery and before the disposal of the body. There may be a suspicion that the act was done with her connivance, but it is difficult to hold upon Janki's evidence that there was any abetment or conspiracy between the male and the female appellant. I, therefore, agree with the Assessors and acquit *Musammat* Ajodhi of the charge under section 318.

The male appellant pleaded that he was at Sirki on the day. His own witness Fadali, D. W. No. 2, proves that the accused had not been in Sirki for a long time before his arrest. Janki's statement that the man came to fetch the midwife is corroborated by Daolat. This is entirely in accordance with probabilities. It is very unlikely that the midwife, a woman of a different caste, would agree to or would be asked to bury the child. The mother was incapable of the necessary physical exertion. Janki's evidence that the appellant Pyare buried the body may, therefore, be safely accepted as true. Agreeing with the Sessions Judge and the Assessors, I uphold the conviction of Pyare under section 318.

The result is that *Musammat* Ajodhi is acquitted of both charges and I direct her immediate release. Pyare is acquitted of the charge of murder, but his conviction under section 318 is maintained and he is sentenced to two years' rigorous imprisonment with effect from the date of the lower Court's order.

Appeal allowed in part.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 336 AND REVISIONS NOS. 533 AND 534 OF 1919.

January 20, 1920.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Newbould.

GRANDE VENKATTA—ACCUSED—PETITIONER

versus

CORPORATION OF CALCUTTA—OPPOSITE PARTY.

Bengal Ghee Adulteration Act (I B. C. of 1917), s. 2 (2)—Calcutta Municipal Act (III B C. of 1899), s. 495 A (1)—Standard of genuineness—Statutory provision, absence of—"Commercial Ghee," adulteration of.

As the Bengal Ghee Adulteration Act does not lay down a standard raising a presumption that Ghee alleged to be adulterated is not genuine, and no standard having been fixed for the purpose by any board of experts similar to the Butter Commission in England, Courts of law have to decide questions of adulteration upon such evidence as is available in each individual case. As there is no statutory provision, every case must depend upon its own evidence. [p. 587, col. 1.]

Where a certain sample of "Commercial Ghee" or buffalo Ghee was found to contain some foreign fat substituted in part for genuine Ghee:

Held, that the Ghee was adulterated within the meaning of section 2, sub-clause (2), of the Bengal Ghee Adulteration Act. [p. 590, col. 2.]

Criminal appeal against the decision of the Municipal Magistrate, Calcutta, dated the 16th April 1919.

Babus *Monmotha Nath Mookherjee* and *Bankim Chandra Mookherjee*, for the Accused.

The Hon'ble The Advocate-General, Mr. *Carnell* and Babu *Satindra Nath Mookherjee*, for the Opposite Party.

JUDGMENT.—In these cases tried together as one case the accused are charged with having adulterated Ghee. The proceedings have unfortunately been very protracted. There were originally three cases ending in conviction, which came up to this Court. The Criminal Bench differed in their opinion and there was a reference to a third Judge which resulted in a remand. Their judgments are reported as *Grande Venkata Ratnan* v. *Corporation of Calcutta* (1). The re-trial extended over 7 months. Five experts were examined and a large number of text books and scientific journals was used. At the re-trial both the accused have been convicted in respect of two samples of Gouranga Brand Ghee which were taken by the Corporation on the 31st October 1917, and sentenced under section 495-A, sub-section (1), to pay fines. In respect of the sample taken on the 27th November 1917 which formed the subject-matter of the third case, the learned Magistrate held that "the Corporation analysis of the sample was not as complete as it might have been." He was "not prepared to arrive at a finding of undoubted adulteration so far as that sample was concerned and although such analysis as had been made aroused suspicion." He gave the accused the benefit of his doubt.

The accused are sellers of Ghee, not manufacturers, and the charge is that they sold or stored adulterated Ghee. Adulteration is defined in section 2 of Bengal Act I of 1917. The definition is fairly comprehensive and the present case is said to be covered by sub-clause (2) of section 2, as some foreign fat is said to have been substituted in part for genuine Ghee. The Act provides "that a report signed by an analyst certified by the Chairman to be employed by the Corporation for the purpose of analysing Ghee shall be sufficient evidence of the result of such analysis." It is unfortunate that the Statute does not lay down a standard raising a presumption that the Ghee is not genuine. In England a committee was appointed to enquire and report as to what regulations might with advantage be made under section 4 of the sale of Food and Drugs Act, 1899, for determining what deficiency, if any, of the normal constituents of butter or what addition of extraneous matter other than water should raise a presumption, until the contrary was proved, that the butter was not genuine; but no such steps have been taken by the Government in this country and the question of adelteration has become an extremely difficult one in consequence. The English Butter Regulations Commitee took a large body of evidence and examined a large number of eminent analytical experts and tabulated the results of some thousands of determinations, the results of actual experiments, and arrived at a figure representing an analytical standard which they reported should be taken as a guide, that is to say, that if any sample fell

(1) 46 Ind. Cas. 593; 22 C. W. N. 745; 28 C. L. J. 82; 19 Cr. L. J. 753.

below that figure, a presumption was to be raised that the butter was not genuine. They examined the results of experiments with butter of different countries. They took into account various factors such as climatic conditions, period of lactation, nature and amount of food, breed and idiosyncracy of the cow. This variation in composition, they stated, had a corresponding influence upon such of the physial characteristics of butter as are used by analysts to supplement their chemical tests. The work was of an extremely difficult and technical nature and was carried on by a board of experts and a standard was fixed by them. Unfortunately nothing of that kind has been undertaken in India, and Courts of Law are called upon to decide questions of adulteration upon such evidence as is available in each individual case and arrive at findings on the basis of experiments which cannot for a moment be compared with the experiments dealt with by the Butter Commission. It is unfortunate that the burden of carrying on necessary experiments was thrown upon the Calcutta Corporation with its limited resources. We, however, find that the chemical experts of the Corporation have done their work with great care and remarkable ability. It was urged upon us by the prosecution that we should accept the Corporation standard and if we were not able to do so, then we should fix a standard ourselves. No doubt we must determine whether or not the Municipal standard ought to be acted upon in this case, but we must decline to fix a standard ourselves if we cannot accept it. If we did so, it would be absolutely of no value. It would not be binding upon any other Bench of this Court. As there is no statutory presumption, every case must depend upon its own evidence. We are strongly of opinion that a statutory standard should be laid down raising a presumption, and cases of this kind should not be made to depend upon the evidence forthcoming in each case testing the value of the Corporation standard. If we had to deal with butter derived from cow's milk, the English standard would be of great value, but "Ghee" is not butter. Admittedly changes take place when butter is clarified and the temperature at which Ghee is prepared is not a negligible factor. Ghee is not defined in the Act; a further difficulty is that Ghee is produced from various kinds of milk, but the Calcutta Corporation standard is practically based upon Ghee made from buffalo milk. That particular kind alone has been treated as "Commercial Ghee", in this case a term not used in the Act, and the Magistrate has dealt with the samples as such Ghee. The Ghee most prized is that made from cow's milk which yeilds different analytical results. Other kinds of butter perhaps give different results but we have no data before us about them. A mixture of cow's milk and buffalo milk gives varying results, but Ghee produced from such mixture cannot be treated as adulterated as it is derived exclusively from milk. This adds to the difficulty of judicial determination.

In the experiments carried on by the Corporation, climatic conditions, the nature of food, period of lactation, breed, stabling and local conditions have not been considered, nor has the temperature of manufacture been taken into account, and the resulting variation noted. It appears that sudden alterations of temperature, exposure to wet and cold winds, affect the volatile acids which are a characteristic constituent of butter fat as distinguished from other fats. All these factors were carefully considered by the Butter Regulations Committee of England and they determined that what is known as the Reichert, Wollny method, hereafter referred to as the R. W. method, supplied a safe test. Butter fat has not a constant composition. The variations are sufficiently wide rendering the establishment of a presumption of adulteration, on the basis of a deficiency in the normal proportion of some one or other of its constituents, very difficult. The R. W. test determines the amount of volatile acids which butter may contain. According to the committee that test fulfils the conditions of a quantitative method which can be made the basis of judicial proceedings. They fixed a limit, although the results of the experiments largely varied. In so doing they were mindful of two considerations, namely, that it was sufficiently low not to press harshly upon too large a proportion of genuine if abnormal butters, and on the other hand that it was sufficiently

high to take away the inducement for adulteration. These points have to be kept in view.

The samples of Ghee, the subject matter of the charges in this case, were bought by the Corporation from the place of business of the accused in Calcutta on the 31st October 1917. One was said to have come from Sagore, Exhibit 1, and the other came from tins marked Gouranga Brand from Guntur (Madras), Exhibit 2. A third sample Exhibit 3 was bought on the 27th November 1917 from tins marked Gouranga Brand, Guntur. The place of production is a matter for consideration. In this case the analyst was not told the place of origin. When the Ghee was purchased, no mention was made what kind was wanted, cow or buffalo Ghee, and the Ghee purchased has been treated as "Commercial Ghee," namely, buffalo Ghee, which according to the evidence is mainly sold in Calcutta. It is also a cheaper Ghee than Ghee produced from cow's milk. That also supports the supposition that what was sold was buffalo Ghee.

The Corporation have from their experiments arrived at a certain standard for pure Ghee. Four tests have been applied by them to test its purity: (1) The Reichert-Wollny process, (2) the Butyro-Refractive index, (3) Saponification, (4) Wellman's test. Butter fat and Ghee are characterised by the presence of certain volatile fatty acids, principally two, which are known as Butyric and Caproic acids. The proportion of these volatile acids is by general consent of chemists by far the most important criterion in butter analysis and it is known as the R. W. number. The process consists in liberating the fatty acids and preparing a distillate, a definite quantity of which is neutralised by titration with a decinormal alkali solution. The amount of the decinormal solution required to neutralise that quantity of the distillate is called the R. W. number. The figures arrived at in the Corporation Laboratory for buffalo Ghee range from 30 to 42 in the case of individual animals and 29 to 32 in the case of samples from herds of cattle. The latter is considered more reliable as eliminating the idyosyncracy of individual animals. The Corporation has adopted 30 as the standard raising a presumption of adulteration so far as buffalo Ghee is concerned. In the same way they have laid down 25 as the minimum R. W. figure for cow Ghee. The R. W. figure adopted in England by the commission for butter derived from cow's milk is 24. More than nine-tenths of the samples before the English Committee yielded figures between 24 and 32, and by far the greater amount of these were between the limits of 26 and 31. Samples yielded results as high as 35 and as low as 18·4; but having regard to their infrequency and special conditions the Committee after a general review of the whole matter arrived at 24 as a safe standard. We are called upon to accept 30 as a safe standard for Calcutta Commercial Ghee. Whether we can do so or not we shall examine later.

The Butyro-Refractive index process, hereafter referred as the B. R. process, is a sorting process testing the density of the Ghee. The Corporation standard is 40 to 42. If the refraction is found to exceed 42 adulteration is suspected. B. R. Index is said to be the same for both cow and buffalo Ghee. By this process whether the adulteration is vegetable or animal cannot be ascertained and it is not claimed that it is anything more than a rough test.

The Saponification test consists in finding out the number of milligrammes of caustic potash required to saponify one gramme of fat. The average figure for buffalo Ghee according to the Corporation is 229 and for cow Ghee 227. It is said that if the figure goes down it indicates adulteration.

Wellman's test is a colour test for detecting the presence of vegitable oil, but it fails in the case of cocoanut oil. The Ghee is melted and dissolved in a little chloroform and a re-agent is applied. The presence of oil other than cocoannt oil is indicated if a green colour appears at the top, which turns blue on the addition of ammonia.

The Corporation standard is, therefore, as follows:—

	R. W.	B. R.	Sap.	Wel.
Pure buffalo Ghee ..	30	40—42	229	Negative.
Pure cow Ghee ...	25	40—42	227	Negative.

According to their experiments,

	R.W.	B. R.	Sap. Wel.
Ex. 1 (yielded) ...	26 6	44	222 Positive (Showed colour)
Ex. 2 ...	24·9	45	220 (Ditto)
Ex. 3 ...	27·1	44	222 Negative (No colouration).

The learned Magistrate has come to the conclusion that the following figures ought to be adopted in testing adulteration.

R. W. 28, B. R. 40—42, Sap. Buf. (220), Cow (227). In this connection it may be mentioned that certain chemists and analysts of Calcutta held a conference in 1917 at the instance of the Corporation. At that conference the R. W. figure agreed upon was 28 for "Commercial Ghee." Two of the expert defence witnesses were members of that conference.

In England the R. W. figure alone has been adopted as a test for adulteration, but we cannot accept the figure arrived at by the Corporation as by itself raising a presumption of adulteration, having regard to the limited number of experiments and because sufficient allowance does not appear to us to have been made for the varying conditions above referred to. Dr. Ghose, the Corporation expert, says that on the R. W. figure alone he would not give any opinion. He would on "all the others," referring to the three other tests. He says if he found a sample give the R. W. figure "as below 30, between 24 and 30, and near 24, while the other tests, satisfactory," he would regard it as pure cow Ghee and pass it as genuine.

It appears from the evidence that the consigment of Ghee from which samples were bought by the Corporation came from Madras. The accused have produced their books and railway documents have also been produced corroborating their statement. There is no evidence to the contrary. The Corporation has not carried out any experiments in Madras Ghee. There is evidence, though not of much value, that in Madras cow's milk and buffalo milk are mixed together and milk from goats and sheep is also mixed, in the preparation of Ghee.

The evidence is that "if buffalo and cow Ghee are mixed, the R. W. figure adopted by the Corporation for buffalo Ghee is lowered, the limits of such variation being between 25 and 30. The R. W. figure of Exhibit 1 is within those two limits. Exhibit 2 gives 24·9 which is just below the cow standard by ·1, which is a very small difference. It is admitted that the R. W. process is a highly technical process and that if the details of analysis are not minutely carried out, the results may be vitiated and that various errors may creep in. But even taking that the analysis was scrupulously and very carefully carried out, beyond raising a suspicion of adulteration nothing more can be said from the figures found by the Corporation.

It is then urged that the other figures not only confirm the suspicion, but lead to certainty. Let us examine this contention. It is said by Dr. Ghose that the same causes that influence the R. W. figure also influence the figures under the other two tests, *i. e.*, the B. R. index and the Saponification number, and that the variations in one test shew a corresponding variation in the other two. Mr. Briggs, one of the expert witness for the defence, admits that the three tests are consistent, *i. e*, they vary consistently with each other. Mr. Thomas, another expert witness for the defence, says that if all the four tests (including the Wellman test) agree, they would be sufficient to pronounce upon the genuineness of the sample, although they would not give absolute certainty in every instance. Mr. Hayward, another expert witness for the defence, however, says that he would not in all cases consider the four tests as sufficient, though he might in some. He admits that generelly speaking they would indicate the presence of foreign fat and the nature of that fat may be determined by the melting point and Wellman's tests, but that they may break down in special circumstances. It depends, he says, on the extent of the variation from the standard, but if the results are all very kindred, he says, they would be sufficient. On the evidence and also from the text books and scientific journals placed before us, we have no hesitation in holding that the B. R. and Saponification tests afford valuable corroboration, that the same causes which influence the R. W. figure, influence them and that they vary consistently.

In this case, the R. W. figures are below the Corporation standard, the Saponification value is also below that standard and the B. R. is above in each.

The Corporation standard for B. R. is 40—42, for Saponification, buffalo 229, cow 227.

The conference accepted the same B. R. figure as the Corporation, and the Saponification figure for buffalo accepted by them was 225 to 233, the Corporation figure being the average between 225 and 235; but the samples Exhibit 1 and Exhibit 2 yielded B. R. 44 and 45 and Saponification 222 and 220 respectively.

From the evidence we take the Corporation standards for B. R. and Saponification to be fair. Mr. Briggs admits that they are fair. The B. R. figures for cow and buffalo are the same and a mixture of the two would not make any difference. The Saponification figures in this case are much lower and a mixture of the two kinds of Ghee would not account for it. It is an inconsistent variation. Taking these figures into account, even the defence experts say that the samples in this case are suspicious, though they do not in words admit that a positive deduction of adulteration can be arrived at from them.

In addition to the above, Wellman's test in this case yielded a positive result, showing that there was oil in the samples. The text books show that oil sometimes passes through the food taken by the animals, and it was strenuously urged before us that the presence of oil in the samples may have been due to the feeding. Whether it had or had not so passed could be ascertained by what is known as the phytosteral acetate test, which has not been undertaken by the Corporation. That undoubtedly can be urged, but the result of Wellman's test cannot be altogether ignored by us although the last mentioned test was not employed. The samples of Bengal and United Provinces Ghee examined by the Corporation have given negative results by Wellman's test. No doubt Madras Ghee has not been examined as such by the Corporation, but we have the following evidence about the food. Girish Chandra Mukherjee, a partner of the accused, who is the only witness on the point says :—

"As to food I have seen in the United Provinces cotton seeds, barley, wheat bran being given. There are no paddy districts there, only 'Jowari,' 'Kooli' or dry barley plants are given. In Bengal straw, rapes eed are given. Cattle in Bengal do not get the same food as in Madras. In Madras you have rice, husked rice dust."

This does not show that any specially oily food is given to cow or buffalo in Madras. A large quantity of oil cakes as food may cause some oil to pass into the milk according to the evidence, but there is no evidence that in Madras they are more largely used for cattle food than in Bengal or the United Provinces. Taking all these tests together, we think that it has been established that the samples are adulterated.

We uphold the able judgment of the trial Court, although we are not able to confirm the standard for Commercial Ghee which he has accepted. The Ghee in this case, even if it be considered as a mixed product of buffalo and cow Ghee, has, in our opinion, been adulterated by foreign fat.

The conviction and sentence are upheld.

The appeal is in respect of the two cases based upon Exhibits 1 and 2. They were tried together and are covered by one judgment. Separate fines have been inflicted on each charge. As the total amount exceeded Rs. 200 the appeal was filed. No objection has been taken to that on behalf of the Crown. Applications for revision were filed by way of greater caution, should it be contended that the appeal was not maintainable. The appeal is dismissed and the applications rejected.

In conclusion we think we ought to add that we have received very great assistance from Counsel on both sides in this case and that special mention should be made of the ability and fairness with which the learned Vakil for the defence has conducted his case.

Appeal dismissed;
Applications rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 233 OF 1920.

May 1, 1920.

Present:—Mr. Justice Scott-Smith.

SUNDAR SINGH—PETITIONER

versus

PHUMAN SINGH – RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195 (6) (7)—Sanction given by Munsif—Appeal, forum of —Munsif's Court, whether subordinate to that of Senior Subordinate Judge.

A Munsif granted sanction for the prosecution of one *S.* for an offence under section 210, Indian Penal Code. On appeal the Senior Subordinate Judge maintained the order. *S.* filed an application for revision in the High Court:

Held, that as appeals from the order or decree of a Munsif ordinarily lie to the District Court and only in special cases to the Senior Subordinate Judge, the Munsif is subordinate to the District Court within the meaning of section 195 (6), Criminal Procedure Code; [p. 592, col. 1.]

(2) that consequently the Senior Subordinate Judge had no power to hear the appeal [p. 592, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Senior Subordinate Judge, 1st Class, Ludhiana, dated the 22nd January 1920, affirming that of the Munsif, 1st Class, Ludhiana, dated the 11th December 1919, granting sanction for the prosecution of the decree-holder petitioner under section 210, Indian Penal Code.

Mr. *Dev Raj Sawhney* for Mr. *Kunwar Narain*, for the Petitioner.

Mr. *Jaigopal Sethi*, for the Respondent.

JUDGMENT.—The Munsif, 1st Class, Ludhiana, under section 195, Criminal Procedure Code, granted sanction for the prosecution of Sundar Singh for an offence under section 210, Indian Penal Code. From this order an appeal was preferred in the Court of the Senior Subordinate Judge, who maintained the order of the Munsif. Sundar Singh has now filed an application for revision in this Court, and it is contended on his behalf that the Senior Subordinate Judge had no power to hear an appeal from the order of the Munsif, granting sanction. Section 195 (6), Criminal Procedure Code, lays down that any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, and sub section (7) lays down that for the purposes of this section every Court shall be deemed to be subordinate only to the Court to which appeals from the former Court ordinarily lie. Now, under section 39 of the Punjab Courts Act, 1918, an appeal from the decree or order of a Munsif shall lie to the District Judge, except as otherwise provided in any enactment for the time being in force. Under section 39 (4) of the Act the Chief Court may, with the previous sanction of the Local Government, by notification in the Local Official Gazette direct that appeals lying to the District Court under sub-section (*2*) from all or any of the decrees or orders passed in an original suit by any Munsif shall be preferred to such Subordinate Judge as may be mentioned in the notification. Now, under this sub section the Senior Subordinate Judge of Ludhiana hears all appeals from the decrees or orders passed in original suits by any Munsif in small cause cases which do not exceed Rs. 500 in value. In the present case the alleged offence was committed in execution proceedings in a case which was a small cause one not exceeding Rs. 500 in value and an appeal in that case would, therefore, have lain to the Senior Subordinate Judge. It is, however, contended that appeals from the decrees or orders of a Munsif ordinarily lie to the District Judge and it is only in exceptional cases, such as provided for in section 39 (4), Punjab Courts Act, that appeals lie to the Senior Subordinate Judge. It is, therefore, urged that for the purposes of section 195, sub sections (6) and (7), of the Criminal Procedure Code it is only the District Judge who could hear an appeal from an order giving or refusing to give sanction under section 195. Counsel for the petitioner has referred me to *Ram Charan Chandra* v. *Tirupulla Sheikh* (1), *Ramkrishnapuri* v. *Mohanlal* (2) and *In re Anant Ram Chandra Lotlikar* (3). The first two of these rulings cannot be

(1) 13 Ind. Cas. 1007; 39 C. 774; 16 C. W. N. 645; 13 Cr. L. J 191.

(2) 15 Ind. Cas. 642; 13 Cr. L. J. 498; 8 N. L. R. 57.

(3) 11 B. 438; 6 Ind. Dec. (N. S.) 288.

considered to be on all fours with the present case, because the law as to the Court to which appeals lie is not the same in the Punjab as that in Bengal. The Bombay ruling, however, appears to me to be in point. There it was held that though the decree was appealable to the High Court, still as appeals from the Court of the Subordinate Judge ordinarily lay to the District Court, the former was subordinate to the latter Court within the meaning of section 195, Criminal Procedure Code. Similarly in the present case as appeals from the order or decree of a Munsif ordinarily lie to the District Court and only in special cases to the Senior Subordinate Judge, I hold that the Munsif is subordinate to the District Court within the meaning of section 195, Criminal Procedure Code.

I, therefore, allow the revision and setting aside the order of the Senior Subordinate Judge, direct that the appeal from the order of the Munsif granting sanction be heard and decided by the District Judge.

Order set aside.

PATNA HIGH COURT.
CRIMINAL REVISION No. 345 OF 1919.
September 27, 1919.
Present:—Mr. Justice Das.
RAGHU SINGH—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Appellate Court, power of, to alter conviction.

Where a person is tried and convicted of a particular offence, it is illegal for a Court of Appeal to alter the conviction to one for an altogether different offence.

Application against the order of the Sessions Judge, Gaya, affirming the order passed by the Deputy Magistrate, Aurangabad.

Mr. *Nageshwar Prasad*, for the Petitioner.

JUDGMENT.—The petitioner was convicted in the Court of first instance under section 457, Indian Penal Code, for having committed lurking house trespass by night in order to commit theft, and was sentenced to undergo rigorous imprisonment for three months.

In appeal the learned Sessions Judge came to the conclusion that there was undoubtedly a trespass, but that it was not proved that the object of the trespass was to commit theft. He thought that there was another object, namely, to annoy or insult the women in the house in which the trespass was committed. He altered the conviction from one under section 457 to one under section 456 and sentenced the petitioner to one month's rigorous imprisonment.

It seems to me that the petitioner has really not been tried for an offense of which he has now been convicted. The case of *Mahomed Hossein* v. *Emperor* (1) is in point. I, therefore, set aside the conviction and sentence passed upon the petitioner.

The question still remains whether he should be re tried. In my view it is unnecessary to order a re trial, having regard to the fact that he has already been in jail for 15 days. I, therefore, do not direct a re-trial.

Rule made absolute.

(1) 22 Ind. Cas. 766; 41 C. 743; 15 Cr. L. J. 190; 18 C. W. N, 1247.

MADRAS HIGH COURT.

CIVIL APPEAL No. 422 OF 1917.

September 18, 1919.

Present :—Mr. Justice Oldfield and Mr. Justice Bakewell.

Sreemat KANATALA VENKATA KRISHNAMA CHARLU (NOW MAJOR) AND ANOTHER—PLAINTIFFS NOS. 2 AND 3—APPELLANTS

versus

Sreemat KANDALA PERUNDEVAMMA (DEAD) AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Award—Minor not properly represented—Guardian, negligence of—Award, whether binding on minor—Agreement between parties, award based on, validity of—Guardian, whether can bind ward's reversionary interest.

Where a reference to arbitration is made on behalf of a minor but the latter is not properly represented in the arbitration proceedings and his guardian fails grossly and fraudulently in his duty to protect his interests, the award passed by the arbitrators is not binding on the minor. [p. 594, col. 2.]

The rule that an award is not open to objection on the sole ground that it merely reproduces an agreement come to between the parties, applies only where the consent of the parties is regarded by the arbitrators as evidence that the settlement proposed is fair to all. [p. 594, col. 2.]

A guardian is incompetent to bind his ward's reversionary interest by a reference to arbitration. [p. 595, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Ellore, in Original Suit No. 1 of 1918.

Messrs. *K. Srinivasa Aiyangar* and *C. V. Rajagopala Chariar*, for the Appellants.

The Hon'ble The Advocate-General, Messrs. *P. Somasundram* and *N. Rama Rau*, for the Respondents.

JUDGMENT.—The main reliefs asked for in these cases are declarations that the adoption of 2nd defendant by 1st defendant is not valid and that the proceedings in Appeal Suit No. 72 of 1911 and No. 51 of 1912 are not binding on plaintiffs. The lower Court refused the latter and, therefore, did not deal with the claim to the former on its merits.

The facts are that plaintiffs were in 1912 minors, the eldest being about sixteen, and their father Kanakacharyalu was the nearest reversioner to the estate of 1st defendant's deceased husband. First defendant in 1910 set up the adoption of the 2nd defendant and Kanakacharyalu sued in Original Suit No. 72 of 1911 to have it declared invalid In 1912, as it was thought that a decree in terms of the award would not bind plaintiffs or 3rd defendant, their adult elder brother, because they were not parties to Original Suit No. 72, there was a reference to arbitration; and an application, numbered as Original Suit No. 51 of 1912, was made to the Court to file the award by the 1st defendant, Kanakacharyalu, the present 2nd and 3rd defendants and plaintiffs being made defendants. On the same day, 28th September 1912, Original Suit No. 72 was dismissed on the ground that an adjustment had taken place. In Original Suit No. 51 a decree was passed on 30th September 1912, Exhibit F, filing the award and giving effect to its terms. Those are the proceedings, which the plaintiffs desire to displace. As regards Original Suit No. 72 they were not parties and it is admitted, when they become reversioners, they will not be bound by the acts of the previous reversioner, Kanakacharyalu. Plaintiffs, therefore, are clearly entitled to a declaration as regards those proceedings. But it is not disputed that they must displace the decree in Original Suit No. 51 and the award on which it was based before they can obtain a decision as to the validity of the adoption on its merits. The grounds of attack on these proceedings are that the 3rd defendant, who represented them in Original Suit No. 51, was fraudulent or negligent in his conduct of the case and had no right to support the filing of an award, which was disadvantageous to them or at least had not been passed in any arbitration at which they were represented or indeed in any real arbitration proceedings at all.

Before the direct evidence is referred to, the result of the award must be stated. But for it under Hindu Law Kanakacharyalu or after his death whoever might be the reversioners at the time, and they would be (so far as appears) the plaintiffs and 3rd defendant, would be entitled on 1st defendant's death to the estate of her late husband and so far as appears, they could be deprived of the succession only by an adoption on her part, to be made with the consent of her deceased husband, the existence of which Kanakacharyalu and his family did not admit and could have dis-

puted, or their own consent, which they could have refused. The award, Exhibit K 1, upheld the adoption conditionally on the carrying out of its other terms, gave 1st defendant an absolute estate in about 20 acres, debarred Kanakacharyalu and 2nd defendant from disputing an alienation already made by the widow and 2nd defendant from disputing the claims of Kanakacharyalu's family as reversioners in the future to the property of one Ramavataram and gave Kanakacharyalu half of the remainder of the estate of 1st defendant's husband. The result was no doubt to give Kanakacharyalu immediate possession of something, which he could have got only on 1st defendant's death after successfully attacking the adoption. But, on the other hand, if he had so attacked it, he could eventually have obtained also, not only the half of the residue allotted to 2nd defendant, but also the 20 acres given absolutely to 1st defendant which composed the more valuable portion of the estate, as well as the possibility of regaining the property alienated by her already. And as regards plaintiffs, there were the further considerations that although Kanakacharyalu might leave them what he obtained, there was no guarantee that he would do so or would not spend it, since it was self-acquired property in his hands, and that, as he was, it will be seen, failing at the time (he in fact died early the next year), there was no reason for depriving them of the option in the matter, which, on becoming reversioners, they would soon be entitled to exercise and regarding which 1st plaintiff at least was already old enough to form an intelligent opinion. True, we at present do not know whether the case against adoption or 1st defendant's previous alienation, available to Kanakacharyalu or to them, was strong. But there is no reason in the terms given by 1st and 2nd defendants for supposing that it would be negligible, or for supposing that there was any reason for hurrying the disposal of the matter and depriving them of rights, which in the ordinary course would accrue so shortly. There was further a faint suggestion in argument, although 1st and 2nd defendants have not been explicit on the point, that the decree in Original Suit No. 51 contains nothing distinctly debarring plaintiffs from claiming in the future since it debars Kanakacharyalu under whom they would not claim and, therefore, they will not be prejudiced by it. The answer is that it includes a declaration of the validity of the adoption, to which they are parties and by which they are bound, and that, if the decree is binding on them, they will, in consequence of it, be debarred indirectly from setting up their rights. In these circumstances the conclusion must be that 3rd defendant is not shown to have acted prudently in consenting to the decree on their behalf. It will be found that he also was guilty of gross negligence or fraud, and that will be enough to enable plaintiffs to succeed. *Hoghton, In re, Hoghton* v. *Fiddey* (1) and *Lala Sheo Churn Lal* v. *Ramnandan Dobey* (2).

[Their Lordships here discussed the evidence.]

This completes the case on the facts. It may, no doubt, be argued that an award is not open to objection on the sole ground that it merely reproduces an agreement come to between the parties. See the judgment of Strachey, Chief Justice, in *Gobardhan Das* v. *Jai Kishen Das* (3). But that can be accepted, only when the consent of the parties can be and is regarded by the arbitrators as evidence that the settlement proposed is fair to all, and it can have no application against the plaintiffs before us, who were not represented in the arbitration and whose interests were not considered, although it was almost admittedly in order to bind them that the pretence of an arbitration was made. When they were formally represented by 3rd defendant in Civil Suit No. 51, whether or not the manner in which he hurried through the proceedings is more than consistent with the imputation of fraud, there is no doubt that by accepting what he and all concerned, except the Court, knew to have been merely a pretence as the basis of the decree, he failed grossly and fraudulently in his duty to protect their interests and that is sufficient to justify us in declaring that the decree is not binding on them.

(1) (1874) 18 Eq. 573; 43 L. J. Ch. 758; 22 W. R. 854.

(2) 22 C. 8; 11 Ind Dec. (N. S.) 7.

(3) 22 A. 224; A. W. N. (1900) 52; 9 Ind. Dec. (N. S.) 1180.

Apart, however, from the facts we are asked to grant relief on another ground, that, as the Judicial Committee held in *Amrit Narayan Singh* v. *Gaya Singh* (4), the right of a Hindu reversioner becoming concrete only on the death of the female owner and till then merely a *spes successionis* "his guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him with any contractual engagement in respect thereto," and a guardian's action in referring to arbitration a matter connected with his ward's reversionary interest was held null and void. This is perfectly consistent with *Kanhai Lal* v. *Brij Lal* (5) relied on by 1st and 2nd defendants, because there, as the judgment explicitly states, not only an agreement by the reversioner, but an estoppel constituted by his acceptance of benefits thereunder which could not arise against a minor, was in question. A further attempt was made to distinguish the present case on the ground that in it the minor reversioners were made parties not only to a bargain as to their own succession, but also as to the adoption of 2nd defendant. But this cannot affect the principle involved. For the bargain on the plaintiffs' side was no less one made with their reversionary right; because their opponents relied on its extinction in consequence of an alleged adoption and not in another way or, as in *Amrit Narayan Singh* v. *Gaya Singh* (4), on a contention that it never arose. Plaintiffs are, therefore, entitled to succeed also on the ground that, whether or no 3rd defendant's conduct of the previous proceedings on their behalf was negligent or fraudulent, neither he nor any other guardian could have conducted them to a substantial result, since they were fundamentally incompetent.

The result is that we allow the appeal and setting aside the lower Court's decision hold that plaintiffs are entitled to the declaration asked for, that they are not bound by the decision in Original Suits Nos. 72 and 51 and remand the suit for disposal on the merits with reference to the issues Nos. 7, 9, and 11. With regard to the observations made by the lower Court on issue No. 7 it is pointed out that plaintiffs' claim as regards the previous decrees was not to have them set aside, but to have them declared void and inoperative against them. We notice, moreover, that no issue already framed touches plaintiffs' prayer with reference to the alienations to 3rd defendant, an omission which the lower Court will be at liberty, if the plaintiffs so desire, to repair. Defendants will be liable jointly for plaintiffs' costs to date in this and the lower Court, whatever the ultimate result.

M. C. P.

Appeal allowed;
Case remanded.

(4) 44 Ind. Cas. 408; 45 C. 590; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918 M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 45 I. A. 35 P. C.).

(5) 47 Ind. Cas 207; 40 A. 487; 22 C. W. N. 914; 8 L. W. 212; 24 M. L. T. 236; 35 M. L. J. 459; 16 A. L. J. 825; (1918) M. W. N. 709; 28 C. L. J. 394; 5 P. L. W. 294; 20 Bom. L. R. 1048; 45 I. A. 118 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 316 OF 1917.

April 21, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

BISHESHAR LAL—PLAINTIFF—APPELLANT

versus

Musammat **BHURI—DEFENDANT—RESPONDENT.**

Registration Act (XVI of 1903), s. 17—Agreement to give up rights in property on certain conditions, whether compulsorily registrable—Agreement, whether admissible in evidence in so far as it relates to moveable property—Oral evidence, whether admissible to prove contents—Evidence Act (I of 1872), s. 91.

Plaintiff sued for possession of certain property, moveable and immoveable, left by one *B.* on the ground that the widow in possession had forfeited her rights in her husband's estate owing to her unchastity. It was pleaded that the plaintiff had waived his rights by means of an agreement by which he gave up all his rights in *B's* estate, real and personal, on the condition that the widow paid Rs. 1,000 to the *gowshala*:

Held, (1) that the document was inadmissible in evidence for want of registration: [p. 596, col. 2.]

(2) that the fact that the plaintiff admitted execution of the document did not make any difference; [p. 596, col. 2.]

(3) that oral evidence was inadmissible to prove the contents of the document. [p. 597, col. 1.

BISHESHAR LAL *v.* BHURI.

Satyesh Chunder Sircar v. *Dhunpal Singh*, 24 C. 20; 12 Ind. Dec (N. S.) 678, *Chedambaram Chetty* v. *Karunalayavalangapuly*, 3 M. H. C. R. 342, distinguished.

(4) that the document was not admissible even in so far as it related to moveable property. [p. 597, col 1.]

Muhammad Bakhsh v. *Amir Begam*, 44 Ind. Cas. 837; 23 P. R. 1918, *Pusapati Venkatapathiraju Garu* v. *Vatsavaya Venkata Subhadrayyamma*, 47 Ind. Cas. 563, distinguished.

Bevan Petman v. *Ganesh Das*, 34 Ind. Cas. 542; 49 P. R. 1916; 144 P. W. R. 1916; 149 P. L. R. 1916, followed.

First appeal from the decree of the Subordinate Judge, 1st Class, Hissar, dated the 22nd December 1916.

Pandit *Nanak Chand*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—A goldsmith named Basanta died leaving two widows, *Musammat* Bhuri and *Musammat* Daya Kaur, the latter of whom was a minor. Proceedings were taken under the Guardians and Wards Act for the appointment of a guardian to look after the share inherited by *Musammat* Daya Kaur in her husband's estate. These proceedings were still pending when the plaintiff, Basheshar Lal, instituted a suit as a reversioner of the deceased Basanta, claiming to be entitled to possession of *Musammat* Bhuri's share in the property on the ground that she had forfeited her rights in her husband's estate owing to her unchastity. *Musammat* Daya Kaur died while Basheshar Lal's case was still pending, and thereupon Basheshar Lal amended his plaint claiming possession from *Musammat* Bhuri of the entire estate, real and personal, left by Basanta.

Musammat Bhuri contested the suit on various grounds, one of them being that the plaintiff had waived his claim to succeed to the property left by Basanta. This matter was put in issue as Issue No. 3. The other issues arising out of the pleadings were not disposed of by the learned Subordinate Judge, who found against the plaintiff on the third issue and dismissed his suit. He has thereupon come up to this Court through Mr. Nanak Chand Pandit and we have heard Mr. Nand Lal for the respondents.

In support of the plea of waiver *Musammat* Bhuri put forward a document Exhibit D 2, which she said was an agreement entered into by the plaintiff at the instance of a *Panchayat* by which he gave up all his rights in Basanta's property, real and personal, on the condition that she, *Musammat* Bhuri, paid a sum of Rs. 1,000 to the *gowshala*. Objection was taken to the admission of this document on the ground that it required registration and had not been registered. *Musammat* Bhuri put forward this document in Court in the course of her statement and, without deciding whether it was admissible or not, the learned Subordinate Judge questioned Basheshar Lal as to whether he had executed it and recorded a note that the execution had been admitted (page 23 of the printed book). At the conclusion of the case the learned Subordinate Judge held that this document required registration and, therefore, was inadmissible in evidence. He, however, held that apart from this document there was oral evidence on the record which proved that the plaintiff had agreed to relinquish his claim to Basanta's property and that having regard to the fact that plaintiff had admitted execution of the agreement, he saw no reason to discredit the oral evidence. We have read the document and after giving due weight to Mr. Nand Lal's arguments, we hold that the decision of the learned Subordinate Judge was correct and that this document is inadmissible in evidence for want of registration. The oral evidence consists of the statements of Bhana (page 34) and Ladhu (page 36 of the printed book). We have been taken through the statements of these witnesses by Counsel on both sides and are unable to say that their evidence can be regarded, by itself, as sufficient to prove the alleged agreement. It was contended by Mr. Nand Lal that inasmuch as the plaintiff had admitted the execution of this document, the question of registration was of no importance, and we were referred to *Satyesh Chunder Sircar* v. *Dhunpal Singh* (1) and *Chedambaram Chetty* v. *Karunalayavalangapuly* (2). In those cases, however, it was not only the execution of the documents, concerned that was established but their contents had been admitted. Mr. Nand Lal then contended that oral evidence was admissible to prove the contents of the document, inasmuch as the evidence showed that the agreement had been arrived at orally and quite apart from the document in question.

(1) 24 C. 20; 12 Ind. Dec. (N. S.) 678.
(2) 3 M. H. C. R 342.

We are, however, unable to accept this contention. Almost every transaction, which is reduced to writing, is preceded by an oral agreement and we think that in this case section 91 of the Indian Evidence Act renders inadmissible the oral evidence referred to.

Again Mr. Nand Lal contended that as the bulk of the property left by the deceased Basanta was moveable, the document was admissible in so far as it related to it, and our attention was drawn to *Muhammad Bakhsh* v. *Amir Bagam* (3) and *Pusapati Venkatapathiraju Garu* v. *Vatsavaya Venkata Subhadrayyamma* (4). The former ruling has no bearing on the present case and the second does not afford any assistance. The agreement put forward is to the effect that the plaintiff relinquished his claim to the entire property left by Basanta in consideration of *Musammat* Bhuri paying to the *gowshala* a sum of Rs. 1,000. We think that it may be presumed that the relinquishment of his claim to the personal estate was not made without taking the real estate into account. This consideration cannot, we think, be apportioned between the real and personal estate. *Bevan-Petman* v. *Ganesh Das* (5), referred to by Mr. Nanak Chand, is, therefore, in point and we hold that the document is inadmissible for any purpose whatsoever. The decision of the case being based on inadmissible evidence, must be and is set aside.

We accordingly accept this appeal and remand the case to the Court below for disposal of the remaining issues. The costs in this Court will follow the event. Stamp on appeal will be refunded.

Appeal accepted;
Case remanded.

(3) 44 Ind. Cas. 837; 23 P. R. 1918.
(4) 47 Ind. Cas. 563 at pp. 573, 574.
(5) 34 Ind. Cas. 542; 49 P. R. 1916; 144 P. W. R. 1916; 149 P. L. R. 1916.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

BOMBAY HIGH COURT.

LETTERS PATENT APPEAL No. 23 OF 1918.
November 19, 1919.

Present :—Mr. Justice Shah and Mr. Justice Crump.

KACHU RAVJI MINDHE VANJARI —APPELLANT

versus

TRIMBAK KHEMCHAND GUJARATHI —RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 104 (2), O. XXI, r. 89, O. XLIII, r. 1 (j)—Execution of decree—Application to set aside sale, dismissal of—Appeal, second, whether lies.

No second appeal lies from an appellate order dismissing an application under Order XXI, rule 89, of the Civil Procedure Code to set aside an execution sale. The accident of the auction-purchaser being the decree-holder makes no difference. [p. 597, col. 2; p. 598, col. 1.]

Letters Patent Appeal against the decision of the High Court (Heaton, J.), in Second Appeal No. 413 of 1918, against the decision of the District Judge, Nasik, in Appeal No. 10 of 19.7, confirming the decree passed by the Subordinate Judge at Yeola, in Miscellaneous Application No. 58 of 1917.

Mr. *P. V. Kane*, for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.—It is urged as a preliminary objection to this appeal that no second appeal lies to this Court. The original application out which this appeal has arisen was made under rule 89 of Order XXI by the judgment debtor. That application was rejected. There was an appeal from that order to the District Court of Nasik and that appeal was dismissed. From the order dismissing the appeal a second appeal was preferred to this Court; and the point now raised is that such a second appeal is not competent. It is clear that the appeal to the District Court was an appeal under Order XLIII, rule 1, clause (*j*), and that under section 104, sub-section 2, of the Code of Civil Procedure, no appeal can lie from any order passed in appeal under the section. The only ground upon which it is said that the present case falls outside the scope of section 104, sub-section 2, is that the auction-purchaser happens to be the decree-holder and that the order on the application of the judgment debtor is an order relating to the execution of the decree between the parties under section 47. We

do not think, however, that the accident of the auction-purchaser being the decree-holder makes any difference in the effect of the provisions of section 104, sub-section 2. Whether the auction-purchaser be the decree-holder or a third person, the result is the same so far as the appealability of the order is concerned.

The appeal must, therefore, be dismissed with costs on the ground that no second appeal lies to this Court.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1925 OF 1918.

January 28, 1920.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

BAYYA SAHU (DEAD)—PLAINTIFF—APPELLANT

versus

Sri Sri Sri KRISHNACHANDRA GAJAPATHY NARAYA DEO GARU AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 6 TO 7—RESPONDENTS.

Landlord and tenant—Easement—Tenant, whether can obtain prescriptive right against landlord—Easement, extinguishment of, by natural forces—Suit to enforce easement, maintainability of.

A tenant cannot, by mere enjoyment, obtain a prescriptive easement against his landlord, but there is nothing to prevent his having a customary right, or a right by implied contract with his landlord. [p. 598, col. 2; p. 599, col 1.]

A servient owner cannot by his own wrongful act destroy the utility of the servient tenement actively and thus claim to have put an end to the easement. But if by the forces of nature the easement or right ceases to exist, an action for relief based on the easement is not maintainable. [p. 599, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ganjam at Berhampore, in Appeal Suit No. 27 of 1918, preferred against the decree of the Court of the District Munsif, Chicacole, in Original Suit No. 433 of 1915.

FACTS appear from the judgment.

Mr. *C. S. Venkatachariar*, for the Appellant.—The appellant had for over the statutory period used the water of the tank of the Zemindar for irrigating his fields. He had acquired a prescriptive right.

The Hon'ble Mr. *B. N. Sarma* and Messrs. *L. A. Govindaraghava Iyer* and *L. S. Veeraraghava Aiyar*, for the Respondents.—The appellant could not, by mere enjoyment, claim a prescriptive right to the use of the tank water. If he had acquired any such right by custom or by implied contract with the Zemindar, that had been extinguished under section 47 of the Easements Act as the appellant had not used the water of the tank for purposes of irrigation for more than 20 years. That is the finding of the lower Court. It was not possible for the plaintiff, from natural causes, to use the water. There is nothing to prevent the landlord to regulate the supply of water.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant The question relates to a tank in the Parlakimidi Zemindari. The plaint is rather obscure and if we take prayer (*a*), paragraph 14, which is, "the Court may be pleased to pass a decree establishing the plaintiff's right to the Dayanidhi tank," it looks as if he claimed title to the ownership itself of the tank. But it seems to have been conceded from the beginning that his only right was a right by contract or custom against his landlord, the Zemindar (1st defendant), to use the water of the tank for irrigating the plaintiff's lands. He cannot, of course, obtain by mere enjoyment a prescriptive easement against his landlord. See *Basavanagudi Narayana Kamathy* v. *Lingappa Shetty* (1). But there is nothing to prevent his having a customary right, which may also be called "customary easement," or a right by implied contract with his landlord to use the water of the tank to irrigate some particular lands of his. Calling that right also an "easement", the question is whether that easement existed when this suit was brought. The finding of the lower Appellate Court is that, owing to natural causes, it has been impossible to take the water of the tank to the plaintiff's lands for the purposes of irrigation for more than 20 years before suit, assuming

(1) 54 Ind. Cas. 948; 11 L. W. 34; 26 M. L. T. 439; 38 M. L. J. 28.

that the plaintiff's lands were at some time (before 20 years ago) irrigated by the tank water. Section 44 of the Easements Act says: "An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement." "Superior force," as shown by illustrations (*a*) and (*b*), includes natural causes. Of course a servient owner cannot, by his own wrongful act, destroy the utility of the servient tenement actively and thus claim to have put an end to the easement. But if, through the forces of nature, the tank has become long ago unfit for use by the plaintiff for the irrigation of his lands, the principle of law embodied in section 44 of the Easements Act clearly applies and the easement or right has ceased to exist long ago and the dismissal of the suit brought for reliefs based on the easement alleged to exist was, therefore, justified.

I would dismiss the second appeal with costs, one set.

SPENCER, J.—In the opinion of the Subordinate Judge, as I understand paragraph 3 of his judgment, the plaintiff failed to establish that, either by contract or custom, he had a right to get his field irrigated by the water of the suit tank. This being so, he had no right of suit against his landlord's act in letting out the bed of the tank for cultivation to 2nd defendant in exercise of the landlord's rights of ownership over tank beds which are not otherwise restricted (*vide* section 2) of the Madras Estates Land Act).

It is clear that that the plaintiff has no prescriptive right to irrigate his fields from this tank, as the Subordinate Judge has found that they could not have been irrigated from that source at any time within 20 years before suit.

The appellant's Pleader has attemped to put his client's alleged right on the footing of an easement, but this attempt has failed for two reasons, (1) because a tenant could not prescribe for an easement against his landlord [see *Basavanagudi Narayana Kamathy* v. *Lingappa Shetty* (1)] and (2) because, if there was such an easement, it must have become extinguished under section 47 of the Easements Act.

I agree that the second appeal should be dismissed with costs (one set).

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1025 OF 1918.

April 27, 1920.

Present:—Mr. Justice Jwala Prasad.

Swami BISUDHANAND—PLAINTIFF—APPELLANT

versus

ISRI SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Benamidar, *whether can maintain suit for redemption.*

A *benamidar* can maintain a suit for redemption in his own name, and the beneficial owner is bound by the decision of the suit, whether he is a party to it or not. [p. 602, col. 1.]

Second appeal from a decision of the Subordinate Judge, Chapra.

Messrs. *Siveshwar Dayal* and *Kailaspati*, for the Appellant.

Mr. *A. K. Roy*, for the Respondents.

JUDGMENT.—The appellant seeks to redeem a mortgage over 1 *bigha*, 2 *kathas*, 10 *dhurs* of *kasht* land, part of a holding of 2 *bighas*, 5 *kathas*.

This holding originally belonged to three brothers, Tulsi Prasad, Lakshmi Prasad and Gobindjee. On the 3rd of June 1896 they executed two mortgage-deeds by conditional sale for Rs. 400 each: one in favour of two brothers, Narain Das and Iser Das, defendant No. 2, and the other in favour of Liakat Hussain and Rajab Ali in respect of the remaining moiety of the holding 1 *bigha*, 2 *kathas*, 10 *dhurs*, and the mortgagees came into possession thereof.

On the 1st July 1901 these mortgagees executed a simple sub-mortgage in respect of their rights under the deeds of the 3rd June 1896 in favour of Sahebzada Singh, brother of Isri Singh defendant No. 1, for Rs. 700,

BISUDHANAND v. ISRI SINGH.

On the 19th January 1912 Lakshmi Prasad and Gobindjee, after the death of their brother Tulsi Prasad, executed a sale-deed in respect of 1 *bigha*, 2 *kathas*, 10 *dhurs* of their holding, which was in the mortgage of Narain Das and Iser Das by the deed of conditional sale of 1896, for Rs. 500. Rs. 100 was paid in cash to the vendors and the balance Rs. 400 was kept in deposit with the plaintiff vendee for payment to the mortgagees Narain Das and Iser Das. The plaintiff's case was that this money was paid to the mortgagees per registered receipt, dated the 9th February 1912.

On 2nd June 1913 Sahebzada Singh, brother of defendant No. 1, purchased the prior *baiulwafa* mortgage right of Narain Das and Iser Das defendant No. 2 in the entire 2 *bighas*, 5 *kathas*, in execution of his decree passed on simple mortgage of the 1st July 1901. On the strength of this purchase he dispossessed, on the 29th July 1913, the plaintiff from 1 *bigha*, 2 *kathas*, 10 *dhurs* purchased by him. But upon an objection filed by the plaintiff under Order XXI, rule 100, he recovered possession. Sahebzada Singh then brought a regular Suit No. 145 of 1914 for possession over 1 *bigha*, 2 *kathas*, 10 *dhurs* and obtained a decree. In that suit he claimed to have purchased under his simple mortgage decree not only the *baiulwafa* or mortgage right of Narain Das and Iser Das of 1896 but also the entire *kasht* right of the original tenants Tulsi Prasad, Lakshmi Prasad and Gobindjee It was, however, held that Sahebzada Singh had purchased only the said prior mortgage right, but that the plaintiff's plea of payment was not proved and, therefore, Sahebzada Singh got possession of the 1 *bigha*, 2 *kathas*, 5 *dhurs* in question as a prior mortgagee under the *baiulwafa* of 1896.

The term of this *baiulwafa* or mortgage by conditional sale was from 1303 to 30th Jaith 1323 and, therefore, on the expiry of the term the plaintiff as purchaser of 1 *bigha*, 2 *kathas*, 5 *dhurs* deposited in Court on the 20th May 1916 the mortgage money Rs. 400 for its redemption. Notice of the deposit was served upon Sahebzada Singh, the purchaser of the mortgage right. He declined to take the money and redeem the mortgage. Hence the plaintiff as purchaser of 1 *bigha*, 2 *kathas*, 5 *dhurs kasht* right of the original mortgagors under the sale-deed, dated the 19th January 1912, brought the present suit for redemption and recovery of possession against Isri Singh, the surviving brother of Sahebzada Singh now deceased, who is in possession of the property as purchaser of the *baiulwafa* or mortgage right by conditional sale of Narain Das and Iser Das. Narain Das is dead. Hence Iser Das, a sole surviving brother, has been made a party as defendant No. 2. The suit is, therefore, against the mortgagee Narain Das and the purchaser of the mortgage right Isri Singh.

Iser Das, the original mortgagee, did not appear in this litigation although summons was served upon him. Defendant No. 1, Isri Singh, as purchaser of the mortgage right, only contested the suit. He pleaded *inter alia* that the sale-deed, dated the 19th January 1912, propounded by the plaintiff was without consideration and was a collusive transaction; that the plaintiff acquired no right under the sale to redeem or to recover possession of the property: that Lakshmi Prasad and Gobindjee had no right to execute the sale-deed in the plaintiff's favour inasmuch as after the *baiulwafa*, the mortgage by conditional sale of 1896 sought to be redeemed, the mortgagors sold their *kashtkari* right in the land in dispute to the mortgagees Narain Das and Iser Das and the said mortgagees became absolute purchasers of the *kashtkari* rights and that the entire holding, including the land in dispute, was purchased by the defendant in execution of a simple mortgage decree against his mortgagors Narain Das and Iser Das. The following issues were laid down for trial by the Munsif :—

Is the sale deed, dated the 19th January 1912, genuine and for consideration (Issue No. 1.)

Is defendant No. 1 a tenant of the land in suit, or is he only a mortgagee? If the latter, is the plaintiff entitled to possession of the disputed land on redemption of the mortgage debt? (Issue No. 2).

Issues Nos. 3 and 4 relating to mesne profits and other reliefs that the plaintiff might be entitled to need not be referred to for the purposes of this appeal.

The Munsif decided the aforesaid issues

in favour of the plaintiff and against the defendant and decreed the plaintiff's suit.

Defendant No. 1 appealed to the District Judge of Chapra making the plaintiff and defendant No. 2 Iser Das as respondents. The appeal was heard by the Subordinate Judge.

The finding of the Munsif on issue No. 1 that the plaintiff's sale deed, dated the 19th January 1912, is genuine, and on the first part of issue No. 2 that defendant No. 1 was not a tenant of the land but was only a mortgagee thereof by virtue of his purchase of the prior mortgage by conditional sale of 1896, was accepted as correct by defendant No. 1. The contest before the Subordinate Judge was only with respect to the second part of issue No. 2 "Is the plaintiff entitled to possession of the disputed land on redemption of the mortgage-debt?"

The contention of defendant No. 1 was that long before the sale-deed of 1912 Exhibit 3 propounded by the plaintiff, the *kashtkari* right in the disputed land had been conveyed away by the plaintiff's vendors Lakshmi Prasad, Tulsi Prasad and Gobindjee to the mortgagees Narain Das and Iser Das under the deed of conditional sale by means of a sale deed executed in their favour of 12th February 1902 (Exhibit 1). So the plaintiff acquired no right to the property by virtue of his sale.

The Munsif and the Subordinate Judge have differed in their decision on this point, the former holding that the sale-deed of 1902 (Exhibit 1) was not given effect to and acted upon and the latter holding that it was. It appears that after the execution of the sale-deed, Tulsi Prasad the vendor and Iser Das the vendee applied to the Hathwa Raj, proprietor of 8 annas of the land, for mutation of names on the strength of the sale-deed and the Manager, Hathwa Raj, sanctioned the same and issued a *hukumnamah* to the Sajawal and the Patwari for entering the purchaser Iser Das's name in the *jomabandi* and realising rent from him (*vide* applications Exhibit L-I and M of July and September 1902 and Office Note Exhibit K and *hukumnamah* Exhibit D). This was done and an account of rent due from Iser Das was prepared (*vide* Tirij Wasil Bakis and Hisabs Exhibits E-1 to E-4 and J-1 to J-4 for the years 1311, 1313—1316), but no rent ever appears to have been paid.

In rent suits brought by the proprietor of the other 8 annas Misri Bibi against the original tenant Lakshmi Prasad in the years 1905 and 1907, Lakshmi Prasad stated that he had sold the property to Iser Das and Narain Das by the sale-deed of February 1902 and that he was not liable for the rent as the purchasers were in possession (*Vide* Exhibits G and G 1). Iser Das also filed a petition (Exhibit C-1) to be added as a defendant in the suit of 1907 and in 1904 he had applied for depositing money due under a rent-decree so as to protect the property from being sold in execution (*vide* Exhibit N-1). Both the Courts below have considered these documents but have come to different conclusions. The Munsif held that these are paper transactions, that the vendor and the vendee were trying to have the sale recognised, but the 8-annas proprietor *Musammat* Misri Bibi persistently refused to do so and the Hathwa Raj, although it ordered the name of the purchaser Iser Das to be entered, there is no evidence that it ever realised any rent from the purchaser. Not a single rent receipt has been filed nor has any counterfoil been called for from the Raj. On the other hand the Subordinate Judge holds that the aforesaid documents shew that Lakshmi Prasad admitted the sale and Iser Das asserted his right under it and the 8 annas proprietor Hathwa Raj recognised it, and hence the deed was acted upon.

Even if this finding of the learned Subordinate Judge be accepted the difficulty arises as to the effect of the finding upon the suit in question. This leads to the consideration of Exhibits F and F-1. Both the Courts below have relied upon these Exhibits for their respective conclusions. These are two petitions, dated the 22nd November 1913, filed by Lakshmi Prasad in the claim case No. 19 of 1913 under Order XXI, rule 100, brought by the present plaintiff against Sahebzada Singh, brother of defendant No. 1, who after the purchase of the prior mortgage of 1896 at an auction-sale in execution of his simple mortgage-decree had dispossessed the plaintiff. By means of these petitions Lakshmi Prasad produced two sale deeds, dated the 11th February

1902, by himself and his brothers Tulsi Prasad and Gobindjee, one executed in favour of Iser Das and Narain Das in respect of the land in suit 1 *bigha*, 5 *kathas*, 10 *dhurs* and the other executed in favour of Liakat Hussain and Rajab Ali in respect of the remaining 1 *bigha*, 5 *kathas*, 10 *dhurs*. In Exhibit F-1, Lakshmi Prasad stated that as the sale-deed of Iser Das and Narain Das of 1902 (Exhibit 1) with which we are concerned was returned to him by them at their request for the reasons best known to them, he executed on 19th January 1912 another sale deed in their favour in the name of the plaintiff. He made a similar statement in Exhibit F-1 with respect to the sale in favour of Liakat Hussain and Rajab Ali, saying that they got another sale-deed in respect of the lands conveyed to them executed in the name of their own man Mohammed Hussain.

The Munsif argues that there being no explanation why the sale-deed was left in the possession of Lakshmi Prasad and was not in the possession of Iser Das where it naturally ought to have been, the sale-deed in question was not acted upon. The Subordinate Judge apparently accepts the statements contained in the petition as to how the document came to be in possession of the vendor and attributes it to collusion between Lakshmi Prasad the vendor, Iser Das, the vendee under the deed of 1902 and Bisudhanand the plaintiff vendee under the deed of 1912. He also attributes the attitude of neutrality taken by Iser Das in the present litigation to the same collusion. If the statement in petition Exhibit F-1 is correct, Iser Das and Narain Das the vendee under the deed of 1902 are either the real purchasers of the property also under the subsequent sale-deed of 1912 in the name of the plaintiff or they abandoned their rights under the sale-deed and allowed the plaintiff to purchase the property. In either case the suit for redemption cannot fail, for a *benamidar* is as much competent to bring an action in his own name in respect of the property as the beneficial owner, whether he is a party to it or not. The beneficial owner is bound by the decision in the case in the same way as if he were a party, the decision operating as *res judicata*. This principle has been well settled, *vide* the two recent decisions of their Lordships of the Judicial Committee in the case of *Bilas Kunwar* v. *Desraj Ranjit Singh* (1) and *Gur Narayan* v. *Sheo Lal Singh* (2). The present case is stronger, inasmuch as Iser Das the sole surviving vendee under the deed of 1902 was made a party to this and the previous litigation concerning this property. He does not repudiate the sale in favour of the plaintiff nor does he set up his own right under the previous deed, the reason being as given by the Court below that he was himself the author of the sale-deed in plaintiff's favour. Collusion or no collusion, he is estopped from disputing the validity and the *bona fides* of the plaintiff's sale deed. The defendant, who is simply a mortgagee, cannot set up *jus tertia* that is the right of Iser Das, when the latter himself abandons it. The petition, Exhibit F, is a document relied upon and used as evidence by the defendant himself and he has proved it to be the statements of Lakshmi Prasad. He is bound by those statements. Even if the statements in Exhibit F-1 be of doubtful character or their admissibility be in any way questionable, the astounding fact remains that the deed of 1902 was in the possession of the vendor since the execution of the subsequent sale-deed in favour of the plaintiff. The Courts below have held it to be so. The oral evidence has conclusively established it: *vide* the evidence of plaintiff's witness No. 1.

Another important fact is that on 1st July 1901 they had to take loan from defendant No. 1, pledging their prior mortgage right under the deed of 1896. They were not in a position to pay part of the consideration money of the sale deed of 1902, said to have been paid in cash. They could not also discharge the sub-mortgage of defendant No. 1, who was compelled to enforce it by a suit and to purchase the prior mortgage in execution of his decree on 2nd June 1913. The finding of the Munsif that not a single farthing out of

(1) 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.).

(2) 49 Ind. Cas. 1; 46 C 566; 17 A. L J. 66; 36 M. L. J. 6[illegible]; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1 (P. C.).

Rs. 500, the consideration of the sale-deed of 1902, was paid and that no passing of consideration at all took place is borne out by facts and circumstances in the case. This finding of fact has not been upset by the learned Subordinate Judge in appeal. He has not addressed himself to it, as perhaps it was not disputed before him. In fact there is no evidence on record about payment of consideration. None of the defendants' witnesses speaks about it.

There was no question of possession under the sale-deed of 1902, for the vendees under it were in possession of the property under a prior mortgage by conditional sale, so the question of possession is immaterial in this case. No doubt one of the vendors Tulsi Prasad and one of the vendees Iser Das have been trying from 1902 to 1909, as is obvious from the defendants' Exhibits C to N. to have the sale-deed recognized. In that sense only the finding of the Court below that the sale-deed of 1902 was acted upon can be appreciated.

It is noticeable that the *hukumnamah*, Exhibit D, dated the 8th April 1905, upon which the recognition by the Hathwa Raj of the sale-deed of 1902 is based, mentions the name of Iser Das only, and not that of his joint vendee Narain Das in respect of 3 *kathas*, 12 *dhurs*, whereas the sale deed Exhibit 1 covers 1 *bigha*, 5 *kathas*, 10 *dhurs* and the share of the Hathwa Raj is about 11 *kathas*. There is, as held by the learned Munsif, no evidence of payment of rent. Neither defendant No. 2 nor the Patwari of the Hathwa Raj defendants' witness No. 3 speaks about it. Be that as it may, there is absence of any evidence of the deed being acted upon after the year 1909. This bears out the fact already noticed that the vendees were unable to pay the mortgage of defendant No. 1's brother Sahebzada Singh, that their prior mortgage right was in danger of being sold and hence they returned the sale-deed of 1902 to the vendors and joined in the execution of the sale-deed in favour of the plaintiff. This points to the fact that the plaintiff is the real purchaser.

Both the Courts below have held that the plaintiff's sale deed of 1910 is for consideration; in fact the payment of Rs. 100 to the vendors has been established and found as a fact. He has deposited Rs. 400 in Court. The deed expressly gives him right to redeem. The effect of the possession of the sale deed of 1902 with the vendors and the legal position of the plaintiff and that of Iser Das, defendant No. 2 in the case, have been misconceived by the Court below. I, therefore, disagree with the view taken by the learned Subordinate Judge and hold that the plaintiff is entitled to redeem the mortgage of defendat No. 1 of 3rd June 1896. The decree of the Subordinate Judge must be set aside and that of the Munsif restored.

There is yet another fatal difficulty in the decree made by the learned Subordinate Judge. It appears from the affidavit filed in this Court on behalf of the plaintiff appellant that Iser Das, defendant No. 2, died on the 1st January 1918 and on the 8th August 1918 his widow *Musammat* Kawli *alias* Bahisi was substituted by an order of this Court. There was no counter-affidavit and this fact was not disputed. The appeal in the Court below was decided on the 1st June 1918, long after the death of defendant No. 2. Isri Singh, who was the appellant in the Court below, came to know of the death at least when the substitution was made in this Court on the 8th August. Inspite of that he did not apply in the Court below to substitute the legal representatives of the deceased and to re-hear the appeal against the heirs and legal representatives of defendant No. 2 respondent in the Court below, or take steps to have the abatement set aside within the time allowed by law, nor did he make any application to this Court for sending back the case to the Court below to re-hear the appeal after proper substitution, as was done in the case of *Abhoya Charan Ghosh* v. *Raj Kumar Ghosh* (3). More than six months have elapsed since the death of Iser Das who was respondent No. 2 in the Court below and the appeal against him in that Court, therefore, abated. Upon the pleadings in this case and also because he was a mortgagee under the deed of

(3) 42 Ind. Cas. 506.

3rd June 1896 sought to be redeemed and was set up by the appellant as a purchaser under the deed of 1902, he was a necessary party to the suit and also to the appeal in the Court below under Order XXXIV, rule 1, of the Code of Civil Procedure, under which every person interested in a mortgage property is a necessary party. There is no doubt that the appeal in the Court below abated not only against the deceased defendant No. 2 under Order XXII, rule 4 (3), but also against the plaintiff who was respondent No. 1 in the Court below.

The result is that the decree of the Court below is set aside and that of the Munsif is restored with costs throughout.

Appeal decreed.

MADRAS HIGH COURT.
CIVIL APPEAL No. 135 OF 1919.
January 15, 1920.
Present:—Sir Abdur Rahim, KT., Offg. Chief Justice, and Mr. Justice Phillips.
V. M. NAINA MARAKAYER, PARTNER IN V. M. NAINA MARAKAYER & Co., PENANG—DEFENDANT—APPELLANT
versus
A. R. A. R. S. M. SOMASUNDARAM CHETTIAR, BY AGENT ANNAMALAI CHETTIAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Place of suing—Sale of goods—Payment to be made where goods purchased—Cause of action, accrual of, place of.

The cause of action in a suit to recover the price of goods sold arises where the purchaser stipulates to make payment. Thus, where a person at N. sells goods to a firm at P., it being agreed that payment is to be made at N, the cause of action for recovery of the price of the goods accrues at N. and the Court at N. has jurisdiction to entertain the suit. [p. 606, col. 1.]

Appeal against the decree of the Additional Temporary Subordinate Judge, Tanjore, in Original Suit No. 27 of 1917 (Original Suit No. 90 of 1916 on the file of the Court of the Subordinate Judge, Negapatam).

FACTS appear from the judgment.

Mr. *C. Padmanabha Iyengar*, for the Appellant.—The Sub-Court at Negapatam had no jurisdiction to entertain the suit. The payment, according to the agreement between the parties, was not to be made at Negapatam. The defendant was to send Hundials to plaintiff's address and plaintiff was to cash them.

See *Oomber* v. *Leyland* (1). The action has also been misconceived. The suit should have been framed as one for accounts.

Messrs. *C. S. Venkatachariar* and *V. Rajagopala Iyer*, for the Respondent.—The suit is properly framed. The defendant has not sought to account for the goods that he received. The plaintiff could only have asked for what was due to him.

The Negapatam Court had jurisdiction to entertain the suit. *Oomber* v. *Leyland* (1) is not against this position. The method of payment had been contracted for by the parties. Plaintiff was to receive the Hundials at Negapatam. If they were dishonoured, defendant could not have escaped liability. The fact that the defendant had no branch or agency in Negapatam or the Madras Presidency does not affect the question. The substance of the contract is that the payments were to be made in Negapatam. Defendant must be deemed to have undertaken to account for the proceeds of the consignments by making payments through the agency of the persons on whom the bills were to be drawn. *Comber* v. *Leyland* (1) in effect decided that if all obligations had to be performed outside the jurisdiction of the Court where the suit was instituted that Court had no jurisdiction. Here the defendant did not hold the money for conversion into a particular form.

See *Motilal* v. *Surajmal* (2), *Kedarmal* v. *Surajmal* (3) and *Llewhellin* v. *Chunni Lal* (4).

JUDGMENT.—The appellant's firm carries on business at Penang, and the plaintiff, who lives at Negapatam in this Presidency and does business there, sent several con-

(1) (1898) A. C. 524; 67 L. J. Q. B. 884; 79 L. T. 180.
(2) 30 B. 167; 6 Bom. L. R. 1038.
(3) 3 Ind. Cas. 441; 33 B. 364; 10 Bom. L. R. 1230.
(4) 4 A. 423; A. W. N. (1882) 101; 2 Ind. Dec. (N. S.) 1063.

signments of rice to the defendant for sale on commission. He now sues for recovering the price of the last two consignments, amounting to 200 bags of rice. The only question that requires decision on appeal is whether the Negapatam Court had jurisdiction to entertain the suit. The contention of the appellant is that the defendant was not to make payment to the plaintiff at Negpatam but all that he was under obligation to do was to send Hundials from Penang to the address of the plaintiff and the plaintiff was to receive money due on those Hundials.

The main basis of his defence rests on the decision of the House of Lords in *Comber* v. *Leyland* (1). There the question was whether the English Court could issue writs out of jurisdiction under Order XI, rule 1 (*e*), with respect to a breach of contract on the part of the respondent who carried on business at Perumbuco and to whom the plaintiff (appellant) had sent goods for sale there and who was to keep the sale proceeds, apart from other moneys, to convert that money into first class bank bills on England and to remit such bills to the plaintiff in England. Lord Herschell, who may be taken to have delivered the leading judgment in the case, proceeded entirely on the special terms of the contract in the case and says: "The only agreement was that he" (the defendant) "was to hold this money for the plaintiffs and then turn it into first class bank bills in favour of the plaintiffs and remit those." Then he observed "I cannot doubt that the word 'remit' there means this and nothing beyond this, that the bank post bills, when obtained in favour of the plaintiffs, should be sent in the ordinary course and the ordinary manner in which such documents are sent by commercial men, namely, by mail, and that as soon as that had been done all obligation and all liability of the defendant ceased. I think it is impossible on these words to maintain that there was an obligation and a liability incumbent upon him until these bank post bills had reached the hands of the plaintiffs in England. Therefore, what he had to do was all to be performed and could all be performed (it is enough to say that it could all be performed) in Pernambuco. There was no obligation resting on him after he had received that money of which he could not discharge himself in Pernambuco." There is no written contract here. But the contract between the parties must be inferred from the evidence, especially from the correspondence that passed between them and the accounts of the plaintiff filed in the case. From that evidence what appears is that the defendant was to send Hundials drawn on some firm in the Madras Presidency: it is not quite clear whether it must be on some one at Negapatam itself, but it is certain that it must be on some one in the Mardas Presidency in payment of the sale proceeds for the plaintiff's goods. By agreement, therefore, the plaintiff was entitled to have the payments for the consignments in dispute made in that manner, and there is no reason to doubt that that was the mode of payment contemplated by the parties. It is not the case here, as in the English case, that the defendant, consignee of the plaintiff's goods, was to hold the money for a particular purpose, that is, for conversion into particular bills, and to send those bills alone to the plaintiff. It can hardly be disputed that, in this case, if the Hundis sent by the defendant were dishonoured, the defendant would not be absolved from liability. He would have to pay for the goods, or rather account for the sale proceeds of the goods in some other way. That amounts to this, that the payment was to be made to the plaintiff in Negapatam. It is quite true that the defendant may have had no agent or a branch firm in Negapatam or in the Madras Presidency. But we must conclude upon the facts proved in the case that he undertook to account for the sale proceeds of the goods by making payment through the agency of the persons on whom the bills were to be drawn. The English case above referred to has been considered in a number of cases in India. We may specially refer to the decisions in the Bombay High Court in *Motilal* v. *Surajmal* (2) and in *Kedarmal* v. *Surajmal* (3). In the former case Mr. Justice Tyabji laid down the rule with reference to a contract of what is called *pakki adat*, a transaction between a commission agent at Bombay and a commission agent outside Bombay. A question arose, whether in the absence of any express contract payment by the defendant's firm was to be made in Bombay or not. Mr. Justice Tyabji

held, without any evidence of special usage, more or less on general principles that, as the debtor is required by law to pay the creditor where the creditor may be, the defendant was liable to make the payment at Bombay and, therefore, the cause of action for non-payment arose there. In *Kedarmal* v. *Surajmal* (3) this proposition was confirmed by the learned Judges, though in that case there was evidence of special usage with reference to *pakki adat* transactions. We may also refer to a case in *Llewhellin* v. *Chunni Lal* (4), which seems to bear a close resemblance to the facts of this case. There the payment was to be made by the defendant, who received the goods by approved drafts on Calcutta or Cawnpore payable 30 days after receipt of the goods or by Government Currency Notes. It was held that part of the cause of action arose within the meaning of section 17 of the old Code of Civil Procedure in Cawnpore, that is, payment of the price of the goods was to be made in Cawnpore and, therefore, the Court at Cawnpore had jurisdiction to entertain the suit. There can be no doubt that the correct principle enunciated by the House of Lords in *Comber* v. *Leyland* (1) is that if all the acts to be performed by the defendant are to be performed outside the jurisdiction of the Court in which the suit is instituted, that Court would have no jurisdiction. But it must be a question of evidence in each case or of inference to be drawn from the facts of each case whether any portion of the contract was to be performed within the jurisdiction of the Court in which the suit is instituted. As already mentioned, we have come to the conclusion that the payment was to be made at Negapatam. It was also suggested in the argument of the learned Pleader for the appellant that the proper suit was one for accounts. But the defendant has not in any way sought to account for the goods sent to him by the plaintiff. There is no question but that he received the goods and if he accounted for them in any way, it was open to him to prove it. But he has not taken any such course and it does not look as if he had really any defence to the suit on the merits. The result is that the appeal is dismissed with costs.

The memorandum of cross objections is not pressed and is dismissed with costs.

M. C. P.

Appeal dismissed;
Memo. of objections dismissed.

PATNA HIGH COURT.

CUTTACK CIRCUIT COURT.

SECOND CIVIL APPEAL No. 1 OF 1919.

July 18, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Adami.

KRIPASINDHU PANIGRAHI—PLAINTIFF—APPELLANT

versus

NANDU CHARAN PANIGRAHI AND OTHERS—DEFENDANTS—RESPONDENTS

Decree, ex parte—*Suit to set aside decree, maintainability of—Decree obtained by perjured evidence.*

The mere fact that the claim in a suit in which an *ex parte* decree was passed was supported by perjured evidence, would not by itself be a ground for setting aside the decree. [p. 607, col. 1.]

The principle underlying this rule is that the whole case was before the Court which decided it on the pleadings and on the evidence, and whether the case was a false one or not, and whether the evidence adduced was perjured evidence or not, the Court must be held to have adjudicated on both these points and once having adjudicated on them it cannot be asked to adjudicate on them again. [p. 608, cols. 1 & 2.]

Appeal from the decision of the District Judge, Cuttack, dated the 21st October 1918, affirming that of the Sub Judge, Cuttack, dated the 27th November 1917.

Messrs. *Ashgar* and *B. N. Das*, for the Appellant.

Mr. *G. C. Ray*, for the Respondents.

JUDGMENT.

COUTTS, J.—The facts of the case are shortly as follows:—

In 1913 the defendants in this case brought a Suit No. 244 against the present plaintiff for recovery of possession of certain property. Notice was duly served on the defendant in that suit and he actually appeared, but on a subsequent date, on which the case was fixed for hearing, he did not appear, and the suit was decreed *ex parte*. He applied to have the *ex parte*

decree set aside, but that application was dismissed, and he has now brought the present suit to have it set aside on the ground that "the claim in the Original Suit No. 214 of 1913 was wholly false, and as the defendant No. 1 intentionally cheated the Court by giving false evidence, the decree in the Original Suit No. 214 of 1913 is fraudulent, illegal and inoperative."

This suit was dismissed in the Court of first instance on the preliminary ground that it was not maintainable, and this decision having been upheld in appeal to the District Judge, the present appeal has been filed by the plaintiff. It has not been decided in the Court of first instance or by the District Judge whether the claim was supported by perjured evidence. But it appears to have been assumed by the learned District Judge that the claim was supported by perjured evidence, and he has dismissed the suit on the ground that the plaintiff was guilty of laches.

It is now contended before us that whether the plaintiff was guilty of laches or not, he having asserted in his plaint that the claim was false and supported by perjured evidence, he was entitled to succeed, if his allegations as to the falseness of the claim and the perjured evidence are found to be correct. We are asked, therefore, to set aside the decision of the District Judge and to remand the suit to allow findings to be come to on these points.

So far as perjured evidence is concerned, it is, I think, settled law that the mere fact that the claim is supported by perjured evidence would not in itself entitle the plaintiff to have the *ex parte* decree set aside, and I need not do more than refer to the cases reported as *Moruful Huq* v. *Surendra Nath Roy* (1), *Kedar Nath Das* v. *Hemanta Kumari Dasi* (2) and *Logadapatti Chinnayya* v. *Kotla Ramanna* (3).

It is contended, however, that the matter is different where a false case has been deliberately placed before the Court. There can be no doubt that the Court has jurisdiction in a subsequent suit to set aside a decree which has been obtained by a fraud upon the Court, and it seems clear from *Vadala* v. *Lawes* (4) and *Abouloff* v. *Oppenheimer & Co.* (5) that if a case which was placed before the Court was a false case, it has such jurisdiction. The question, however, is under what circumstances this jurisdiction should be exercised, and whether it should be exercised in this particular case. The leading case on the question of fraud upon the Court is the *Duchess of Kingston's case* (6). In that case De Grey, C. J., (at page 762) observes, "fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal;" and in dealing with this matter of fraud Lord Cairns, L. J., in *Patch* v. *Ward* (7) made the following observation:—

"Now it is necessary to bear in mind what is meant, and what must be meant by fraud, when it is said that you may impeach a decree signed and enrolled on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject, the *Duchess of Kingston's case* (6), where the Judges, being consulted by the House of Lords, replied to one of the questions, 'Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.' The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens* putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him."

The question was also very fully considered in *Logadapatti Chinayyya* v. *Kotla Ramanna* (3) where Benson and Sundara Ayyar, JJ., in the course of their judgment said:—

"There can be no undue advantage taken of another by a party in putting any matter before the Court to be adjudged by it to be

(1) 15 Ind. Cas. 893; 16 C. W. N. 1002.
(2) 22 Ind. Cas. 709; 18 C. W. N. 447.
(3) 19 Ind. Cas. 579; 38 M. 203; (1913) M. W. N. 87; 13 M. L. T. 421; 25 M. L. J. 228.
(4) (1890) 25 Q. B D. 310; 63 L. T. 128; 38 W. R. 594.
(5) (1882) 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57.
(6) (1776) 2 Sm. L. C. 11th Ed. 731 at p. 738; 20 How. State Trials 537; 34 H. L. Jo. 655.
(7) (1867) 3 Ch. App. 203 at pp. 206, 207; 18 L. T. 134; 16 W. R. 441.

true or false. Both parties are entitled to invoke the judgment of the Court and to convince it of the truth of the evidence adduced by them respectively. It is true that parties ought not to let in false evidence, and that it is highly improper and immoral to do so, but it is the function of the Court to decide whether the evidence is true or false. If the adducing of false evidence can be spoken as a fraud, then the Court, in deciding the case, must be taken to have adjudged whether such fraud has been committed or not, and what it has once adjudged, it cannot be called upon to decide again. The test to be applied is, is the fraud complained of not something that was included in what has been already adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards claim to show that the allegation of his opponent was false."

It is true that in this case the learned Judges were dealing with the question of perjured evidence, but the arguments apply equally in my opinion to a false case, where the opposite party has been duly served with notice, and owing to his own laches has not appeared and the suit has been decreed against him *ex parte*. If notice had not been served or if the defendants were prevented by the plaintiff from appearing, there would be some extrinsic collateral act, but where the notice has been duly served and the plaintiff has owing to his own fault failed to appear and place his case before the Court, there is not such extrinsic collateral act. The whole case is before the Court, which has decided it on the pleadings and on the evidence, and whether the case was a false one or not, and whether the evidence adduced is perjured evidence or not, the Court must be held to have adjudicated on both these points and once having adjudicated, it cannot be asked to adjudicate again. In this view of the law the decision come to by the lower Courts is, in my opinion, correct. This suit is not maintainable and I would dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 251 OF 1919.

February 5, 1920.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

SRINIVASA AIYANGAR AND ANOTHER —DEFENDANTS—APPELLANTS

versus

NARAYANA AIYANGAR—LEGAL REPRESENTATIVE OF PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 54—Joint Hindu family—Injunction at instance of one member to restrain others from entering on possession, grant of.

The remedy by injunction should not ordinarily be granted to one member of a Hindu family in possession of certain property against other members of the family who are out of possession. [p. 609, col. 2.]

When a plaintiff is entitled to sole possession of certain property and the defendant who has a right to part enjoyment is likely to enter on the property, such entry cannot be prevented by injunction. The proper remedy for the plaintiff is to sue for partition. [p. 609, col. 2.]

In a prior suit for partition by the plaintiffs as representing one branch of a joint Hindu family against the defendants, who represented another branch, there was a reference to arbitration and a decree was passed in accordance with the award. According to that decree plaintiffs were to remain in possession for 6 years, at the end of which period the defendants could recover their half share either amicably or through Court. As the plaintiffs did not give possession amicably after the six years, defendants attempted to take possession. There were possession proceedings under the Criminal Procedure Code, wherein plaintiffs were asked to establish their right in a Civil Court. Plaintiffs filed the present suit for an injunction restraining defendants from entering on the lands:

Held, that as the parties were restored to the *status quo ante* after six years from the date of the prior decree and the plaintiffs were not entitled to sole possession, the suit for injunction was not maintainable. [p. 609, col. 2.]

SRINIVASA AIYANGAR *v.* NARAYAMA AIYANGAR.

Appeal against the decree of the Court of the Subordinate Judge, Ramnad at Madura, dated the 23rd April 1919, in Appeal Suit No. 20 of 1919, preferred against the decree of the Court of the Additional District Munsif, Srivilliputtur, in Original Suit No. 459 of 1917.

Messrs. *T. Narasimha Aiyangar*, *K. V. Krishnaswami Iyer* and *A. N. Viswanatha Aiyar*, for the Appellants.

Messrs. *T. R. Venkatarama Sastri* and *A. N. Krishna Aiyangar*, for the Respondents.

JUDGMENT.—This is a suit by a certain members of a Hindu family against others for an injunction. The prior proceedings relied on as enabling the plaintiffs to sustain the suit may be shortly stated. Plaintiffs as representing one branch of the family sued the defendants representing the other branch for partition. There were minors in both the branches. There was a reference to arbitration pending the suit. On the award of the arbitrators, a decree was passed. *Vide* Exhibit A series. The material portion of the decree, so far as this suit is concerned, gives the plaintiffs possesion of all the family properties for 6 years from July 1914, and directs that at the end of that period the defendants shall be entitled to recover their half share either amicably or through Court. Plaintiffs did not give possession amicably and according to the plaint they are in sole possession even now. Defendants attempted to take possession. There were proceedings under Chapter XII of the Criminal Procedure Code. Plaintiffs were asked to establish their right in a Civil Court and hence this suit for an injunction. The District Munsif dismissed it, but the Subordinate Judge remanded the suit for further enquiry and disposal.

We think that on the allegations contained in the plaint the suit is not maintainable. This is not a case in which the plaintiffs claim that they have acquired title by prescription to the entire property. Nor is this a case in which the decree based on the award sustains plaintiffs' possession until evicted by defendants in due course of law. Mr. Narasimha Aiyangar rightly conceded that the defendants, if they chose to sue or to execute the decree, would be entitled to half the mesne profits from the plaintiffs. It follows from this that since 1910, the parties were placed in *status quo ante* as tenants-in-common. Each branch had a right to its share in the property in suit; and no branch was entitled to sole possession. In this view the plaintiff, not having alleged sole title to the property, was not entitled to seek the protection of the Court by way of injunction. This is a well-recognised rule of law in *Damodaran Namboodri* v. *Govindan Nair* (1). Moreover, under section 54 of the Specific Relief Act plaintiff must bring his case under one of the 5 clauses enumerated in the second portion of the section, if he claims the discretionary relief. Mr. T. Narasimha Aiyangar suggested that the remedy is necessary to avoid multipilicity of suits. But there is no question of multipilicity at present; all that is alleged is that there is a possibility of defendants breaking the law. For such an offence, there is appropriate remedy elsewhere. No cases have been quoted to show that when the plaintiff is entitled to sole possession and the defendant who has a right to part enjoyment is likely to enter upon property, such an entry can be prevented by injunction. Plaintiff can put an end to this position of affairs by suing for partition. That the remedy by an injunction should not ordinarily be granted to a member of a Hindu family has been well recognised in India. *Anant Ramrav* v. *Gopal Balvant* (2) enumerates the many exceptional circumstances which would justify the granting of such a relief. The present case is excluded by that enumeration. Illustration (*a*) to section 54 also suggests in what cases such a relief is available. Construing these provisions of the law, the Judicial Committee in *Watson and Co.* v. *Ramchund Dutt* (3) say this: "It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husband-like manner, the whole estate may, by means of cross-injunctions, have to remain

(1) 53 Ind. Cas. 229; 37 M. L. J. 307.
(2) 19 B. 269; 10 Ind. Dec (N. S.) 182.
(3) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7.

altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital." In *Lachmeswar Singh* v. *Manowar Hossein* (4) their Lordships reaffirmed this principle. Applying these principles to the present case we are clear that the plaintiff has not shown that he is entitled to this exceptional remedy.

The order of the Subordinate Judge must be set aside and the decree of the District Munsif restored with costs here and in the Court below.

M. C. P.

Appeal allowed.

(4) 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 132; 9 Ind. Dec (N. s.) 614.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 334 OF 1918.

February 27, 1920.

Present :—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, Kt.

JAGAMOHINI DASI—DEFENDANT—APPELLANT

versus

SHIBA GOPAL BANERJEE—PLAINTIFF—RESPONDENT.

Partition, suit for—Res judicata—*Previous suit dismissal of, effect of.*

The right to sue for partition is a continuing right and incidental to the ownership of joint property. Therefore so long as the propetry remains joint, one of the co-owners has a good cause of action for bringing a fresh suit for partition notwithstanding the dismissal of a previous suit for partition. [p. 611, col. 2; p. 612, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Howrah, dated the 21st of November 1918.

Babu *Ram Chandra Majumdar* (with him Babus *Broolal Chuckerbarty*, *Barenashibasi Mukherjee* and *Sarat Chander Dey*), for the Appellant.—The defendant is the appellant in this Hon'ble Court. This appeal arises out of a suit for partition of two plots of land. My client instituted a suit as early as 1894 and that suit was dismissed by the 1st Court. On appeal the Hon'ble High Court gave a decree for partition of plot No. 1 only. A third person having interest in the plot No. 2 and he being not made a party to it, the suit with respect to plot No. 2 was dismissed. My client brought a fresh suit in 1903 for partition of land measuring about 16 *cottas*. This suit was decreed by the 1st Court, but on appeal it was dismissed on the ground that the plaintiff had only half share in it. The plaintiff's title to the eastern portion of the disputed plot was established, but the whole suit was dismissed on the ground that there had been a previous adjudication on the point. An appeal was preferred in the High Court for the recovery of the western portion. The present suit has been instituted for the establishment of title to the eastern portion of the plot by the plaintiff, who was defendant in the previous suit. The lower Court finds that the property is joint.

My first submission is that the matter is *res judicata* and is binding on the parties inasmuch as it was held in the previous suit that there could be no partition of the present plot.

The property being joint, the previous decision is binding upon the parties and the lower Court has fallen into an error by entertaining the present suit between the same parties on the same questions. It is clearly against the principle of *res judicata*.

Sir *Rashbehary Ghose* (with him Babu *Dwarkanath Chuckerbutty*, Dr. *Jadunath Kanjilal*, Babus *Kali Kinkar Chuckerburtty* and *Gour Mohan Dutt*), for the Respondent.—

I submit that the contention of my learned friend must fail. The right to bring a fresh suit for partition is a continuing right and a fresh cause of action arose at the time of the institution of the present suit. This is the view expressed clearly in the following reported cases :—

Madon Mohon Mondal v. *Baikunta Nath Mondul* (1), *Nasrat Ullah* v. *Mujib Ullah* (2), *Bisheshar Das* v. *Ram Prasad* (3), *T. C. Mukerji* v. *Afzal Beg* (4), *Thakore Becharji Ranaji* v. *Thakore Fujaji Vaktaji* (5).

I submit that in the face of these decisions the argument of my learned friend must fail

Babu *Ram Chandra Mojumdar* briefly replied.

JUDGMENT.

SHAMSUL HUDA, J.—I am of opinion that there is no merit in this appeal. The facts appear to be shortly these : In the year 1894 the defendant appellant as plaintiff brought a suit for partition of two plots of land. The suit was wholly dismissd by the first Court, but, on appeal to this Court, there was a decree for partition of plot No. 1 only and the suit for partition in respect of plot No. 2 was dismissed on the ground that a third person had an interest in that plot and the suit could not go on in his absence. It may be mentioned here that plot No. 1 of this suit has nothing to do with the land in respect of which partition is claimed in the present suit. The defendant-appellant again as plaintiff brought a suit in the year 1903 for partition of a plot of land which covered an area of about 16 *cottas*. In this suit the Court of first instance passed a decree in favour of the plaintiff, but on appeal the suit was dismissed on the finding that only 8 *cottas* out of the 16 *cottas* were purchased by the plaintiff and that she had no title to the western portion of the 16 *cottas* plot. Although the plaintiff's title to the eastern portion of the plot in suit was established, the entire suit was dismissed on the ground that so far as this eastern portion was concerned, there had been a previous partition. There was an appeal to the High Court, but that appeal referred to the western portion only with which we are not concerned. The present suit is confined to this eastern plot of 8 *cottas*. The plaintiff in the present suit was defendant in the two previous suits. The finding of the Court below is that this eastern plot of 8 *cottas* has been held jointly by the present plaintiff and the defendant, the plaintiff's share being 12 annas odd *gundas* and that of the defendant being 3 annas odd *gundas*. This finding, in my opinion, is not open to any attack and I agree with the learned Judge of the trial Court that this property is joint. The only argument that has been advanced before us against the decree passed in this suit for partition of the eastern plot is that it being held in the previous suit of 1903 that there could be no partition of this plot as it had already been partitioned before, the matter is *res judicata*. The judgment in that suit has been placed before us, and it is clear that the learned Judge dismissed the whole suit for partition under a misconception. As a matter of fact, the plot with reference to which there was a partition in the first suit was plot No. 1 in that suit, which has nothing to do with the land the subject-matter of the present suit. Even if we were precluded from going behind the findings in the previous suit, I do not think that the contention of the appellant can be given effect to. Whatever may have been the state of facts at the time the second suit was tried, there can be no doubt upon the facts of the present case that as a matter of fact on the date this suit for partition was instituted, the parties were holding the plot of land jointly between them. That being so, I think, it must be held that the plaintiff had a fresh cause of action to bring a suit for partition. In the case of *Madon Mohon Mondul* v. *Baikunta Nath Mondul* (1) it was observed by a Division Bench of this Court that the right to sue for partition unlike other suits is a continuing right incidental to the ownership of joint property. So long, therefore, that the property remains joint, it seems to me that notwithstanding the dismissal of the previous suit, the plaintiff had a good cause

(1) 10 C. W. N. 839.
(2) 13 A. 209; A. W. N. (1891) 117; 7 Ind. Dec. (N. S.) 195.
(3) 28 A. 627; 3 A. L. J. 379; A. W. N. (1906) 142.
(4) 27 Ind. Cas. 694; 37 A. 155; 13 A. L. J. 93.
(5) 14 B. 31; 7 Ind. Dec. (N. S.) 479.

of action for bringing a fresh suit for partition. This view of the case is also supported by several other decisions cited by Sir Rash Behari Ghose for the respondent. He referred to three cases of the Allahabad High Court reported as *Nasrat Ullah* v. *Mujib Ullah* (2), *Bisheshar Das* v. *Ram Prasad* (3) and *T. C. Mukerji* v. *Afzal Beg* (4). In some respects, there may be a distinction between these cases and the present cases but that distinction, in my opinion, makes no difference regarding the maintainability of the present suit. The appeal is, therefore, dismissed with costs. We assess the hearing fee at five gold *mohurs*. The respondent is not entitled to any costs incurred by him in the preparation of the paper book.

Let the record be sent down without delay.

RICHARDSON, J.—I agree. As I understand the matter, the suit is based not on rights which existed antecedent to the previous suit but on rights which are still subsisting. It is not the case that the result of the previous suit altered the mode in which the property was enjoyed so that the parties came to hold in severalty what they had previously held in common. On the contrary the possession continued to be a joint possession. Perhaps the cases nearest to the present are those of *Thakore Becharji Ranoji* v. *Thakore Fujaji Vaktaji* (5) and *Bisheshar Das* v. *Ram Prasad* (3).

I concur in dismissing the appeal.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 92 OF 1919.

December 9, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

PONNUSWAMI ASARI, MINOR, THROUGH HIS GUARDIAN MUTHAIYAN ASARI—DEFENDANT No. 2—APPELLANT

versus

A. M. PALANIANDI MUDALI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 20, 22—Respondent, right of, to file cross-objections against co-respondent—Addition of party for purpose of cross-objections—Power of Court.

A respondent in an appeal has the right to proceed against a co-respondent by memo. of cross-objections and for this purpose is entitled to apply to make the latter a party, whether, at the time of the presentation of the appeal, he was an interested party or not. [p. 613, col. 1; p. 614, cols. 1 & 2.]

Munisamy Mudaly v. *Abbu Reddy*, 27 Ind. Cas. 322; 38 M. 705; (1915) M. W. N. 45; 27 M. L. J. 710, followed.

Jadunandan Prosad Singha v. *Koer Kallyan Singh*, 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612; *Shib Chandra Kar* v. *Dulcken*, 48 Ind. Cas. 78; 28 C. L. J. 123; *Valliammai Achi* v. *Nataraja Pillay*, 13 Ind. Cas. 906; 11 M. L. T. 157; (1912) M. W. N. 198, not followed.

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 340 of 1917, preferred against the decree of the 2nd Additional District Munsif, Madura, in Original Suit No 16 of 1917.

FACTS appear from the judgment.

Messrs. *N. R. K. Thothachariar* and *K. V. Sesha Aiyangar*, for the Appellants:—Cross objections between co-respondents can be permitted only in so far as the appellant is interested in the subject-matter thereof, or in other words, they must not refer to questions outside the subject-matter under appeal. *Munisami Mudaly* v. *Abbu Reddy* (1) does not conclude the question. Even if it does, it is not in accordance with the scheme of Order XLI, Civil Procedure Code. The words 'the decree' in Order XLI, rule 22, Civil Procedure Code, mean only 'the decree' appealed from or so much of it as is questioned in appeal. The privilege of cross objections is to be allowed only when "the decree" or the portion of it questioned in appeal is also against the respondent on some grounds. What is not under appeal can be questioned by a different appeal and not by cross-objections.

[OLDFIELD, J., referred to "which he could have taken by way of appeal" in clause (*i*).]

The right to file a cross objection is co-extensive with a right of appeal. But it can be only with reference to matters under appeal "Parties" in clauses 3 and 4 refer only to parties to the appeal. Clause 4 makes the position clear. There is a specific provision in rule 23

(1) 27 Ind. Cas. 322; 38 M. 705; (1915) M. W. N. 45; 27 M. L. J. 710.

for cases of parties not on record in the appeal. Compare also rule 20.

This view has been held in *Valliammai Achi* v. *Nataraja Pillay* (2).

Mr. *M. S. Ramanuja Aiyangar*, for Mr. *C. S. Venkatachariar*, for the Respondent, said that he relied on *Munisamy Mudali* v. *Abbu Beddy* (1) and *Rebala Bahu Reddi* v. *Dodla Rami Reddi* (3).

JUDGMENT.

OLDFIELD, J.—The only material facts are that plaintiff obtained a decree against 1st defendant and his sons, 3rd and 4th defendants for the amount of a debt incurred by the first mentioned. Third and 4th defendants appealed not making 2nd defendant, 1st defendant's undivided nephew, a party. Plaintiff, however, here 1st respondent, filed a memo. of objection against him and statedly on account of that memo. had made him a party to the appeal in the lower Appellate Court. A decree was given by the lower Appellate Court against him: and he now appeals, the only ground of appeal argued being that, as he was not originally a party to the appeal, no memo. could be filed to his prejudice.

The Full Bench decision in *Munisamy Mudaly* v. *Abbu Reddy* (1) has placed beyond doubt the right of one respondent to proceed against another by memo. of objection: and the only question, therefore, is whether the one is entitled to have the other made a party in order that he may do so. Appellant argued that he is not, because the only provision in Order XLI relating to appeals, rule 20, for the addition of parties refers to "the appeal" and "the result of the appeal," not also to the memo. of objection, and cannot be utilised for the purpose of the latter. Contra it is argued that "the appeal" is referred to in Order XLI, rule 20, as meaning and including all the proceedings in the Appellate Court, whether those involved in the disposal of the appeal proper or also those involved by the memo. The latter construction commends itself as consistent with the reference to 'the appeal' in rules 21, 23, 24, 25, 27, 30, 33, unaccompanied by anything explicitly rendering them applicable to a memorandum of objection or by any other separate provision for the procedure at the hearing of the latter. In these circumstances, the appellant's argument must be rejected. The appeal is dismissed with costs.

KRISHNAN, J.—In this case the lower Appellate Court allowed the plaintiff, who was originally the sole respondent in the appeal to that Court by defendants Nos. 3 and 4, to file a memo. of cross-objection to the decree of the first Court under Order XLI, rule 22, Civil Procedure Code, against the 2nd defendant who had not been made party to the appeal by appellants, and for the purpose of disposing of that memo. added the 2nd defendant as the 2nd respondent to the appeal, under rule 20, on the application of the plaintiff. That Court, finding the claim of the plaintiff established against the 2nd respondent also, allowed the memo. of cross-objection and varied the decree of the first Court and gave a decree to the plaintiff against him as well.

No objection is raised on the merits to that decree, but it is contended that the procedure adopted is unauthorised by the rules and is *ultra vires* and that plaintiff's only proper remedy was to appeal against the decree of the 1st Court himself so far as it dismissed his suit against the 2nd defendant. It must be conceded in the appellants' favour that the 2nd defendant was not a necessary party to the appeal so far as the appeal of the appellants was concerned. The appellant's Vakil contends that rule 22 does not permit a respondent in an appeal to file cross-objections against any person who is not made a party to the appeal by the appellant and who, not being a necessary party for the purposes of the appeal, need not have been added by him as a respondent. It is, however, conceded by the learned Vakil that the somewhat narrow view taken of the scope of rule 22 in *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (4), which is followed in *Shib Chandra* v. *Dulcken* (5), has not been

(2) 13 Ind. Cas. 906; 11 M. L. T. 157; (1912) M. W. N. 198.

(3) 31 Ind. Cas. 978.

(4) 13 Ind. Cas. 653; 15 C. L. J. 61; 16 C. W. N. 612.

(5) 43 Ind. Cas. 78; 28 C. L. J. 123.

adopted by our High Court. It has been ruled here by a Full Bench in *Munisamy Mudaly* v. *Abbu Reddy* (1) that it was open to a respondent under rule 22 to file a memo. of cross-objection against any other respondent, whether the appellant was interested in it or not. The present case no doubt goes one step further as a new respondent had to be added to the appeal to bring the memo. of objections under the rule adopted by the Full Bench and to dispose it of on the merits. The question whether this could be properly done is not free from doubt, but I am inclined to agree with my learned brother that it is not beyond the Court's power to do it. It is true that in the case in *Valliammai Achi* v. *Nataraja Pillay* (2), Miller, J., held sitting as a single Judge that it could not be done. But in coming to that conclusion, the learned Judge followed the view of the Calcutta High Court in *Jadunandan Prosad Singha* v. *Koer Kallyan Singh* (4) above referred to and as that view has now been dissented from by our High Court, the authority of his ruling is lost. The language of rule 22 is quite wide enough in my view to enable a respondent to take any cross-objection to the decree which he should have taken by way of appeal, as it expressly says. His right is not restricted to filing objection against parties already on record; the rule makes no such restriction. We are not concerned with the question whether the rule is reasonable or not but only with its meaning; after the ruling of the Full Bench any argument that it is unreasonable to allow a person to obtain relief against another by way of memo. of cross-objections because a third person has appealed when he himself has not, cannot be supported.

It seems to me that the present Code is much wider in scope than the repealed Code in 1882 in the matter of allowing the Appellate Court to deal with the whole case. Rule 33 is a clear indication of it. There is no reason, therefore, to restrict the scope of rule 22 by reading words into it allowing cross-objections to be filed only against parties to the appeal. No doubt rule 22, clause (3), shows that notice of memo. of objections should be given to all parties affected by it, but I can see nothing in the clause which requires that they should have been made parties to the appeal by the appellant. If they are not already parties to the appeal record, the Court can and will make them parties to hear their objections to the cross-objections being allowed, as was done in the present case.

It is next argued that under rule 20 such persons cannot be made party respondents when they are not interested in the result of the appeal. It may be pointed out that rule 20 does not exhaust the Appellate Court's power to add parties as Order I, rule 10, read with section 107, Civil Procedure Code, also gives such power. Furthermore, I agree with my learned brother that we should treat the memo. of cross-objections as included in and as a part of the appeal proceedings, and when a person is interested in the results of the appeal, rule 20 will in terms authorise his addition as a party respondent to the appeal record. Unless we treat the memorandum as part of the appeal proceeding there will be a difficulty, as pointed out by my learned brother, in applying several rules in Order XLI to it, which obviously apply to it. In fact the Code does not make separate provision for the disposal of such memoranda except in the special case provided for in rule 22, clause (4). The rules relating to appeals seem to be intended to govern them also so far as possible.

I am, therefore, of opinion that the action of the lower Appellate Court in the present case was within its powers and cannot be set aside as *ultra vires*.

The second appeal fails and I agree that it should be dismissed with costs.

M. C. P.

Appeal dismissed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 32 OF 1919.

April 9, 1920.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Adami.

KRIPA SINDHU PANIGRAHI—
PLAINTIFF—APPELLANT

versus

NANDA CHARAN PANIPATU—
DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 109 (c), O. XLV, r. 3 – Decree obtained by perjured evidence —Suit to set aside decree, maintainability of—Case, whether fit one for appeal to Privy Council.

The mere fact that an appeal involves questions of law does not bring it within the scope of section 109 (*c*) of the Civil Procedure Code. [p. 615, col 2.]

The question whether a suit is maintainable to set aside a decree obtained by perjured evidence is not one of such public importance as to bring a case in which it arises within the scope of section 109 (*c*) of the Civil Procedure Code. [p. 616, col. 2.]

Application for leave to appeal to His Majesty in Council from the decision of Coutts and Admi, JJ., dated the 18th July 1919, reported as 56 Ind. Cas. 606.

Messrs. *Manuk*, *Ashgar* and *G. P. Das*, for the Appellant.

Mr. *Rai Guru Saran Prasad*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an application by the plaintiff for leave to appeal to His Majesty in Council from a decision of this Court dated the 18th July 1919.* The suit was instituted on the 13th June 1916 before the Subordinate Judge of Cuttack, claiming that an *ex parte* decree passed against him in favour of the defendants in the same Court on the 3rd February 1915 was fraudulent, illegal and inoperative and that the defendants should be restrained from executing it. The case made in the plaint was that the plaintiff owing to illness could not attend the hearing of the suit which was decreed against him in his absence and that the defendant No. 1, who was the plaintiff in that suit, intentionally cheated the Court by giving false evidence. His allegations of perjury are based upon the fact that certain admissions were made by the defendant No. 1 in a previous deposition inconsistent with the evidence given by him in the suit. He further alleged that the defendants prevented his witnesses from appearing by threatening them with violence. These allegations are all denied in the written statement. It further appears that after the decree which the plaintiff impugns was passed, he applied to the Court under Order IX, rule 13, of the Civil Procedure Code to have it set aside on the ground that he was suffering from dysentery on the last date of hearing, but the application was rejected as the Court considered that no sufficient cause for his failure to appear had been made out. An appeal from that order was preferred but was unsuccessful. It does not appear that he made any complaint in the proceedings under Order IX, rule 13, that his witnesses had been threatened. It also appears that on the date when the *ex parte* decree complained of was passed an application for adjournment was made on his behalf but was rejected.

The present suit was dismissed by the Subordinate Judge on the ground that it was not maintainable. That decision was upheld by the District Judge on appeal. A second appeal was preferred to this Court and the decision of the lower Courts was affirmed. It is from the decision of this Court affirming the judgment of the District Judge that the petitioner now applies for leave to appeal to His Majesty in Council.

The value of the subject-matter of the suit was placed at under Rs. 4,000 for the purposes of Court fees and at Rs. 5,000 the approximate value of the property claimed for the purposes of jurisdiction. The case, therefore, does not fall within section 110 of the Civil Procedure Code. It is urged, however, that the case is a fit one for appeal to His Majesty in Council under section 109 (*c*) of the Civil Procedure Code and that a certificate should be granted under Order XLV, rule 3, on the ground that although it does not comply with the requirements of section 110, it is otherwise a fit case for appeal.

It is well-settled that the mere fact that the appeal involves questions of law does not bring the case within section 109 (*c*), but it is contended that the case is one of considerable importance as there is some conflict as to the law on the subject and it is desirable that a pronouncement should be made by their Lordships

*See 56 Ind. Cas. 606.—*Ed.*

of the Judicial Committee. Since the question was discussed in the *Duchess of Kingston's case* (1) there has no doubt been some divergence of opinion in the Courts both in this country and in England as to whether a suit would lie to set aside a decree on the ground that it was obtained by perjured evidence and whether a decree so obtained was due to some fraud extrinsic and collateral to the matters in dispute, or whether a suit based on such allegations was merely an attempt to reopen questions already adjudicated upon in the original suit. It is not easy to reconcile cases like the *Bank of Australasia* v. *Nias* (2) and *Flower* v. *Lloyd* (3) with cases such as *Abouloff* v. *Oppenheimer* (4) and *Vadala* v. *Lawes* (5).

In this country also there has been some difference of opinion as to whether a decree can be set aside on the ground that it was obtained by perjured evidence. In *Mahomed Golab* v. *Mahomed Sulliman* (6) it was held that it could not, and this has been followed, though not uniformly, in other cases in the Calcutta High Court. The Madras High Court in *Venkatappa Naik* v. *Subba Naik* (7) held that deliberate perjury was a ground upon which a decree could be set aside. This decision, after being doubted in a latter case, was finally overruled in the case of *Kadirvelu Nainar* v. *Kuppusvami Naicker* (8) by a Full Bench of the Madras High Court. The Allahabad High Court has also taken the same view in *Janki Kuar* v. *Lachmi Narain* (9). It appears, therefore, that so far as the Courts of this country are concerned, there is at present little or no divergence of opinion on the subject in the most recent pronouncements of the different High Courts. Moreover, it must not be forgotten that under the Civil Procedure Code every facility is afforded to the parties both under Order IX and by review of judgment to have matters, already adjudicated upon, re-opened where good cause is shown and it is of paramount importance that litigation should have some finality. In the present case the plaintiff failed to convince the Court when he applied under Order IX, rule 13, that his non-appearance at the trial was due to any good cause. He must, therefore, be taken to have been guilty of laches, but for which he would have had every opportunity of appearing at the trial and cross-examining the witnesses whose perjury he now complains of and could have produced the documentary evidence of perjury upon which he relies and upon which his present suit is based. In the circumstances I do not feel justified in holding that the case is one of such public or private importance that we should grant the certificate asked for. I would reject the application with costs. Hearing fee three gold *mohurs*.

ADAMI, J.—I agree.

Application rejected.

(1) (1776) 2 Sm. L. C. 11th Ed. 731 at p. 738; 20 How. St. Tr. 537: 34 H. L. Jo. 655.

(2) (1851) 16 Q. B 717; 20 L. J. Q. B. 284; 15 Jur. 967; 117 E. R. 1055; 83 R. R. 698.

(3) (1879) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.

(4) (1882) 10 Q. B. D. 295; 52 L. J. Q B. 1; 47 L. T. 325; 31 W. R. 27.

(5) (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594.

(6) 21 C. 612; 10 Ind. Dec. (N. s.) 1038.

(7) 29 M. 179; 16 M. L. J. 59.

(8) 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 590; 23 M. L. T. 372; 8 L. W. 103; (1918) M. W. N. 514.

(9) 30 Ind. Cas. 789; 37 A. 535; 13 A. L. J. 753.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 530 OF 1918.

December 8, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

PONNAMBALA MUDALI—PLAINTIFF—APPELLANT

versus

VASUDEVA PILLAI AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

Benami *transaction—Bond taken by creditor in name of concubine's mother, whether enforceable—Immoral consideration.*

Where a bond executed for repayment of a loan is taken by the creditor in the name of his concubine's mother, the debtor is not entitled to plead that the consideration for the bond is tainted with immorality and that the bond is, therefore, unenforceable. [p. 619, col. 2.]

Tenant v. *Elliot*, (1797) 126 E. R. 741; 1 Bos. & Pul. 8; 4 R. R. 755, followed.

Where the bond has been taken *benami* in the name of the creditor's concubine's mother, the latter or her assignee is entitled to sue as such *benamidar* and in that view it cannot be treated as involving the enforcement of an immoral contract between the executant and his creditor. [p. 619, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge,

Vellore, in Appeal Suit No. 147 of 1917 (Appeal Suit No. 761 of 1916 on the file of the District Court of North Arcot), preferred against the decree of the Court of the District Munsif of Arni, in Original Suit No. 681 of 1915.

This second appeal coming on for hearing on the 21st of July 1919, the Court delivered the following

JUDGMENT.—The Subordinate Judge has discussed the evidence but his finding at the end of paragraph 9, which is the only finding we can discover in his judgment, is not sufficient for the disposal of this case. Before we can dispose of this second appeal we must ask the Subordinate Judge to return definite findings on the three issues finally framed in the first Court on the evidence on record. Six weeks will be allowed for the submission of findings and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Vellore submitted the following

FINDINGS.—1. The High Court of Judicature at Madras requires findings on issues Nos. 1 to 3 framed in the suit. Though this appeal was posted for hearing for three separate occasions, no one appeared for either side and the parties also did not put in an appearance.

2. The plaintiff sues for the recovery of possession as an usufructuary mortgagee of the mortgaged property or for the return of the mortgaged amount with damages.

3. For the defence it is said 1st defendant borrowed money from his brother and executed the plaint-mentioned three usufructuary mortgages in the name of Nallathural as 1st defendant's brother intended to keep Nallathural's daughter and are, therefore, invalid, that plaintiff fraudulently obtained an assignment of them and when plaintiff obtained the suit mortgage for Rs. 200 from 1st defendant, as Rs. 25 were due to him under a prior mortgage of 30th September 1913, plaintiff promised to pay him the balance of Rs. 175 but as 1st defendant can only sign his name, the three usufructuary mortgage deeds were fraudulently recited as the consideration for the suit mortgage and the plaintiff know of the *benami* nature of the three usufructuary mortgage-deeds. The suit bond, Exhibit I, recites that the three said mortgages were assigned to him for Rs. 150 and Rs. 25 were due on a prior mortgage, Exhibit G, and Rs. 25 were paid in cash. Exhibit G, an unregistered mortgage-deed for Rs. 25, was executed on 30th September 1913 after the amendment of the Transfer of Property Act which requires such mortgages to be registered. Exhibit C series are the mortgages of 1911 and 1912 in the name of Nallathural, which were assigned to plaintiff on 21st July 1913 and 1st August 1913. For appellant it is, therefore, contended, the mortgage is valid as regards Exhibit G, but under Exhibit G as it is unregistered there can be no decree against the mortgaged properties, the respondent contends, for Exhibit F though registered is a fraudulent document. But Exhibit F is valid as regards the Rs. 25 under Exhibit G, and plaintiff will be entitled to a decree against the mortgaged property for Rs. 25 if there is a covenant to pay, but as there is no such covenant there will be a decree for Rs. 25.

4. The fact that Exhibit D series stand in her name will not show, as alleged by Nallathural, plaintiff's 1st witness, that she was in possession of the mortgaged lands under Exhibit C series for which she alleges she paid cash. She alleges 1st defendant's brother Chinnaswami did not keep her daughter and she did not offer to give her to him as a concubine and that the mortgages were not executed *benami* in her name for Chinnaswami. Her daughter has been thrice married and her husbands are alive. Her evidence shows the house she lives in was purchased from the defendants under an unregistered sale-deed and Chinnaswami was living in the house when Exhibit C series were executed. She alleges he only lived there for six months and that she and her daughter have not been outcasted, but she did not attend Mottai Goundan's sister's marriage. She and the other members of the family earned about Rs. 2 per day for 2 or 3 months and she obtained Rs. 10 or 15 a month by selling milk, etc., and she and her husband cultivated land on Varam. She was thus not in a position to advance money for Exhibits A, B and C series,

The plaintiff has not entered the box and spoken to the documents he relies on, which plaintiff's 1st witness says she assigned to plaintiff as defendants prevented her ploughing the lands alleging the mortgages were nominal.

5. Plaintiff's 2nd witness shows Rs. 25 were not paid on the date of the execution of Exhibit F as recited therein, but he alleges it was paid 2 or 3 days after registration. He wrote Exhibit G and says plaintiff's 1st witness had no property, but he hears she used to lend Rs. 50 or 60 and the writer read out Exhibit F, which 1st defendant read again. Plaintiff's 5th witness who wrote Exhibit F says he read it out to 1st defendant, who signed it after knowing its contents and Rs. 25 were paid the next day or the day after it was registered. He also wrote Exhibits E1 to E4 and attested Exhibit B. He alleges plaintiff's 1st witness enjoyed the lands for 2 years about 2 years before he gave his evidence and that 1st defendant does not know to write but can read and that plaintiff's 1st witness and her daughter have not been outcasted. Thus no money was paid for Exhibit F.

6. Plaintiff's 5th witness says the consideration for Exhibits E1 to E4 was paid 4 or 5 days after registration and not as recited therein on the dates of execution. Plaintiff's 3rd witness, an attestor to Exhibits C and C2. alleges plaintiff's 1st witness paid money for them but he does not know how or from where she got the money to advance. He has also attested the assignment bonds in favour of plaintiff but says no money was paid for them in his presence and that 1st defendant cannot read or write and can only sign his name and that defendants' mother obstructed plaintiff's men ploughing the lands, but he does not know if it was before or after the assignment to plaintiff, for whose consideration it was arranged Rs. 50 were to be appropriated for plaintiff's profit, Rs. 50 were to be reserved for the expenses of litigation and the balance was to be paid in the event of his success in the litigation. He shows Chinnaswami was living with plaintiff's 1st witness for 2 or 3 years and was a co-accused with plaintiff's 1st witness and her daughter in a criminal case which plaintiff's 1st witness denied. He shows Chinnaswami was present when plaintiff's 1st witness advanced the amounts on the mortgages and was present throughout. He says some castemen go to plaintiff's 1st witness's house but he does not go there and that plaintiff's 1st witness enjoyed the lands for a year about 2 years before he gave his evidence, and not before or after that and that she enjoyed the lands under a mortgage for a year about 8 years before he gave his evidence.

7. Plaintiff's 4th witness shows Chinnaswami was living with plaintiff's 1st witness and her daughter when Exhibit A was executed. According to him plaintiff's 1st witness enjoyed the lands under the mortgage for 2 years about 4 years before he gave his evidence. Thus plaintiff's 1st witness was not in a position to lend money and the money was Chinnaswami's.

8. The evidence for the defence shows Chinnaswami and his mother were and are in possession, that Rs. 175 were not paid for Exhibit F as undertaken and Exhibit F was not read out to him and that 1st defendant did not know of the arrangement between plaintiff's 1st witness and his brother when he was asked to execute the mortgages in her name but was going to and coming from her and that no money was paid for Exhibit E series, but plaintiff's witnesses Nos. 1 and 3 stated Rs. 50 were to be plaintiff's profit, Rs. 50 were to be reserved for litigation and Rs. 200 were to be subsequently paid if successful in litigation.

9. Chinnaswami as defendant's 1st witness says he paid the money for Exhibit C series to 1st defendant his brother and Exhibit C series were taken in plaintiff's 1st witness's name *benami* for himself, as she promised to give her daughter to him to be kept as his concubine but her daughter did not come but went away with another. He also says he had no idea of keeping plaintiff's 1st witness's daughter and that plaintiff's 1st witness carried away all the documents when he was away at Madras and that plaintiff's 1st witness cannot advance any money and has been living in his house for over 10 years. I, therefore, hold Rs. 25 and no other consideration passed for the suit bond and that plaintiff is not a *bona fide* transferee for value of the assigned bonds and the mortgages executed by 1st defendant in favour of plaintiff's assignor were for immoral and illegal purposes to the knowledge of the plaintiff and are not enforceable on that ground.

10. *Issue* 3 :—The plaintiff was aware of the transactions and was not misled. He is not entitled to any damages and I so find.

This second appeal came on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial.

Mr. *K. Jagannatha Aiyar*, for the Appellants.—The lower Court's finding is not sustainable in law. The debtor has nothing to do with how his creditor deals with the bond executed by the defendant. The fact that the creditor took the bond in the name of his concubine's mother for an immoral purpose, assuming it to be so, does not affect the relation between the debtor and creditor, nor does it make their transaction void. See *Tenant* v. *Elliot* (1). If the 1st defendant's brother meant to make a gift of the mortgage deed, it has passed the executory stage and the 1st defendant could not plead that the consideration was immoral.

If it be viewed as a *benami* transaction, 1st defendant could not resist the claim either as it is open to the *benamindar* or his assignee to sue on the document. And as the *benamidar* is supposed to act for the real owner, the relationship between them does not arise in this suit. See *Singa Pillai* v. *Govinda Reddy* (2) and *Vaitheeswara Aiyar* v. *Srinivasa Raghava Iyengar* (3).

The respondents were not represented.

JUDGMENT.—The respondents do not appear before us to support the findings.

We are unable to accept the finding that the mortgages executed by the 1st defendant, Exhibit C series, in favour of Nallathural are unenforceable on the ground of their consideration having been for immoral and illegal purpose.

The 1st defendant admitted that he was paid cash consideration by his brother for the mortgage-deeds in question and that the mortgages were taken in Nallathural's name at his instance. It may be that his brother did this to further his immoral purpose. But following the view held in the case of *Tenant* v. *Elliot* (1) we must hold that the question of immorality and illegality as between Nallathural and the brother cannot be pleaded as a defence by the 1st defendant. If in getting the mortgage-deeds in Nallathural's name the brother intended to make a gift of the mortgage right to her, the transaction had passed beyond the executory stage and no objection that the purpose for which the gift was made was immoral can be pleaded to affect it.

If, on the other hand, the brother took the deeds in the woman's name merely as a *benamidar* for himself, which seems to be the contention here, Nallathural could have sued as such *benamidar* and her assignee could also sue. See *Singa Pillai* v. *Govinda Reddy* (2) and also *Vaitheeswara Aiyar* v. *Srinivasa Raghava Iyengar* (3). If this suit is viewed as one by the assignee of a *benamidar*, it cannot be treated as in any way involving the enforcement of an immoral contract between Nallathural and the 1st defendant's brother Chinnaswami. A *benamidar*, recovers money for the use of the real owner who could get it paid over to himself, and no question of the nature of the relation between the *benamidar* and the real owner arises in such a suit.

In any view, therefore, it was not open to the 1st defendant to raise any objection to Exhibit C series on the ground of immorality. As he himself admitted having received full cash consideration for them, he was bound to repay Rs. 150. Rs. 25 was already found to be due under Exhibit G by the lower Appellate Court.

We must, therefore, hold that Exhibit F is supported by consideration to the extent of Rs. 175. First defendant is now dead but defendants Nos. 2 and 3 his sons are on record. They have raised no question here that even if Exhibit F is binding on the 1st defendant it is not binding on them. We must, therefore, allow the second appeal and give a mortgage decree for Rs. 175 to be realised by sale of the mortgaged property, under section 68, clause (c), Transfer of Property Act, as, though the mortgage was a usufructuary one, possession was not given to the mortgagee. See *Marturu Subbamma* v. *Gadde Narayya* (4). Plaintiff does

(1) (1797) 126 E. R. 744; 1 Bos. & Pul. 3; 4 R. R. 755.

(2) 43 Ind. Cas. 905; 41 M. 435; (1918) M. W. N. 107.

(3) 50 Ind. Cas. 309; 42 M. 348; 36 M. L. J. 296; 9 L. W. 362; 25 M. L. T. 351; (1919) M. W. N. 299 (F. B.).

(4) 43 Ind. Cas. 4; 41 M. 259; 33 M. L. J. 623; 22 M. L. T. 429; 6 L. W. 738; (1917) M. W. N. 823 (F. B.).

not now want a decree for possession. The plaintiff will pay and receive proportionate costs throughout. Defendants will have three months' time for payment from this date.

M. C. P.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 25-B OF 1918.

March 12, 1920.

Present:—Mr. Prideaux, A. J. C. and Mr. Macnair, A. J. C.

SONIBAI—PLAINTIFF—APPELLANT

versus

DHANRAJ—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 118, *applicability of Suit for possession questioning validity of adoption—Limitation—Hindu Law—Adoption*—Factum valet, *doctrine of, applicability of —Document, subsequent addition to, whether binding —Burden of proof.*

A suit for possession of property where the plaintiff questions the validity of an adoption is not governed by Article 118 of Schedule I to the Limitation Act. [p. 628, col. 1.]

(Case-law discussed).

The doctrine of *factum valet* in Hindu Law only applies to adoptions where matters which do not affect the essence of the adoption have been disregarded. It cannot be applied to validate the adoption of an orphan. [p. 628, cols. 1 & 2.]

Where a party has shown it probable that there is a subsequent addition to a document, he cannot be held bound by the addition merely because it is proved or admitted that the rest of the document is genuine. [p. 623, col 2.]

Appeal against the decree of the Additional District Judge, Amraoti, in Civil Suit No. 23 of 1914, dated the 28th January 1918.

The Hon'ble Sir *B. K. Bose*, Messrs. *M. V. Joshi* and *B. W. Joshi*, for the Appellant.

Dr. *H. S. Gour* and R. B. *R. N. Mudholkar*, for the Respondent.

JUDGMENT.—*Musammat* Sonibai, the daughter of Ramdhan, sues for possession of the property of her deceased father. It is admitted that about 1890 after the death of their father Ramnath, Joharmal and Ramdhan were joint, but the plaintiff alleges that Joharmal and Ramdhan had separated, though she cannot give the date of separation. She further alleges that though the defendant Dhanraj was ostensibly adopted by Joharmal on 25th May 1908, the adoption was invalid as Dhanraj was an orphan at the time. Joharmal died in 1912 and Ramdhan died on 24th June 1914. After Ramdhan's death the defendant Dhanraj claimed his estate and took possession of his property. Proceedings were instituted under section 145, Criminal Procedure Code, but on 17th September 1914 the Magistrate passed an order in favour of Dhanraj. The plaintiff claimed all the property belonging to her father Ramdhan, a sum of Rs. 3,275 to the credit of her mother in Ramdhan's shop at Khanapur, certain ornaments which she alleged were her mother's *stridhan* and certain mesne profits. The relief claimed was valued at over Rs. 50,000.

The plaintiff's claim then is based on alternative grounds: (1) if the defendant's adoption was invalid and Joharmal and Ramdhan were separate, she is heir to Ramdhan, we remark that Ramdhan's wife had died during Ramdhan's lifetime: (2) if Dhanraj's adoption was invalid, but Joharmal and Ramdhan were joint, then on the death of Joharmal Ramdhan became entitled to the whole of the joint property. On Ramdhan's death the plaintiff succeeded as heir to the joint property, and she is, therefore, entitled to that portion of the joint property which she now claims; (3) if Dhanraj has been validly adopted and Joharmal and Ramdhan had separated, the plaintiff is the heir of Ramdhan in preference to Ramdhan's separated nephew by adoption; (4) if Dhanraj's adoption is valid and Joharmal and Ramdhan remained joint, even then the plaintiff is entitled to the separately acquired property of Ramdhan. She alleges that the whole of Ramdhan's property was separately acquired. Alternatively she alleges that she is at least entitled to the money which belonged to her mother and to the *stridhan* of her mother.

It will be convenient to deal with the first two of these grounds. The learned Additional District Judge remarks in paragraph 10 of his judgment that if the defendant's adoption is found to be invalid, the plaintiff must succeed whether Joharmal and Ramdhan were joint or separate. The defendant appears to have contended that

even if the plaintiff could prove that the adoption was invalid, she might still be estopped from asserting her right to her father's property: but we shall deal later with this contention.

The defendant's reply on the point of adoption was as follows:—The formal ceremony in regard to the adoption took place on 25th May 1908 after the death of defendant's natural mother: but during her lifetime the mother had actually given the defendant in adoption to Joharmal. Even if the defendant's mother had only made an agreement to give her son in adoption, she granted an authority to one of her sons to carry out this adoption and the adoption subsequently carried out was valid. Next, Ramdhan not only consented to the adoption of the defendant but took an active part in bringing it about. He attested the deeds made at the time of the adoption. He is, therefore, estopped from questioning the adoption and the plaintiff who claims under him is also estopped.

The learned Additional District Judge has found:—

(*a*) on issue No. 4 (*a*) that the defendant was given in adoption during the lifetime of his mother:

(*b*) on issue No. 4 (*b*) that the defendant's mother gave her eldest son authority to carry out the adoption, but that unless there was actual adoption during the mother's lifetime this authority would not render the subsequent adoption valid;

(*c*) on issues Nos. 5 (*a*), 5 (*b*), 6 (*b*) and 7 that Ramdhan's actions in bringing about the adoption and consenting to it and attesting the deed and his conduct subsequent to the adoption now operate as estoppel and prevent the plaintiff from questioning the defendant's adoption.

The plaintiff appeals. On grounds 5 to 9 it is urged that there was no valid adoption.

The first point we have to consider is on whom the burden of proof lies. It is admitted that ceremonies took place on 25th May 1908 and that after that Dhanraj was acknowledged as the adopted son of Joharmal for a period of six years, both by Joharmal and his brother Ramdhan. The respondent's Counsel cites the case of *Shrinivas* v. *Balvant* (1) and relies on the reasoning at page 522.* The appellant's Counsel concedes that the burden of proof on the question whether there was a legal adoption in 1908 would have lain upon him, but he contends that once it is admitted that the defendant was an orphan in 1908 and that no legal adoption could then take place, he has discharged the burden. We agree that it is for the defendant to prove that an adoption took place in 1903.

We remark that the case is somewhat different with regard to the allegation that the defendant's mother on her death-bed gave her eldest son authority to carry out the adoption. If such authority was sufficient to render the adoption legal, then in view of the ostensible adoption, the burden of proof might initially lie upon the plaintiff to show that the giving of such authority was extremely improbable.

We proceed to consider the evidence regarding the alleged adoption in 1903. The learned Judge of first instance has relied on (*a*) the oral evidence of D. W. Nos. 1, 2, 4 and 13; (*b*) an entry in a document (Exhibit D-62) executed at the time of the adoption; (*c*) a post card (Exhibit D-21-D. W. No. 1) in which some one is styled Joharmal Dhanraj: and (*d*) the evidence of Laxman Govind (D. W. No. 25) supported by an entry in an account-book.

The witnesses D. W. Nos. 1, 2, 4 and 13 were not examined in the presence of the Judge who decided the case. Kaluram (D. W. No. 1) is the natural brother of the defendant. Dhanraj (D. W. No. 2) is the defendant himself. In 1903 he was a child of 8 or 10 years, and his evidence appears of little value. Chaturabai (D. W. No. 13) is the adoptive mother of the defendant: it is common ground that the defendant when a boy of 13 or so was received into the family of Joharmal. Chaturabai then has been treating him as a son since he was a boy. We consider it natural that she should bear a strong affection towards one whom she has long considered her adopted son: it follows that there is strong reason to suspect that her evidence is biassed.

(1) 20 Ind. Cas. 162; 37 B. 513: 15 Bom. L. R. 533.

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Kaluram (D. W. No. 1) has stated that the boy was taken by Ramdhan to Chandur some months after his mother's death and remained at Chandur Bazar since. He gave this evidence on 15th December 1915. On 7th August 1916 Tukaram (P. W. No. 8) gave evidence, strongly supported by entries in the school registers, that the boy was at Thugaon for some years after the adoption. We shall refer later to this evidence, but at present only state that Kaluram appears to have given false evidence on the point. In cross-examination Kaluram first denied that his brother was in the school at Thugaon in 1906, and then admitted that he might have come sometime and attended the school.

Kaluram states: "The boy was placed on the lap of Joharmal by my mother. There were 5 or 7 persons present. There were 2 or 4 Marwari Brahmins, some women and 2 or 4 Musalmans and 2 or 4 Marwaris. Panna Musalman was there. Joharmal's cook was there and he was a cook. The Marwaris there were Maheshri. One Agarwali was called and he did not come. An Oswal Jain Marwari Budda was present and is alive. I knew nobody else there." Bhagwant (D. W. No. 4) was the writer of the deeds executed on 25th May 1908. There seems no reason why he should have been present on the previous occasion in 1903. He says he had gone there because Ramdhan wanted him to write an agreement that day, but Joharmal said no writing was necessary. It is noticeable that Kaluram did not mention that this man, a Krishnapakshi, was present. Kaluram signed the document in 1908 and states he was present when these documents were written: he ought then to remember the writer. Bhagwant (D. W. No. 4) cannot explain why the documents which he wrote in 1908 are inaccurate, although to his personal knowledge there had been an adoption in 1903 and the name of the boy was then changed. His statement that Ramdhan had brought a draft is unsatisfactory. Chaturabai (D. W. No. 13) deposes to a fairly complete ceremony in 1903. She speaks of *tilak* of red powder, singing of songs, distribution of cocoanuts and jaggery and the giving of rupees and new clothes. This is opposed to the evidence of Kaluram who states that Joharmal said: "The ceremonies according to our customs will be done later". Chaturabai says: "There were 5 or 7 persons seated in the shop at the time of seating on the lap of the boy. There were 5 Musalmans, 2 Oswals, possibly 2 Brahmins and two of my castemen, either Anandilal or Jodhraj." She subsequently mentions names and states that two of the persons present are alive. It is to be noted that she too does not mention Bhagwant (D. W. No. 4).

We consider the oral evidence scanty and unconvincing. Kaluram and Chaturabai are biassed witnesses. They do not mention the presence of Bhagwant (D. W. No. 4), though they mention the names of several other people. The persons they mention are not examined on the point. The defendant as D. W. No. 2 gives a fresh set of names saying that his adoptive mother told him these men were present. They also are not examined on the point, though one Brijlal (D. W. No. 35) has given lengthy evidence.

We now consider the statement in Exhibit D 62. On the day of adoption, 25th May 1908 two deeds were executed. The deed of adoption (Exhibit D 63) was registered. The deed of agreement (Exhibit D-62) is unregistered. The deed of adoption contains no mention of any previous giving or taking or of any authority given by the deceased mother of the defendant Dhanraj. It purports to be in favour of Ganesham and says: "From this day you will be named Dhanraj son of Joharmal Galgoti." It states clearly that Ganesham is adopted this day, obtains the rights from this day and will be named Dhanraj from this day.

The deed of agreement (Exhibit D-62) is, except for a single sentence, to the same effect. The executants give Ganesham in adoption this day. The boy ceases to have any ownership in the property henceforward. His name is Dhanraj from this day. The right of brotherhood has been given up from this day. In the middle of the document appears the sentence "Our mother gave him in adoption just in his childhood." This appears entirely at variance with the rest of the document and also with the registered document executed at the same time. We are asked to infer that this is an interpolation.

The learned Judge of first instance states that from a close inspection of the document he can see nothing to make him suspect that

the clause has been interpolated. We have closely inspected the document and do see reason to suspect that this is the case. The sentence runs: "*Amche aini lahanpanich dattak dile.*" The last word "*dile*" commences a new line. Two lines lower down a fresh sentence is commenced a short distance to the right of the place corresponding to the commencement of other lines. It is, therefore, quite possible that there might have been a blank in the place now occupied by "*dile,*" The line above "*dile*" does not appear to have been drawn together with the line above the succeeding words in a single stroke. No doubt there are other instances in the document where the line above the letters has not been drawn from left to right in a single stroke, but it is a curious coincidence that the line above "*dile*" shows the appearance which it would do if "*dile*" had been subsequently interpolated. Similarly the line above does not appear to have been drawn in a single stroke. The junction is not exactly above the word "*amche*", but it must be noticed that in at least one instance three lines further down the original line does not extend to the end of the writing. The appellant's Counsel urges that part of the suspected sentence appears cramped as if the scribe was trying to fit it into the upper line. The letters do appear somewhat closer than in the average line, but we do not lay much stress upon this. It is also urged that there is a difference in the fineness of the pen: we are not prepared to say that any difference is apparent.

For the respondent it is urged that neither in Exhibit D-62 nor in D-63 is there any case of a half line with half left vacant on the right. This is the case. But in the two documents there is now only one instance where a space has been left to the left of the line. The sentence above this existing space translated "May this family thrive" could be omitted without detriment to the sense of the document and might also be an interpolation. Whether this is or is not the case, no strong inference can be drawn from the fact that in the two documents no other half line is visible.

The really strong arguments for doubting the authenticity of the sentence are:—(*a*) that the sentence is contradictory to the sense of the remainder of the document and (*b*) the difficulty of holding that the documents could have been drafted in the way they are drafted if it was present to the minds of the parties that there had been a previous giving in adoption. Unquestionably all the parties desired that the adoption should be valid, and it would surely have struck them, when they remembered the previous giving and taking, that there might be a doubt whether the subsequent giving and taking the only adoption mentioned in the deed, Exhibit D-62, was valid. These arguments are strengthened by the fact that we consider from a careful study of the document that the sentence may well be interpolated. The learned Additional District Judge alludes to the fact that the plaintiff had the document examined by an expert, but after this examination the expert was not called as a witness. This is not an ordinary case of disputed handwriting. Whether the sentence is interpolated or not, it seems to have been written by the writer of the document (D. W. No. 4). It is very likely that an expert could give no useful evidence in a case of this sort, unless he was allowed to dissolve the ink on the document in water and make a chemical examination. So far as we know even such permission might not have been likely to lead to a useful result. The defendant knew of the examination by the expert. If the expert had formed an opinion unfavourable to the plaintiff, the defendant ought to have examined the expert. No inference can be drawn from the failure of the plaintiff to put the expert in the witness-box, as the reason for this may well have been that the expert was unable to give an opinion useful to either party.

For the respondent it is contended that where a document is proved, the onus lies heavily on the party attempting to show that any part is an interpolation. There is no doubt that the person alleging fraud has to prove it, but fraud from its nature cannot ordinarily be proved by direct evidence. It is obvious that when a party has shown it probable that there is a subsequent addition to a document, he cannot be held bound by the addition merely because it is proved or admitted that the rest of the document is genuine. We consider that the arguments mentioned in the preceding paragraph are sufficient to discharge the onus or proof resulting from the presumption against fraud. The oral evidence regarding the existence of this clause is clearly value-

less. We must hold that the clause is an interpolation.

The next piece of evidence we have to consider is the post card (Exhibit D-21 D. W. No. 1). This post card is addressed to Joharmal Ramdhan of Chandur Bazar. This was the usual address of Ramdhan's shop. The card commences "To Joharmal Dhanraj of Chandur Bazar" and is dated 10th April 1907. The defendant urges that the card was intended for Dhanraj son of Joharmal. The substance of the post card is, however, not such as would be written to a boy of 12 years old The writer urges the recipient to leave Chandur and stay in a village if an epidemic is raging at Chandur. Surely the boy would not have been requested to go away, but the guardians would have been asked to take him away. Another sentence is "Please be writing to us for any work that we can do." This sentence should be addressed to a person who has charge of some work, and not to a small boy. The next sentence is "You are a great man and know everything." Surely this could not be written to a small brother of 12, even if that brother had been adopted by a rich man. The card was put in at a late stage. The plaintiff had little opportunity of rebutting an inference to be drawn from the card, and in any case could not be expected to explain the exact circumstance in which a card had been written ten years previously. The defendant has not put in the communication to which the card is a reply. There are great difficulties in considering that this card was addressed to the boy, and though no other explanation has been given, it appears to us that other equally probable explanations may exist. We add that the post marks are not free from suspicion.

The next piece of evidence is contained in the deposition of Laxman Govind (D. W. No. 23) supported by an account book. The entry is: "Received from Joharmal Ramnath Marwari of Chandur Rs. 400 by the hand of Dhanraj," The date is 1903. The witness cannot state whether the Rs. 400 was paid in his presence in 1906. Dhanraj the defendant was about 11 years old. It does not seem likely that he would be sent with Rs. 400. There may well have been another Dhanraj. Ramdhan on whose account the sum was credited is dead. So no inference can be drawn from the plaintiff's failure to explain 10 years later who this Dhanraj was. We consider this piece of evidence of no value.

The respondent's Counsel urges that it is very unlikely that the parties would go through the ceremony of an adoption which was so obviously illegal: but it seems more unlikely that knowing the law they would adopt legally and allow the adoption to be represented as illegal in the deed. A probable explanation of the illegal adoption is that there was reason to believe that no one would contest the adoption. It is to be noted that the present plaintiff claims only the property in Ramdhan's possession and it is probable that she really believed that the brothers were separate,

The plaintiff has given some evidence to rebut the allegation that the defendant Dhanraj was adopted in 1903. Tukaram (P. W. No. 8) was assistant master at the school at Thugaon from 1900 to 1911. He proves the register for 1898 to 1906. Dhannu son of Sheokaran entered the school on 2nd August 1902: *vide* Exhibit P-1. It is not contested before us that the defendant Dhanraj was known as Dhannu as well as Ganesham in his boyhood. Chaturabai (D. W. No. 13) says he was called Dhannu in the family of his birth. The witness proves that this entry refers to the defendant. Exhibit P-1 shows that Dhannu left school on 1st January 1903, but this is obviously a slip. The document shows that he entered in 1902 and studied for 4 years and 5 months. The document is thus inconsistent in itself. Exhibit P-2 shows that Dhannu was studying at Thugaon in 1906 and left in January 1907. Exhibits P-3 to P-5 show that Dhannu was examined after studying one year 5 months and 10 days, two years 2 months and 10 days, and 3 years six months. It is clear then that Dhannu attended Thugaon School from 1902 till 1906. Kaluram, defendant's natural brother, finally admits that his brother might have attended the school at Thugaon at times. Dhanraj himself as D. W. No. 2 says in examination-in-chief that he lived at Chandur after his mother's death in Sambat 1960. In cross-examination he says: "I cannot say even approximately when I left Thugaon School last. I do not remember whether I had left in 1908 when the adoption took place."

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The evidence of the school master is important, as it contradicts the case of the defendant set up both in the pleadings and at the time of evidence. No reason is given why the boy should stay at Thugaon after his natural mother's death if he had been adopted in 1903. We lay little stress on the fact that the register shows the name of his natural father, as the entry made in 1902 might be repeated in subsequent years. The learned Judge of first instance says that attendance at Thugaon School would not invalidate the adoption, but the argument is that such attendance was unlikely if the adoption had taken place.

The plaintiff has produced evidence to the effect that other persons, especially Mahadeo of Tumser, desired to adopt Dhanraj shortly before 1908. This evidence does not appear to us convincing. It seems unlikely that Mahadeo and other persons should propose to adopt an orphan : Mahadeo himself has not been called as a witness. But the rejection of this evidence does not affect our decision.

We hold then that the story of an adoption in 1903 has not been proved and we reject the whole of the evidence regarding that adoption.

It is necessary to consider the allegation that defendant's mother on her death-bed gave authority to her eldest son to adopt on her behalf. Dr. Gour on behalf of the respondent cites 2 cases:—*Vijiarangam* v. *Lakshuman* (2) and *Jamnabai* v. *Kaychand Nahalchand* (3); but these cases merely lay down that a parent prevented from attending the ceremony may delegate to a relative the duty of making the formal presentation to the adoptive mother. The present case is quite different. The proposition that an orphan cannot be adopted has never been controverted. In Mayne's Work on Hindu Law and Usage, 8th Edition, paragraph 132, it is stated : "Nor can the parents delegate their authority to another person, for instance a son, so as to enable him, after their death, to give away his brother in adoption, for the act when done must have parental sanction." We hold, therefore, that the authority so given by the mother would not render this adoption legal. We add that the story of sanction is not supported by reliable evidence.

The next point for consideration is whether the plaintiff is estopped from questioning the legality of the adoption. The learned Judge's finding seems to be based on the finding that the adoption was valid, but if the adoption was valid, the question of estoppel does not arise. The respondent's Counsel relies on *Dharam Kunwar* v. *Balwant Singh* (4). It is only necessary to cite one sentence from this judgment in order to distinguish the present case :—"Under these circumstances the Rani's argument that the doctrine of estoppel does not apply because the defendant could show no loss or detriment, is without any substance whatever and she must be held to her word and to the results of her conduct." In the present case the defendant's reply, dated 4th January 1915, does not allege any detriment to the defendant. We can find no evidence to this effect. It is not shown that the joint family to which the defendant belonged possessed any property. On the other hand the plaintiff does not seek to disturb the defendant's possession of the property which was in the hands of his adoptive father at the time of Joharmal's death. Again when this suit was instituted less than seven years had elapsed after 1908. It was then open to the defendant who had recently emerged from minority to regain his rights to the property of his natural family. The case cited then has no application.

Again in the present case there was no misrepresentation of fact. We may refer to the case of *Gopee Lall* v. *Musammat Sree Chundraolee Buhoojee* (5). In that case the defendants appeared to have recognised Luchmunjee as the adopted son of Damodurjee for a long period. It was argued that they had represented in former suits and in various ways by letters and by their actions that Luchmunjee was the adopted son of Damodurjee, but it appeared to their Lordships that there was no estoppel

(2) 8 B. H. C. R. (O. C. J.) 241.
(3) 7 B. 225; 7 Ind. Jur. 429; 4 Ind. Dec. (N. S.) 153.

(4) 15 Ind. Cas. 673; 34 A. 393; 16 C. W. N. 675; 9 A. L. J. 730; 14 Bom. L. R. 485; (1912) M. W. N 641; 12 M. L. T. 95; 16 C. L. J. 160; 23 M. L. J. 200; 39 I. A. 142 (P. C.).
(5) 10 W. R. 12.

in the case. Their Lordships say: "There has been no misrepresentation on the part of Luchmunjee or the defendant on any matter of fact." and later: "It comes to no more than this that they have arrived at a conclusion that the adoption which is admitted in fact was valid in law, a conclusion which in their Lordships' judgment is erroneous; but that creates no estoppel whatever between the parties." The same opinion was reached by a Bench of this Court in the case of *Govind* v. *Musammat Chandrabhaga* (6). In that case the facts were similar in many respects to the present case. The head-note* runs:— "The belief induced in the person who sets up an estoppel under section 115 of the Evidence Act must be one in a fact, not in a proposition of law. Hence a Hindu widow's conduct in adopting an orphan and subsequently supporting the adoption, even if regarded as equivalent to a representation that an orphan can be validly adopted, does not give rise to an estoppel."

Ramdhan did not cause the defendant to believe a thing to be true. He also shared in a mistake as to law. The defendant did not act in consequence of his erroneous view of the law. Either of these reasons would be sufficient to prevent Ramdhan or his heir being estopped from questioning the adoption. We, therefore, hold that the plaintiff is not so estopped.

An argument was put forward with some hesitation that even if Ramdhan and his heir could successfully challenge the adoption, yet Ramdhan's conduct would prevent his heir claiming any of the joint property of which he had led the defendant to expect receipt. It is sufficient to repeat that Ramdhan made no representation on a matter of fact, and did not cause the defendant to act to his own prejudice.

The respondent's Counsel urges that a suit for possession on the ground that the apparent adoption on 15th May 1908 was invalid is governed by Article 118, Schedule I of the Limitation Act, IX of 1908. He relies on *Shrinivas* v. *Balwant* (1), which follows the Bombay Full Bench ruling *Shrinivas* v. *Hanmant* (7). In the latter Bombay case an attempt is made to distinguish two Privy Council cases, *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8) and *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (9). The Madras High Court in *Velaga Mangamma* v. *Bandlamudi Veerayya* (10) considered that the former Privy Council case settled the question. It is necessary to consider in detail the Privy Council rulings and to decide whether the reasoning in *Shrinivas* v. *Balwant* (1) can be accepted.

In the case of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8) the alleged adoption was made in 1858. The suit was brought in 1899. It was contended for the appellant that the principle laid down in *Jagadamba Chaudhrani* v. *Dakhina Mohun Roy* (11), that where a suit to set aside an adoption was barred so also was any suit which in order to succeed must first get rid of the adtion, applies equally to Act XV of 1877, Schedule II, Article 118. *Jagadamba's case* (11) interpreted Article 129 of Act IX of 1871. The appellant's contention to this effect is recited on page 160 of the report. On page 163 their Lordships remarked that Mr. Cohen argued the case with great ability and admitted that if the Act of 1877 applied, his client was out of Court. It is clear then that Mr. Cohen abandoned this contention.

The subsequent argument before their Lordships was that the Limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877 and his rights were, therefore, saved by section 2 of that Act. It is important to notice that the Thakurain Daryao Kunwar, who made the apparent adoption in the appellant's favour in 1858 was Talukdar in her

(6) 34 Ind. Cas. 675; 12 N. L. R. 100.

(7) 24 B. 260; 1 Bom. L. R. 799; 12 Ind. Dec. (N. S.) 709.

(8) 33 I. A. 156; 4 C. L. J. 405; 10 C. W. N. 1065; 16 M. L. J. 440; 28 A. 727; 8 Bom. L. R. 722; 3 A. L. J. 695; 1 M. L. T. 265; 9 O. C. 377 (P. C.).

(9) 13 Ind. Cas. 344; 39 I. A. 19; 9 A. L. J. 137; 15 C. L. J. 172; 12 P. L. R. 1912; 22 M. L. J. 240; 14 Bom. L. R. 182; 16 C. W. N. 458; 39 C. 418, 126 P. R. 1912; 6 P. W. R. 1912; (1912) M. W. N. 77; 11 M. L. T. 76 (P. C.).

(10) 30 M. 308; 17 M. L. J. 182; 2 M. L. T. 178.

(11) 13 I. A. 84; 13 C. 308; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715; 6 Ind. Dec. (N. S.) 705.

*Head-note of 12 N. L. R. 100.—*Ed.*

own right. Between 1858 and 1871 then the appellant was an heir and not a reversioner. Their Lordships state:—"Giving full effect to the *Jugadamba's case* (11) and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of section 2 of the Act of 1877. Their Lordships think that the appeal may be disposed of on this short ground, whether the alleged adoption was or was not an apparent adoption to which the ruling in the *Jagadamba's case* (11) would apply if the Act of 1871 were now in force."

In the subsequent case, *Muhammad Umar Khan* v. *Muhammad Niaz-ul-din Khan* (9), the date of the alleged adoption is not stated. It is clear that it was between 1853 and 1887. Their Lordships remarked in this case:—"Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8). Under the general Muhammadan Law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance."

With all deference to the opinion of the learned Judges who decided the case of *Shrinivas* v. *Balwant* (1) we do not think the latter quotation can bear the meaning suggested by them.

Their Lordships' statement that it is advisable to give their opinion on a point immaterial to the case naturally precedes the determination of a disputed question: in view of this statement it was unnecessary for their Lordships to mention that a different view had been taken by the Bombay High Court. It is difficult to believe that their Lordships' reference to "a suit like this for possession of property" could refer only to a suit in which the adoption alleged was not an ordinary adoption but what Scott, C. J., terms an adoption in the popular sense [*Shrinivas* v. *Balwant* (1)]. The reference to *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rimeshar Bikhsh Singh* (8) appears to leave absolutely no doubt on this point: for whatever were the facts in that case, the *ratio decidendi* applies to adoptions by Hindu widows, such as were considered in the *Jagadamba case* (11).

We remark that in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8) there was not a formal decision regarding the effect of the substitution of Article 118 of Act XV of 1877 for Article 129 of Act IX of 1871. It seems clear from the quotation from the judgment under appeal (pages 157-159) and of Mr. Cohen's argument (page 160) that it was throughout admitted that the plaintiff and his ancestors had known of the adoption more than six years before the institution of the suit, but the original contention was that Article 118 applied to suits for possession. Mr. Cohen, who is complimented on the conduct of the case, abandoned this argument. In the subsequent case, then their Lordships formally declared their opinion that the point of law abandoned by Mr. Cohen was not sustainable.

The Bombay Judges appear to think that their Lordships would have discussed the application of Article 118 to suits for possession had they meant to decide the point: but it is clear that their Lordships did intend to decide a disputed point in connection with Article 118, and their judgment contains no discussion and refers to a case where the meaning of Article 118 was not discussed.

We must with respect entirely dissent from the opinion of Scott, C. J., and Chandavarkar, J., that Mr. Cohen admitted that under the Act of 1877 a suit was still within time: this opinion is controverted by the precis of Mr. Cohen's original argument, and if it were correct, the reference to *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8) in the subsequent case, decided by a Bench including Lord Macnaughten who decided *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (8), would be pointless.

The last sentence of the quotation from *Muhammad Umar Khan* v. *Muhammad Niaz-ul-*

din Khan (9) then cannot mean that Article 118 does not apply, because the adoption alleged is a peculiar kind of adoption. We can see no reason for such an interpretation. Their Lordships, having held that Article 118 does not bar the claim challenging the adoption, might briefly mention that this challenge must succeed: the adoption, made by a Muhammadan, carried no right. In the next paragraph they give another reason for holding that the challenge must succeed.

Another reason for the insertion of the last sentence is impossible. Their Lordships had expressed their approval of the interpretation of Article 118 in *Thakur Tirbhuan Buhadur Singh* v. *Raja Rameshar Bakhsh Singh* (8). But in the case they were deciding the adoption may have been soon after 1853, and if title were acquired by adoption, section 2 of the Act of 1877 would render all interpretation of Article 118 unnecessary. The last sentence, mentioning that no right of inheritance could accrue, shows that section 2 has no application.

For these reasons we hold that the Privy Council has finally decided the question. A suit for possession of property, where the plaintiff questions the validity of the adoption, was not governed by Article 118 of Act XV of 1877. Article 118 of Act IX of 1908 is identical with that article. The present suit is within time.

Our decision follows a decision of this Court in *Dorao* v. *Musammat Sakhu Bai* (12). It is in consonance with the decisions of three High Courts. We cite *Jogannath Prasad Gupta* v. *Runjit Singh* (13), *Nathu Singh* v. *Gulab Singh* (14), *Chandania* v. *Salig Ram* (15) and *Velaga Mangamma* v. *Banalamudi Veeroyya* (10). We have in the course of this judgment carefully considered the reasons given by the Bombay High Court for distinguishing the Privy Council decisions and must respectfuly dissent from them.

The respondent's learned Counsel next refers to the doctrine of *factum valet*. This doctrine only applies to adoptions where matters which do not affect the essence of the adoption have been disregarded. It cannot be applied so as to validate the adoption of an orphan. We may refer to *Gonga Sahai* v. *Lekhraj Singh* (16) and the cases cited therein; *Rangubai* v. *Bhagirthibai* (17) and *Sri Balusu Gurulingasvami* v. *Sri Balusu Ramalakshmamma* (18).

The question whether Ramdhan and Joharmal were joint or separate has been argued at great length. We may state that there is considerable evidence that the brothers were separate, while, on the other hand, there are many facts which it is difficult to explain on the supposition that they were separate. We do not propose to decide this question.

Similarly we find it unnecessary to decide whether the property in suit or any part of it was the self-acquired property of Ramdhan, nor to decide whether part of the property belonged to Ramdhan or to the mother of the appellant.

Again it need not be decided whether the defendant was entitled to succeed to the property of a divided uncle in preference to the daughter of that uncle. We remark, however, that the evidence of such customary succession is entirely unconvincing.

We hold that whether Ramdhan or Joharmal were joint or separate during their lifetime Ramdhan, had good title to the property in suit after the death of Joharmal. On Ramdhan's death the plaintiff became entitled to the property in suit. The suit is within time, and the plaintiff is not estopped from challenging the adoption of the defendant. The alleged adoption of 1908 was invalid and the defendant has failed to prove that there was a previous adoption. The suit must, therefore, succeed. A decree will pass in favour of the plaintiff with respect to the property claimed by her. We note that certain ornaments in Schedule A are subject to a pledge. The defendant must bear the costs in both Courts.

Appeal accepted.

(12) 11 C. P. L. R. 49.
(13) 25 C. 364; 13 Ind. Dec. (N. S.) 237.
(14) 17 A. 167; A. W. N. (1895) 26; 8 Ind. Dec. (N. S.) 423.
(15) 26 A. 40; A. W. N. (1903) 163.
(16) 9 A. 253; 5 Ind. Dec. (N. S.) 604.
(17) 2 B. 377; 1 Ind. Dec. (N. S.) 674.
(18) 26 I. A. 113 at p. 144; 22 M. 398; 8 Ind Dec. (N. S.) 286; 3 C. W. N. 427; 9 M. L. J 67; 21 A. 460; 9 Ind. Dec. (N. S.) 1001; 1 Bom. L. R. 226; 7 Sar. P. C. J. 330.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 32 OF 1919.

January 20, 1920.

Present:—Mr. Lindsay, J. C.

RAM SUCHIT—PLAINTIFF—APPELLANT

versus

SHEO SEWAK SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Shankalapnama *with power of transfer—Grant in perpetuity—Transaction, whether amounts to sale—Pre-emption, right of, whether arises.*

A document, described as a *shankalapnama* with powers of transfer, recited that the grantors had received from the grantees a certain sum of money as *zar-i-peshgi yani baithki*, and that in consideration of this payment they had openly put the grantees in possession of a certain piece of land, and declared that the grantees would remain in possession for ever subject to an annual payment on account of Government revenue. The proprietors and under-proprietors in the village brought this suit for pre-emption, contending that the document amounted to an out-and-out sale of an under-proprietary right. The defendants pleaded that the document was merely a lease and did not give rise to a right of pre-emption in favour of the plaintiffs, and the lower Courts, accepting this view, dismissed the claim. On appeal by the plaintiffs:

Held, that the document amounted to an out-and-out sale, because the stipulation therein making the grantees liable for the payment of the Government revenue necessarily imported the grant of an under-proprietary right and that consequently, a right of pre-emption did arise in favour of the plaintiffs. [p. 630, col. 2]

Second appeal against the decree of the Subordinate Judge, Sultanpur, dated the 3rd December 1918, confirming the decree of the Additional Munsif, Sultanpur, dated the 10th August 1918.

Mr. *M. Wasim*, for the Appellant.

Mr. *Niamat Ullah*, for Respondents Nos. 3 to 7.

JUDGMENT.—This is a second appeal in a pre emption suit. The plaintiff came into Court alleging a right of pre emption in respect of a certain transaction which took place on the 15th of December 19.6. On that date the first and second defendants to the suit, who are Thakurs and superior proprietors in a village called Daora, executed a deed in favour of the defendant No. 3 who is a Brahman. The deed is described as *shankalapnama* and professes to transfer an interest in a small area of land 2 *bighas* and 16 *biswas* in extent.

The plaintiff is an under-proprietor in the village and his case was that the document, which was executed in the above circumstances, amounted to an out-and-out sale of an under-proprietary interest.

The executants of the deed did not contest the suit. The defence in the case was raised by the defendant No. 3, the transferee. His plea was that the document did not amount to a sale but was merely a lease and that no right of pre-emption, therefore, had accrued in favour of the plaintiff. He further pleaded that in any event he had an equal right of pre-emption with the plaintiff.

In the Court of first instance the Munsif decided at an early stage of the case that the plaintiff and the third defendant were both under-proprietors in the village and had equal rights of pre-emption. In accordance with the provisions of section 9 of the Oudh Laws Act he directed lots to be drawn and the lot fell to the plaintiff. He then went on to consider whether or not in the circumstances above stated any right of pre-emption had arisen, and on the authority of certain rulings to which he refers, he came to the conclusion that there had not. He appears to have been influenced by some previous judgment given in appeal by the Subordinate Judge, and to have reached the conclusion that the document in suit was evidence not of a sale but of a lease only. The suit was, therefore dismissed.

In appeal the Subordinate Judge has affirmed the order of dismissal. He examined the language of the deed in question, and was of opinion that it amounted to a lease and not to a sale. He was guided to this decision by a judgment of this Court to which he refers, namely, *Data Ram Tewari* v. *Deobali Tewari* (1). The learned Subordinate Judge was of opinion that the present case was on all fours with the case just mentioned.

After hearing the arguments in the case I took time to consider my decision in order that I might examine the documents which were considered in the reported case to which reference has just

(1) 25 Ind. Cas. 855; 17 O. C. 293; 11 O. L. J. 463.

been made. Having examined the documents in that case and comparing them with the documents in this case, I am satisfied that the decision of the lower Appellate Court is erroneous. It is altogether incorrect to say that the facts in the present case are identical with those of the case which was dealt with in *Data Ram Tewari* v. *Deokali Tewari* (1).

In the latter case the documents were described as "*pat birt shankalap.*" On the face of them, therefore, they purported to be leases. It was recited in those documents that a *nazrana* or premium had been taken. It was provided by the deeds that the grantees or *birtdars* were to remain in possession of the granted lands for ever on payment of the assessed rent (*lagan mushakhkhasa*) at the rate of Rs. 4 per annum. They were to have powers of transfer of all kinds and were also to have power to make attachments, eject tenants and enhance rents. It is clear on the language of these documents that what was granted was only a lease of certain lands given in perpetuity. There was a distinct covenant that the grantees were to pay an annual rent of Rs. 4 a year, and that fact in itself is sufficient to show that the intention was to grant a lease and not to make an out and out transfer of an under-proprietary right.

In the case now before me the facts seem to me to be entirely different. The document began with a recital by the grantors that they had taken from the grantees a sum of Rs. 84 which is described as *zar-i-peshgi yani baithki*. I have not been referred to any case in which this peculiar word "*baithki*" has been used and I am, therefore, uncertain as to what it really implies; but most probably it means "occupation" or "tenure".

The deed goes on to say that in consideration of the payment of the sum above mentioned the grantors had openly put the grantees in possession of 2 *bighas* and 16 *biswas*. It is then declared that the grantees are to remain in possession for ever subject to an annual payment of Rs. 3, which is described in the deed as being on account of "*malguzari sarkari*;" in other words Government revenue. The grantors expressly say that they have reserved no rights whatever in connection with the land granted except the right to receive this sum of Rs. 3 per annum as the Government revenue appertaining to the area granted. The document closes with a statement that the deed has been written as a *shankalapnama* with powers of transfer. I must construe this document as an out-and-out sale of an under-proprietary right. The use of the word "*zar-i-peshgi*" does not, in my opinion, show that the intention was to grant a lease only. Any such argument founded upon the use of the word *peshgi* is negatived by what follows in the deed, namely, the declaration by which the grantees are made liable to pay the Government revenue of Rs. 3 a year. A stipulation of this kind seems to me necessarily to import the grant of an under-proprietary right. The sum agreed upon, namely, Rs. 3 a year is not payable as rent to the grantors, but as the share of the Government revenue due from the lands granted—revenue which the grantors are under a liability to pay to the Government. This document, in my opinion, is evidence of the grant of what is called a "*bai birt.*" The Subordinate Judge has recorded his opinion that there is an agreement to pay rent. I have already expressed my opinion on this point. He seems to have found in the document an agreement for rent by arguing that the proportionate share of the Government revenue payable in respect of 2 *bighas* 16 *biswas* granted to the third defendant worked out in fact at less than Rs 3 per year and so he says the balance necessary to make up this sum of Rs. 3 must be taken as rent. I am unable to follow this reasoning. It seems to me quite clear that the parties agreed by a rough calculation that Rs. 3 a year represented the Government revenue payable in respect of the area which was being transferred, and there is no reason to suppose that because this sum does not represent with mathematical accuracy the real proportion which would be due if the revenue were distributed, there was some intention on the part of the grantors to treat the payment as rent and not revenue. In my opinion the rights of the case are with the plaintiff and he is entitled to succeed.

It was suggested that there should be a fresh drawing of lots as the first Court,

acted prematurely in ordering the parties to draw lots before deciding that the right of pre-emption had arisen. I do not think there is any need for the drawing of fresh lots. The Munsif clearly intended that if a right of pre-emption was found to exist, the plaintiff was entitled to have it as he had been successful in drawing the lot.

I allow the appeal, set aside the order of the Court below and direct that the plaintiff's claim be decreed with costs in all three Courts against the defendant-respondent No. 3.

Appeal allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 167 OF 1917.

April 15, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

Musammat RAM KAUR—PLAINTIFF—APPELLANT

versus

RAGHBIR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Principal and agent—Agent, collusive act of, detrimental to principal—Principal, whether bound.

Where an agent acting in collusion with a third party does an act without the consent of his principal and the act is detrimental to the interests of the principal, the latter is not bound by the act. [p. 632, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Gurgaon, dated the 19th October 1916.

Pandit *Manmohan Nath*, for the Appellant.

Mr. *Cooper*, for the Respondents.

JUDGMENT.—On the 20th January 1916 Raghbir Singh, purporting to act as the agent of the plaintiff, *Musammat* Ram Kaur, executed a lease of her land in favour of Bihari Lal for a period of five years, the rent reserved being Rs. 150 payable to the proprietor and Rs. 382-14-6 payable to Government as land revenue. The lady, when she came to know of the lease, at once protested against the misdeed of Raghbir Singh, and repudiated his authority. In July 1916 she brought the action, which has led to the present appeal, for a declaration that the lease was not binding upon her. The Subordinate Judge has dismissed the suit, and she accordingly comes up to this Court on appeal.

Now, there can be no doubt that on the 10th July 1911 *Musammat* Ram Kaur executed a general power-of-attorney in favour of Raghbir Singh, which contains the usual clauses conferring plenary authority upon the agent to conduct litigation on her behalf, and also authorises him to execute a lease or to get a *kabuliat* executed. Now, Raghbir Singh, as a witness for the plaintiff, has admitted that during the period of four years and a half, which intervened between the date of the power-of-attorney and the date of the lease in question, he never gave the land on lease; and it is by no means clear that he acted on her behalf in any other transaction except for a short period immediately after the execution of the power-of-attorney The fact, however, remains that the authority was not revoked until a week after the date of the lease, and that the agent taking advantage of the power-of-attorney granted the lease in question, the terms of which are wholly disadvantageous to her. It is to be observed that neither Raghbir Singh nor Bihari Lal deposes that *Musammat* Ram Kaur gave her consent to the terms of the transaction.

It is significant that Raghbir Singh had, some months before January 1916, left the village, and gone over to Ferozepore where he obtained an employment; and that in January 1916 he returned to the village and granted the lease in question without obtaining the consent of the woman. He says that he came back in response to a letter sent to him by her, but he is unable to produce that document and puts forward the excuse that he has lost it. This excuse is palpably false, and we have no doubt that he came to the village in order to lease the property to his friend Bihari Lal, with whom he appears to be in collusion.

The documents upon the record show that the rent in cash and kind for the land in dispute amounted to Rs. 713-4-0 in 1908-09, Rs. 816 9-0 in 1909-10, and Rs. 709 in 1910-11. The average for the three years comes to Rs. 746-4-0 per annum and it is a matter of common knowledge that during the last few years the prices of the produce and consequently of the landed property have gone up considerably. In these circumstances

one would expect that the rent in 1916 would exceed the aforesaid average, but on the contrary we find that the rent reserved by the document executed by Raghbir Singh amounted to Rs. 532 14 6 only. There can, therefore, be no doubt that the transaction is detrimental to *Musammat* Ram Kaur, and no reason has been shown why the lease was given for a period of five years.

We have considered the evidence on the record and reached the conclusion that the transaction is wholy indefensible, and that the strange conduct on behalf of Raghbir Singh can be attributed only to his collusion with Bihari Lal. An act of this description done by the agent without the consent of the principal cannot be held to be binding upon the latter.

We accordingly accept the appeal and setting aside the judgment of the lower Court, decree the plaintiff's suit with costs throughout.

Appeal accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 52 OF 1919.

November 17, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Marten.

HURNANDRAI FULCHAND AND OTHERS —PLAINTIFFS—APPELLANTS

versus

PRAGDAS BUDHSEN AND OTHERS —DEFENDANTS—RESPONDENTS.

Contract, construction of—Condition, implied—Sale of goods to be supplied to vendor by third parties—Goods not supplied to vendor—Liability of vendor to purchaser.

Defendants undertook to supply a certain number of bales of Dhoties manufactured by the Bradbury Mills to the plaintiffs The agreement after setting out the details proceeded to say: "The goods under manufacture are sold. The same are to be taken delivery of as and when the same may be received from the mills Delivery is to be caused to be given in full by the 3 st of December in the year 918." The mills failed to supply the full number of bales to the defendants, who consequently could not supply them to the plaintiffs. The latter sued the defendants to recover damages for breach of contract:

Held, that the basis or foundation of the contract was the anticipation, common to both parties, that the mills would supply the goods to the vendors, and that the goods not having been supplied by the mills, the foundation of the contract disappeared, and neither party had any claim against the other for damages [p. 634, col. 2; p. 635, col. 2; p. 637, col. 2.]

Appeal from the decision of Macleod, C. J. in Original Suit No. 273 of 1919.

FACTS appear from the following judgment of

MACLEOD, C. J.—On the 26th November 1917 the plaintiffs entered into a contract with the defendants for the purchase of 864 bales of Dhoties of the Bradbury Mills of various numbers, lengths and widths. The plaintiffs signed the contract and a counterpart was kept by them. The contract signed by the plaintiffs states as follows:—

"(The goods) under manufacture are sold. The same are to be taken delivery of as and when the same may be received from the mill. (Delivery) is to be completed on or before the 31st December in the year 1918. If you delay taking delivery, interest, insurance charges and godown rent will be charged according to the Bazar practice."

The counterpart runs as follows:—

"Delivery by the 31st December in the year 1918. (Goods) to be manufactured are sold. The same are to be taken delivery of as and when the same may be received from the mills. If you delay taking delivery, interest, insurance (charges) and godown rent will be charged according to the Bazar practice."

There may be a little difference in the words but the terms of these two documents are in effect the same. It is urged by the plaintiffs that this is an absolute contract for the sale of 864 bales which had to be delivered by the defendants up to the 31st December 1918, whether as a matter of fact they were manufactured by the mills or not. On the other hand the defendants say that it is a conditional contract and if they can show that they contracted with the mills for the purchase of these bales and did everything in their power to get delivery of these bales and failed to get delivery owing to the default of the mills, then they are under no obligation to deliver to the plaintiffs any more of the bales than those of which they actually got delivery. The words are very similar

to those in another contract I had to construe in a recent case with reference to goods to arrive from Europe, and to me it is perfectly clear that this contract is conditional. It is open to the parties to contract absolutely and it is open to the defendants to bind themselves to deliver the goods whether they got them or not. But it is difficult to suppose that any prudent man contracting for delivery of goods to be manufactured at the date of the contract in the future by a third party would contract to sell those goods absolutely. In my opinion the words in this contract admit of only one possible construction. The goods are stated to be under manufacture and delivery is to be taken by the purchasers as and when they are received from the mills. It follows that if the seller does not get the goods from the mills he cannot possibly give delivery, and it would require very plain words in the contract to bind him to pay damages to his purchaser on account of non-delivery if he had done everything in his power to get the goods.

It was urged by Sir Chimanlal that the defendants might be able under the terms of their contract with the mills to get damages for the default of the mills in delivering the goods and that it would seem inequitable that the defendants might get damages from the mills and yet be exempt from performing their contract with the plaintiffs. That is a matter which is quite irrelevant to the issue I have to decide. I have only to decide what was the contract between the plaintiffs and the defendants. They could contract in any way they chose. The plaintiffs have nothing whatever to do with the terms in which the defendants have contracted with the mills. Supposing the defendants had bought unconditionally and themselves sold conditionally, they could not be likely to admit that they could not recover damages from their seller because they had not to pay damages themselves.

In my opinion, therefore, the defendants will succeed if they can show that they have done everything in their power to get the goods which they contracted to sell to the plaintiffs from the mills. Therefore, their contract with the mills which Sir Chimanlal objected to as irrelevant is in my opinion clearly relevant on the question I have to try.

It has now been proved that the defendants got delivery from the mills of 401 bales. They delivered to their other purchasers in full. If they had delivered the proper proportion to each purchaser as they got the bales from the mills, the plaintiffs would have got 23 bales more. Therefore, there was a breach of contract as regards 23 bales. I take the difference on the 31st of December to be annas 4 pies 6. That comes roughly to Rs. 2,875 for the 23 bales. Mr. Desai argued that the defendants had not proved that they had done everything they could to get the contract goods from the mills. But I cannot see that there was any default on the part of the defendants. Delivery under the contracts went on in a normal fashion until April 1918 when the mills employed over 300 looms on Government work. Whether the defendants could have sued the mills for breach of contract is a question which I do not think is relevant in this case. The defendants asked for delivery and were told that the looms were engaged on Government work and the weaving master has shown that the remaining looms could not be employed in weaving Dhoties of the contract description. The defendants, therefore, were not in default and they will only have to pay damages to the plaintiffs on 23 bales which I have already fixed at Rs. 2,875.

As to costs, I think the fairest order to make is that there will be no order as to costs. The costs payable by the plaintiffs would be found on an examination to correspond roughly with the costs payable by the defendants.

Messrs. *Jinnah* and *Desai*, for the Appellants.

Messrs. *Kanga* and *Campbell*, for the Respondents.

JUDGMENT.

HEATON, J.—In this case the plaintiffs sued to recover damages for the breach of a contract. The contract was an undertaking by the defendants to supply a certain number of bales of Dhoties manufactured by the Bradbury Mills on or before the 31st December of the year 1918. The defendants supplied a certain number but they did not supply the number con-

tracted for. The plaintiffs, therefore, sued for damages for failure of the defendants to supply the full number.

The trial Court gave them a certain amount of damages on the ground that the defendants had failed to supply a certain number of bales which they ought to have supplied; but it refused a part of the damages claimed on the ground that in the circumstances of the case the contract was not to be interpreted as an absolute undertaking to supply the whole number contracted for.

On this the plaintiffs have appealed and they claim the full amount of the damages which they claimed in their plaint. They say the contract was an absolute contract to sell them the goods described.

The defendants, who are respondents, maintain that it became or was a conditional contract.

The appeal turns really on that point. If the contract was conditional, as the defendants maintain, the decree of the trial Court is correct. If it was an absolute contract, as the appellants maintain, then they are entitled to the full amount of damages.

The contract is in writing. It sets out all the details, the number of bales and so forth; and then it proceeds to say:

"The goods under manufacture are sold. The same are to be taken delivery of as and when the same may be received from the mills. Delivery is to be caused to be given in full by the 31st of December in the year 1918."

The question really resolves itself into this: Was this a contract by which the defendants undertook to supply the goods whether they received them from the Mills or not, or was it a contract which both the parties to it understood was based on the assumption that the goods would be supplied by the mills, the foundation of the contract being that the goods if supplied by the mills were to be delivered by the defendants to the plaintiffs? The trial Court has taken the latter view. There is no doubt that the goods sold were goods to be manufactured or in process of being manufactured by the Bradbury Mills, a mill in Bombay. This is not the case of a vendor who undertakes absolutely to supply goods which he will obtain somehow or somewhere in the open market. It is a contract to supply goods of a particular kind which he has to obtain from a particular mill.

Now, one way of looking at the case is to ask oneself whether it was probable that a business man would absolutely contract to deliver these goods of a particular kind made by a particular mill, whether he could obtain them from the mill or not. Looked at from that point of view, I think the probabilities are that a sensible business man would not undertake to deliver goods of that kind, whether he was able to obtain them from the mill or not. That way of looking at the case inclines one to the view taken by the trial Judge.

Another way of looking at it is to take the words of the contract themselves and see how the subject-matter of the contract is described. The word used to describe the goods is the word '*bunto*', which may be translated in a variety of ways; but it is admitted that it means "goods that have not yet at any rate fully come into existence," "goods that remain to be manufactured or which are only partly manufactured." That is what is the subject-matter of this contract. The underlying idea, seeing that the goods are so described, is quite clearly to my mind this that the goods sold are goods which the vendor will receive from the Bradbury Mills. And I should describe the basis or foundation of the contract as the anticipation—an anticipation common to both the parties to the contract—that the mills would supply the goods to the vendor. So regarded, it follows that if the goods are not supplied to the vendor, the foundation of the contract disappears. Neither party, therefore, has any claim against the other for damages.

I may mention here that it was not argued in appeal that the plaintiffs had any claim against the defendants on account of negligence. Their claim in appeal was not based on an allegation that the defendants, had they been more active or more careful, could have obtained more goods from the mills than they did obtain. The finding of the lower Court was that the defendants were not in default in that particular. That is to say, they had obtained from the mills such goods as they could reasonably obtain and their failure to deliver the goods to the plaintiffs was due to the fact that the mills

had not supplied them to the vendors, the defendants; and that conclusion was not attacked by Counsel who appeared for the appellants in his opening address.

Now, having arrived at this conclusion, as a matter of fact it seems to me that on that set of facts the law is comparatively simple. We have been referred to a number of cases and they take us back to an early case, that of *Taylor* v. *Caldwell* (1). The judgment in that case deals as a matter of principle with the question of implied conditions and contingent as contrasted with absolute contracts. In the judgment there occur these words:

"In none of these cases (*i. e.*, certain cases which had been referred to) is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance, but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance."

That case dealt with a contract which could not be performed because a music hall had been destroyed by fire. The underlying idea, however, is that if the basis or foundation of the contract has disappeared, neither party can claim performance from the other. And this principle has been re-stated in very much those words in a number of later cases. I think I cannot do better than quote another sentence from the same case of *Taylor* v. *Caldwell* (1):—

"There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition."

I do not myself doubt for a moment that business men in Bombay, if they were called upon to express an opinion on this particular contract with which we are dealing, would say that the contract is based on the anticipation that the mills would deliver the goods to the vendors; and that, if the anticipation was disappointed, the vendors were not bound to give the goods to the purchasers.

I think, therefore, that the decision of the trial Court is correct and that the appeal should be dismissed with costs.

The cross objections have not been pressed, and they also should be dismissed with costs.

MARTEN, J.—The question in this appeal is whether the suit contract was an absolute contract of sale by the defendants, or whether it was contingent on the goods in question being manufactured and supplied by the mills. The more material words are: "Delivery by the 31st December 1918. Goods to be manufactured (*bunto*) are sold. The same are to be taken delivery of as and when the same may be received from the mills." Another translation of the word '*bunto*' is 'goods under manufacture.' The parties themselves have not expressly provided for the event which has happened, *viz*, non manufacture by the mills of the greater portion of the goods.

Now, dealing with the matter generally as to what one would expect from reasonable business men, the learned trial Judge says:

"But it is difficult to suppose that any prudent man contracting for the delivery of goods to be manufactured at the date of the contract in the future by a third party would contract to sell those goods absolutely."

And when one considers the nature of the contract which the defendants had with the mills, one finds that it was not an absolute but a determinable contract. Under clause 4 of their contract (Exhibit 1), the mills were entitled to cancel the contract or the remaining portion if the mills met with any accident or obstruction or if for any other reason the mills could not give in full the goods mentioned in the contract or any portion thereof, and in that event the defendants were not to get any compensation whatever. Then, there was another clause that in case of strike, stoppage of machinery, or such unforeseen circumstance (*sic*) the mills did not under-

(1) (1863) 3 B. & S. 826; 32 L. J. Q. B. 164; 8 L. T. 356; 11 W. R. 726; 122 E. R. 309; 129 R. R. 573.

take to give regular deliveries in terms of the contract.

Now, that being so, why should the defendants, who had not got an absolute contract themselves, contract to sell the goods absolutely? On the other hand, from the purchasers' point of view, and for the matter of that from the vendors' too, the third parties who were to manufacture the goods were well known mills in Bombay. Both parties might, therefore, reasonably consider that the mills would carry out their obligations honourably, and that if those obligations were not carried out it would be for some good and valid reason and not from any improper motive, and that accordingly a conditional contract would be fair to both the plaintiffs and defendants. Further, the mill contract (Exhibit 1) is mainly a printed form. There is not any direct evidence that the plaintiffs were familiar with it, but I think it a reasonable inference under section 114 of the Indian Evidence Act that large buyers like the plaintiffs of 864 bales would know the usual selling conditions of the mills, or at any rate know that the mills did not guarantee delivery in all events. The probabilities, therefore, seem to me that the parties to the suit contract would contract on the basis of its being conditional on the manufacture of the goods, and not on the basis that the vendor would warrant the manufacture by the mills. I think this particularly applies in time of war with its numerous uncertainties, and, as regards this, there may be noticed the very long time for delivery which was allowed in the suit contract.

But we must decide this case not on probabilities, but on the contract the parties have actually entered into, for it was open to them to contract as they pleased. Before I pass on, there are some words in the contract which perhaps I should notice here. Exhibit 3 and Exhibit B are different translations of the same contract, *viz.*, that handed by the defendants as vendors to the plaintiffs as purchasers. The words are "Delivery is to be caused to be given in full by the 31st of December" in Exhibit 2 and "delivery is to be completed on or before the 3 st December" in Exhibit B. Then in the counterpart, Exhibit A, signed by the plaintiffs the words are "Delivery by the 31st of December." Now, standing by themselves, there may be different shades of meaning between the words "delivery to be caused to be given in full by..." and "delivery is to be completed on or before..." and "delivery by...", but I think these words have to be read with the rest of the contract. That being so, their meaning is "delivery of goods which are to be manufactured or are under manufacture."

Now taking the words "goods to be manufactured," they indicate that the parties are dealing with something which is to be brought into existence in the future by a third party. That seems to me more consistent with the contract being conditional on that expectation being realised, rather than on one party warranting it shall be realised. Similarly, the expression "goods under manufacture" implies that the goods are not yet manufactured—at any rate wholly. So, too, the stipulation that the goods are to be taken delivery of "as and when the same may be received from the mills" would rather point to the contract being conditional on that receipt.

We have been referred to no authority either in the Contract Act or in any decided case which is precisely in point on the facts; but I think useful analogies may be drawn from other typical cases. One class of cases is referred to by the learned trial Judge, *viz.*, the "goods to arrive" cases, which were dealt with by this Court quite recently in *Tribhovandas* v. *Nagindas* (2). I will not repeat what is said there by my learned brother and myself, but the authorities there cited tend to show that speaking generally in the case of goods to arrive from a third party, there is no warranty implied by the vendor that the goods will arrive: see Halsbury's Laws of England, Volume XXV, page 144, *note* (q), and Benjamin on Sale, 5th Edition, page 585. Why, then, in the case of goods to be manufactured by a third party, should there be a warranty by the vendor that the goods will be manufactured?

Then, we were referred to *Taylor* v. *Caldwell* (1) which was frequently cited in the Coronation Procession cases. As regards that case

(2) 54 Ind. Cas. 230; 21 Bom. L. R. 1137.

Vaughan Williams, L. J., in *Krell* v. *Henry* (3) says at page 754:—

"It is not essential to the application of the principle of *Taylor* v. *Caldwell* (1) that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time."

In the present case I think anybody would say that the existence of the "manufactured goods" was essential to the performance of the suit contract.

Then in *Tamplin Steamship Company* v. *Anglo Mexican Petroleum Products Company* (4) Lord Loreburn dealt with the case of *Horlock* v. *Beal* (5) in which *Taylor* v. *Caldwell* (1) was cited with approval, and he says at page 403:—

"An examination of those decisions confirms me in the view that, when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

Lower down he says:—

"That seems to me another way of saying that from the nature of the contract it cannot be supposed the parties, as reasonable men, intended it to be binding on them under such altered conditions. Were the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said 'if that happens, of course, it is all over between us?' What, in fact, was the true meaning of the contract? Since the parties have not provided for the contingency, ought a Court to say it is obvious they would have treated the thing as at an end?"

If it is necessary so to do, I think one may fairly imply a condition here that the goods were to be manufactured and supplied by the mills: and that if that condition was not fulfilled, both parties were to be released *quoad* those unmanufactured goods.

It is argued for the plaintiffs that the only object of stating that the goods were to be manufactured was to distinguish them from ready goods, and to entitle the vendor to deliver the goods by instalments as received from the mills, which but for this stipulation he would not be entitled to do. This may have been one object, but in my opinion it was not the only object. This still leaves one with this, *viz.*, that both parties contemplated that the goods would be received from the mills—an event which in fact did not happen. There is, therefore, some resemblance between the present case and *Howell* v. *Coupland* (6), where both parties anticipated that a crop of potatoes would be grown on defendant's land, but in fact most of it perished from disease without default on the part of the defendant. Then the defendant was held excused by reason of his being prevented by causes for which he was not answerable (per James, L J. at page 262).

In the result, I am of opinion that on the true construction of the suit contract, and having regard to the surrounding circumstances, the vendor did not warrant the manufacture and supply by the mills of the goods in question, and that accordingly the decision of the Court below is correct.

I should add that there is no question here of the vendor being in default with the mills, or having put it out of his power to give delivery of the suit goods. It is unnecessary, therefore, to consider whether an obliga-

(3) (1903) 2 K. B. 740 at p. 754; 72 L. J. K. B. 794; 89 L. T. 328; 52 W. R. 246; 19 T. L. R. 711.

(4) (1916) 2 A. C. 397 at p. 403; 85 L. J. K. B. 1389; 115 L. T. 315; 21 Com. Cas. 299; 32 T. L. R. 677.

(5) (1916) 1 A. C. 486; 85 L. J. K. B. 602; 114 L. T. 193; 21 Com. Cas. 201; 60 S. J. 236; 32 T. L. R. 251.

(6) (1876) 1 Q. B. D. 258 at p. 262; 45 L. J. Q. B. 147; 33 L. T. 832; 24 W. R. 470.

tion on his part should be implid not at any rate wilfully to prevent fulfilment of the suit contract: see *Hamlyn* v. *Wood* (7). We are not dealing with the cas of a dishonest vendor who deliberately breaks his contract with the mills. If anybody is in default, it is the mills and not the vendor. But the fact appears to be that the mills could not give delivery, because a large proportion of their looms were engaged on Government contracts.

Accordingly, I agree that the appeal should be dismissed and that the cross-objections should be dismissed in both cases with costs.

Appeal dismissed.

(7) (1891) 2 Q. B. 488; 60 L. J. Q. B. 734; 65 L. T. 286; 40 W. R. 24.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2174 OF 1916.

April 29, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Broadway.

ANANT RAM—DEFENDANT—APPELLANT

versus

THE BHARAT NATIONAL BANK, LTD., DELHI—PLAINTIFF—RESPONDENT.

Practice and procedure—Pro-note, suit on—Defendant admitting execution but denying consideration—Burden of proof—Pleadings—Court, whether can set up new case.

Plaintiff Bank sued one *A.* for recovery of Rs. 27,000 on the basis of a pro-note for Rs. 25,000. Defendant, while admitting the execution of the pro-note, denied having received any consideration therefor and pleaded that the transaction was a bogus one and that he signed the pro-note on the assurance given him by one *B.*, the Chief Manager of the Bank, who himself stood in need of money, that he (defendant) could not be liable as *B* ,had a fixed deposit of Rs. 25,000 in the Bank which would cover the transaction. Counsel for the Bank flatly contradicted the suggestion made by the defendant's Pleader that the fixed deposit receipt was obtained by *B.* as consideration for the pro-note and stated that it was given by *B.* as security for a debt already due. The Court held that no cash was paid to *A.*, but decreed the claim on the ground that the consideration to *A.* was the fixed deposit receipt which was a good consideration. The defendant appealed:

Held, (1) that the suit being based on a pro-note the execution of which was admitted, the onus was on the defendant to prove that no consideration passed; [p. 639, col. 2.]

(2) that as no money was paid to *A* as consideration for the pro-note and as *B.* had paid no money into the Bank in consideration for the fixed deposit receipt the plaintiff's suit should have been dismissed and the Court was wrong in setting up a case for the plaintiff which not only he did not set up but which he through his Counsel definitely repudiated. [p. 641, col. 1.]

First appeal from the decree of the District Judge, Delhi, dated the 25th April 1916.

Messrs. *C. Bevan Petman* and *M. S. Bhagat*, for the Appellant.

Bakhshi *Tek Chand* and Babu *M. N. Mukerji*, for the Respondent.

JUDGMENT.—The Bharat National Bank, Limited, of Delhi instituted the suit out of which this appeal has arisen against one Anant Ram for the recovery of Rs. 27,000 on the basis of a pro-note for Rs. 25,000. It was set out in the plaint that Anant Ram had taken a loan of Rs. 25,000 from the Bank on the 24th July 1911 and had executed a pro-note for the same in favour of the Bank agreeing to pay interest at the rate of Rs. 6 per cent. per annum. It was further stated that the Bank had been paid Rs. 634-1-2 out of the interest through Barkat Ram and after remitting Rs. 47-6-6 a decree was asked for for Rs. 27,000. The Barkat Ram referred to in the plaint as having paid the item of interest on behalf of Anant Ram was the General Manager of the plaintiff Bank, and it is this Barkat Ram who signed and verified the plaint on behalf of the said Bank. The suit was filed on the 24th April 1913 and came up for hearing on the 13th May 1913. On that day Anant Ram failed to appear and proceedings were taken against him *ex parte*. Barkat Ram went into the witness box, swore to the pro-note having been executed by Anant Ram and stated that the sum of Rs. 25,000 was paid to Anant Ram in cash. He further stated that he had himself on the date in question sent a sum of Rs. 25,000 to the Bank through Anant Ram with a letter, asking that the said amount be deposited as a fixed deposit in his favour and that the advance to Anant Ram was to be secured on that deposit. On the basis of this statement an *ex parte* decree was

passed against Anant Ram for the amount claimed. This decree was, however, set aside on application by an order dated the 28th May 1913, and on the 4th June 1913 Anant Ram filed his written statement in which while admitting the execution of the pro-note he flatly denied ever having received any consideration therefor. He proceeded to state that the transaction had been a bogus one, that Barkat Ram, the Chief Manager of the Bank, himself stood in need of money and that the said Barkat Ram had deceived him by stating that he Anant Ram would not be held liable for the debt as Barkat Ram, being the Chief Manager, would arrange matters and that it was on this assurance that the pro note was signed. Further it was stated that Barkat Ram had said that he had a fixed deposit of Rs. 25,000 in the Bank which would cover this transaction. Anant Ram also denied ever having signed what is known as a "debit voucher." It was also pointed out that this fixed deposit had matured on the 24th May 1912 and the Bank should have credited the amount to this pro-note. This written statement was traversed by the plaintiff, presumably through Barkat Ram, and when Anant Ram's Pleader said that the fixed deposit receipt for Rs. 25,000 was obtained by Lala Barkat Ram as consideration for the pro note, the suggestion was flatly contradicted on behalf of the Bank by its Counsel Mr. Kirkpatrick, who stated that the fixed deposit receipt was given by Barkat Ram as security for the debt already due. The following issues were framed:—

1. Was any deceit practised on defendant when he signed the pro-note as a token of its having been duly executed?
2. Was the pro-note without consideration?
3. Is plaintiff entitled to recover the debt in suit from defendant without first trying to recover it from the fixed deposit receipt given by way of collateral security?

and in due course the parties proceeded to trial.

The learned District Judge held that no cash was paid to Anant Ram and that the supposed loan was secured by the supposed deposit for which a receipt was issued in Barkat Ram's favour. The claim was nevertheless decreed on the ground that the consideration to Anant Ram was the fixed deposit receipt which was a good consideration. Against this decree the defendant has preferred this appeal and we have heard Mr. Bevan-Petman on his behalf, while Mr. Tek Chand has addressed us on behalf of the Bank.

The main point for determination is whether the pro-note was without consideration (issue No. 2). The suit being based on a pro-note the execution of which was admitted, the onus was placed, and rightly placed, on the defendant, and on his behalf it is claimed that the onus has been fully discharged. To prove his allegations he has produced Hira Lal, the then auditor of the Bank, Chetan Sarup, a clerk in the Bank, S. C. Bose, who was the Chief Accountant of the Bank, Jawala Pershad, the Treasurer of the Bank, and Mul Raj, a clerk in the Bank, and he himself has gone into the witness box. All these witnesses have definitely stated that no money was paid to Anant Ram when the pro-note was written and further that no money was received from Barkat Ram when the fixed deposit receipt was issued to him. Hira Lal says that when cash is paid out of a Bank, a debit voucher is prepared which is signed by the person who receives the cash. In the course of his duties the debit voucher which was prepared in connection with this deposit was seen by him, and he swears that it had no signature on the back either of Anant Ram or anybody else. This voucher, an important piece of evidence, is missing and it is said that it has been stolen. This witness also said that the closing balance on Saturday, the 22nd July 1911, as given in the cash book was Rs. 17,000 odd. Therefore, unless Barkat Ram paid in the Rs. 25,000 for which a fixed deposit receipt was issued, it is obvious that the Bank could not have advanced Rs. 25,000 to Anant Ram on Monday the 24th July 1911. Further it appears that several pages of the cash book have been removed and new ones inserted. This witness also states that the original pages in the loan ledger have been removed and new ones substituted for them, and that in the original there was an entry in the handwriting of Barkat Ram to the effect "*in presence of the Directors.*"

It has been contended by Mr. Tek Chand that this witness is hostile to Barkat Ram and that he could scarcely be expected to remember the details he deposes to after a lapse of four years. It appears, however, that there were reasons for Hira Lal to have this matter impressed on his memory. He regarded this transaction as a suspicious one and challenged it. He was told by Barkat Ram that there was a fixed deposit which was the security for this loan and which would be credited against it on the due date, and a note to that effect was made. When the witness called for the fixed deposit receipt it was not forthcoming, although having been given as security it should have been in the possession of the Bank. Soon after this transaction Hira Lal found it necessary to sever his connection with the Bank, and on the 20th January 1912 submitted his resignation which he sent under cover of a private letter written by him to Sri Kishen Das who was the Chairman of the Bank. There is really no reason to think that Hira Lal had any grudge against Barkat Ram, and his statement is of importance as showing the extraordinary manner in which the affairs of the Bank were being conducted at that time.

The next witness Chetan Sarup states that no money was actually paid to Anant Ram and that no money was actually paid in by Barkat Ram, that vouchers were passed for cash, but the transaction was really a transfer. This witness was not cross examined, as Lala Barkat Ram for the Bank stated that there had been some misunderstanding about the time of taking up the case. The learned District Judge has made a note that the time fixed was 12 o'clock and everybody had been kept waiting for half an hour. He was not subsequently produced, but we see no reason to think that the blame for this attaches to any one other than the plaintiff. This witness is no longer in the employ of the Bank and it is said that he was dismissed. We are, however, unable to see any reason to doubt the veracity of his statement.

S. C. Bose, the next witness, was the Chief Accountant of the Bank on the 24th July 1911. His evidence is clearly to the effect that no money was received from Barkat Ram on that date and that no money was paid to Anant Ram. The deposit receipt, he states, was kept by Lala Barkat Ram although the lien was entered in the books of the Bank. Mr. Tek Chand argued that this witness had been dismissed for malpractices and referred to page 9 of the paper book, where are to be found certain resolutions of the Board at meetings held in connection with Mr. Bose. From these it appears that Mr. Bose had tendered his resignation. The first resolution is dated the 13th April 1912 and the last is dated the 7th April 1913, in which it was resolved that Mr. Bose be criminally prosecuted. There is nothing to show that this resolution was ever given effect to while, Thakar Das, a Director of the Bank, produced as a witness for the plaintiff, stated that Mr. Bose was found to have advanced large sums to Sen Ghosal and Co. without any authority. After a careful perusal of this witness's evidence we are unable to see any reason whatever for thinking that he is speaking falsely.

The next witness Jawala Pershad was a servant of Rai Bahadur Lala Sri Kishen Das and used to work in those days as the Treasurer of the Bank. His evidence is to the effect that the transfer of Rs. 25,000 was made but nothing was actually paid out. No money came or went and the transaction was a mere transfer. This witness's evidence was attacked on the ground that he was an old employee of Sri Kishen Das, who was the Chairman and promoter of this Bank. There is no evidence whatever on the record worth the name from which it can be deduced that there was any ill-feeling between the said Sri Kishen Das and Barkat Ram and the evidence of this witness is, in our opinion, worthy of considerable weight.

Next comes Rup Narain, who also says that no money actually passed either in payment to Anant Ram or as received from Barkat Ram. This witness was dismissed from the Bank for refusing to go to a branch office at Etawah in November 1911. The reason for his dismissal is not one that can be regarded as a ground for disbelieving him.

Next there is the evidence of Mul Raj, who also swears that no money passed.

He is no longer in the employ of the Bank, having resigned.

Finally there is Anant Ram himself, who has gone into the witness box and has definitely and clearly stated that he received no money when he signed the pro note because he was distinctly given to understand by Barkat Ram, the Chief Manager of the Bank, that he would see that he incurred no liability.

After a careful consideration of all this evidence we are satisfied that the view taken by the learned District Judge is correct and that no money was paid to Anant Ram as consideration for the pro note and further that Barkat Ram paid no money into the Bank in consideration for the fixed deposit receipt issued to him on the same day. On these findings it seems to us that the plaintiff's suit should have been dismissed and that the learned District Judge was wrong in setting up a case for the plaintiff which not only he did not set up but which he through his Counsel definitely repudiated. We would also note that the fact that Barkat Ram refrained from going into the witness box to submit himself to cross-examination is extremely suspicious. He was conducting the case for the Bank and the defendant repeatedly urged that Barkat Ram should be made a party, to which course the Bank through Barkat Ram declined to agree. He was fully aware of the defence set up and of the evidence given by the late employees of the Bank. He himself was the only person who could explain many of the circumstances, for instance, he could have proved where he got Rs. 25,000 which, he said, he sent to the Bank and why the fixed deposit receipt which was given as collateral security was not in the possession of the Bank. Mr. Tek Chand argued that it was very unlikely that Anant Ram would have been deceived by Barkat Ram, being a man of 36 years of age who had already served a sentence for forgery. A letter, dated the 12th March 1911, printed at page 2 of the paper-book from Anant Ram to Barkat Ram shows that these two were at that time on the best of terms and that Anant Ram was looking to Barkat Ram for assistance in obtaining an employment. There was, therefore, nothing improbable in his having relied on Barkat Ram's assurance that he, as the Chief Manager of the Bank, would see that Anant Ram would not incur any liability by signing the pro-note. It is also evident that the books of the Bank relating to this transaction are highly suspicious. The original pages have been removed and others substituted therefor, being marked "duplicate," a description which must be obviously incorrect as there can be no honest reason for preparing a duplicate set of books. The rate of interest 6 per cent. is also absurdly low, and in all the circumstances we are of opinion that the whole transaction is a bogus one and that Anant Ram is not liable to the Bank in any sum whatsoever.

Mr. Tek Chand complained that his client had not been given sufficient opportunity to produce certain witnesses, but we consider that the Court below dealt correctly with this question. In the view we take of the case it is not necessary to discuss the other points argued at the Bar and we accept this appeal and dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.
CIVIL REVISION No. 90 OF 1919.
March 30, 1920.
Present:—Mr. Justice Tudball.
JAWAD ALI SHAH—PLAINTIFF —APPLICANT
versus
KAMLAPAT RAI AND OTHERS—DEFENDANTS —OPPOSITE PARTY.

Succession Certificate Act (VII of 1889), s. 4 (a)—Plea that suit not maintainable without production of succession certificate—Procedure—Court, duty of.

Where a defendant raises the plea that the suit is not maintainable without the production of a succession certificate, the Court ought not to dismiss the suit without giving the plaintiff an opportunity of obtaining the necessary certificate and filing it. [p. 642, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes, Gorakhpur.

Mr. *Shiva Prasad Sinha*, for the Applicant.

VYRAVAN CHETTI v. SUBRAMANIAN CHETTI.

Mr. *Iswar Saran*, for the Opposite Party.

JUDGMENT.—In this case the Judge of the Small Cause Court at Gorakhpur dismissed the plaintiff's suit on the sole ground that no succession certificate had been filed. The plaintiff was one of several heirs of a deceased creditor. I have examined the order-sheet. The suit was finally decided on the 22nd of November 1918. It was on that date that the defendants first appeard to defend the suit and it was on that date the plea was taken that a suit without a succession certificate is not maintainable. The Court came to the conclusion that this was a good plea. It, however, dismissed the suit without giving the plaintiff an opportunity of obtaining the necessary certificate and filing it, as it obviously was the Court's duty to do for the ends of justice. If any such opportunity was given to the plaintiff, there ought to be something in the order-sheet or on the record to show that this was done. There is nothing on the record. As I have said above, the case came up for hearing on the 22nd of November 1918, and was heard and dismissed that day. I allow the application, I set aside the decree of the Court below, I direct that Court to restore the case to its original number on the file and to proceed to hear and determine it according to law. I am informed that the succession certificate has already been obtained. The Court will give the plaintiff an opportunity of filing it. If he refuses to file it, then his suit may rightly be dismissed by reason of his default, otherwise it must be decided on its merits. The costs of this application will abide the result of the suit.

Application allowed ;
Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

April 26, 1920.

Present :—Lord Buckmaster, Lord Dunedin, Sir John Edge and Mr. Ameer Ali.

R. M. M. C. T. VYRAVAN CHETTI AND ANOTHER—APPELLANTS

versus

V. K. N. S. P. SUBRAMANIAN CHETTI AND ANOTHER—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Mortgage—Agreement between first and second mortgagees to share moneys equally—Registration, whether necessary.

An agreement between first and second mortgagees to share equally monies realised is, although not registered, admissible in evidence to prove such agreement. [p. 644, col. 1.]

Appeal from the decree of the High Court, Madras, dated 16th November 1917, which reversed the decree of the Temporary Subordinate Judge, Ramnad at Madura.

FACTS.—The essential facts of the case are clearly set out in their Lordships' judgment. The Subordinate Judge held that the agreement in question was legally invalid for want of registration, and dismissed the suit. On appeal the High Court (Sir John Wallis, C. J., and Sadasiva Aiyar, J.) held that the non-registratinn of the agreement did not affect the claim of the plaintiffs, and remanded the suit. Mr. Justice Sadasiva Aiyar observed as follows :—

"Granting that under section 49 (*c*), Exhibit A cannot be received as evidence of any transaction affecting immoveable property, it may be received as evidence of any other transaction which does not affect such property but only affects the defendants personally as imposing a personal liability on them. In the Full Bench decision in *Puloka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madhava Menon* (1) it was held that a document which purports to be a mortgage but which being unregistered cannot affect immoveable properly, was admissible in evidence of the personal covenant to pay contained in it. I think (though I was not at first clear about it) that this decision covers the present case and that though, so far as the

(1) 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 584 (F. B.).

security over the immoveable property is concerned, the plaintiffs cannot rely upon the plaint document Exhibit A to prove that the defendants' prior right of security over the immoveable property is affected thereby, there is nothing to prevent them from using it as evidence of the co ordinate transaction, namely, the personal covenant to divide the realisations equally, when and as realised. The mortgagors are not affected at all by the equal division of moneys realised by either of the parties to Exhibit A and such division cannot be taken advantage of by the mortgagors, nor can it be held to prejudice them in any suit brought by them for redemption of either mortgage or brought against them for sale under any of the mortgages. Even as regards the amounts due under the promissory note to the defendants, the debtors will not be bound to pay again, because the plaintiffs and the defendants divide the realised amount between themselves. In the Full Bench case in *Pothi Naic'en* v. *Nagama Naicker* (2), which was a case of a deed affecting both immoveables and moveables, the reason why without registration the deed was held not to affect even the moveables was because the parties did not intend to affect by division in the joint character of the moveables without affecting at the same time the joint character of the immoveables also. But in the present case, it cannot be held, looking at the terms of Exhibit A, that the equal division of moneys realised under the promissory note or either sets of mortgage documents, was not intended by the parties to be made, unless also the security over the immoveable properties was simultaneously affected. In fact, such a division could not affect it so as to bind the mortgagors without notice to them even if the document was registered; and the very informal character of the document as a 'Varthamanam', which is executed between friends and not intended to be stamped or registered, negatives the idea. I would, therefore, reverse the judgment of the lower Court and remand the suit for disposal according to law."

Hence this appeal.

(2) 32 Ind. Cas. 486; 30 M. L. J. 62; 19 M. L. T. 50; 3 L. W. 115; (1916) 1 M. W. N. 70.

Mr. *Dube*, for the Appellants, submitted that the agreement was compulsorily registrable under section 17 of the Registration Act as it affected interests in immoveable property, and that under section 49 it could not be admitted in evidence as it was not registered.

[LORD BUCKMASTER.—The question was whether the arrangement to pool their claim was admissible in evidence.]

Sir *Erle Richards*, *K. C.*, and Mr. *Kenworthy Brown*, for the Respondents, were not called upon.

JUDGMENT.

LORD BUCKMASTER.—Their Lordships think it unnecessary to trouble Counsel for the respondents in this case.

The appellants are the first mortgagees of certain property. The respondents hold a second mortgage upon the same estates. It is unnecessary to determine the circumstances under which those mortgages arose, or the history of the title of the mortgagor. It is sufficient to say that on the 14th March 1907 an agreement was entered into between the first mortgagees and the second mortgagees which has given rise to the present dispute. The effect of that agreement was to put the first and the second incumbrances on a relative position of equality with regard to the security. The appellants having realised part of the estate, the respondents instituted the proceedings out of which this appeal has arisen for the purpose of obtaining their share of the proceeds to which they claimed to be entitled by virtue of the agreement. The answer that was raised was, first, that the agreement required registration, and not having been registered could not be given in evidence; and, secondly, that in any circumstances no consideration had even been given by which the agreement could be supported. With regard to the question of consideration it is sufficient to say that the learned Judge before whom the case was first heard found that there was consideration from the fact that contemporaneously with the execution of this agreement there had been an arrangement made by which the defendants had profited by loans that the plaintiffs had made to the extent of Rs. 42,000, and the question was not further raised in the High Court. The point, therefore, is not open to the appel-

lante; but if it were, their Lordships think there was abundant evidence to support the conclusion of the Subordinate Judge.

The real question, therefore, which now arises is whether or no the agreement of the 14th March 1907 required to be registered for the purpose of enabling it to be given in evidence upon these proceedings. That depends entirely upon the consideration of clause 3 of the agreement. Clause 3 of the agreement, after referring to the total amount of rupees that is owing to both the mortgagees and stating that interest is due to the first and second mortgagees under the documents, provides that their rights shall be arranged in the following way, that "both parties should, as regards rights, stand in the same position without claiming prior or subsequent rights, and divide and appropriate in equal halves, as per terms mentioned herein, whatever amount may be realised, on the date of realisation." The clause is open to two interpretations. It may be that the provision that the rights, both prior and subsequent, should stand on the footing of equality, is explained and limited by the following words, which state that the amounts of realisation shall be divided and appropriated in equal halves, or it may mean that two separate and distinct results are effected by the clause: first, that the rights should stand on a footing of equality and, secondly, that the proceeds should be equally divided. Whichever interpretation is taken, there is no objection to the lack of registration in such proceedings as those out of which this appeal has arisen, for, if the whole effect of the agreement is to provide merely that the realised money is to be divided in equal shares, then there is nothing in this agreement which requires to be registered, and if, on the other hand, there are two distinct provisions, the one relating to rights of property and the other with regard to the division of the realisation moneys then, as these proceedings relate merely to the question of the realised money, it need not be registered for the purpose of being given in evidence in this suit, although it may be that it would require to be registered for the purpose of being given in evidence in a suit relating to the regulation of the rights against the estate itself.

For these reasons their Lordships think that the judgment of the High Court was quite right, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellants:—Mr. *H S. L. Polak*.

Solicitor for the Respondents:—Mr. *Douglas Grant*.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 778 OF 1919.

April 30, 1920.

Present:—Mr. Justice Wilberforce.

THAKAR DAS—DEFENDANT—PETITIONER

versus

NARAIN *alias* HAR NATH—PLAINTIFF—RESPONDENT.

Arbitration—Withdrawal of one arbitrator, effect of, on arbitration—Court, duty of—Procedure.

Where two arbitrators are appointed to decide a case and one of them withdraws before the arbitration is completed, the remaining arbitrator cannot proceed with the case and file an award. It is the duty of the Court in such a case to appoint another arbitrator in place of the arbitrator who has withdrawn or to supersede the arbitration and decide the case on the merits. [p. 645, col. 1.]

Petition, under section 44, Act VI of 1918, for revision of the order of the Senior Subordinate Judge, Kangra, dated the 7th October 1919.

Bakhshi *Tek Chand* and Lala *Mehr Chand Mahajan*, for the Petitioner.

Lala *Dharm Chand*, for the Respondent.

JUDGMENT.—This suit was referred to arbitration and two arbitrators were appointed. After some proceedings one of the arbitrators put in a sealed award on some preliminary points, and refused to take any further part in the proceedings. The other arbitrator then asked for instructions from the Court and was told that he could proceed by himself and record the evidence and file his award. Against this order an application for revision has been preferred on the ground that the reference to arbitration provided that the case should be decided by two arbitrators, and that one of them having

withdrawn, either another arbitrator should be appointed or the Court should have decided the case on the merits. These grounds are clearly correct.

I, therefore, accept the application for revision and set aside the order complained against, and as both parties agree before me that the arbitration shall be superseded, I direct that the Court shall try the case on its merits. The costs of this Court will follow the result.

Application accepted.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 5 OF 1919-20.

January 16, 1920.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

Musammat HEM KUAR—APPELLANT

versus

SEWA RAM—RESPONDENT.

Agra Tenancy Act (II of 1901), s 10 (1)—Transfer of proprietary right—Sir land, lease of, validity of.

Proprietors, when selling or about to sell their property, cannot be allowed to deprive themselves by any trickery or subterfuge of the rights which section 10 (1) of the Agra Tenancy Act was framed to give them.

Therefore, a collusive lease of *sir* land intended to defeat the law is entirely void.

Second appeal from the order of the Commissioner, Allahabad Division, dated the 1st of August 1919, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—(*January* 10, 1920).—The plaintiff appellant *Musammat* Hem Kuar sued as ex proprietary tenant to eject the defendant Sewaram as her sub-tenant. Sewaram's sons are the superior proprietors of the Mahal. Sewaram's defence is that he holds the land under a lease for 101 years given to him on a rent of Rs. 40 per annum *plus* premium Rs. 500, which lease was given to him by the plaintiff-appellant when she was co-sharer and Lambardar before the partition. The lease is dated 18th February 1910. There is on record also a deed of agreement by plaintiff-appellant to sell her proprietary right to the respondent's sons. It is also dated 18th February 1910. The position seems to me quite clear. *Musammat* Hem Kuar on February 18, 1910, was contracting to sell her proprietary rights to the respondent's sons. She was Lambardar in the Mahal and simultaneously gave this lease of the *sir* land, which belonged to herself and her relative *Musammat* Amrit Kuar, to her vendees' father Sewaram with the intention of defeating the law of section 10, Tenancy Act. The Commissioner holds that the lease is invalid so far as other co sharers are concerned, but that *Musammat* Hem Kuar herself must be held to it and that now that she has become ex-proprietary tenant under the respondent's sons, she cannot eject the respondent because this lease stands in the way. This is tantamount to allowing a deliberate effort to get round the law of section 10, Tenancy Act, to be successful. I cannot agree with this finding of the Commissioner. It has been held over and over again by the Board and affirmed by the High Court that proprietors, when selling or about to sell their property, cannot be allowed to deprive themselves by any trickery or subterfuge of the rights which section 10 (1) was framed to give them. This lease of 18th February 1919 was a clear device of *Musammat* Hem Kuar and respondent in collusion to avoid the effect which section 10, Tenancy Act, would have when the projected sale of *Musammat* Hem Kaur's proprietary rights to the respondent's sons should come into effect. I hold that the lease, being a collusive one intended to defeat the law, is entirely void. *Musammat* Hem Kuar, plaintiff appellant, is, therefore, in my opinion clearly entitled to eject Sewaram respondent as her sub tenant, though, as the first Court held, the latter may have an equitable ground for suing her in the Civil Court for any *nazrana* he may have paid her in consideration for the lease.

I would set aside the Commissioner's appellate order and restore the decision of the Assistant Collector, but as both parties have been equally parties to the attempt to defeat the law of section 10, I would let the parties pay their own costs throughout.

HARRISON, J. M.—(*January* 16, 1920).—I agree.

Appeal allowed.

SRI KISHNA RAI *v.* RAMSARAN RAI.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 70 AND 71 OF 1918.

July 5, 1918.

Present:—Mr. Justice Mullick and Mr. Justice Thornhill.

SRIKISHNA RAI AND ANOTHER—OBJECTORS—APPELLANTS

versus

RAMSARAN RAI—DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 90—Application to set aside sale—Appeal, second, whether competent—Non-transferable occupancy holding—Objection to sale of holding, when to be taken—Mortgagee, objection by, subject to equities against judgment-debtor.

There is no second appeal against an order passed on an application under Order XXI, rule 90 of the Civil Procedure Code. [p. 646, col. 2.]

Although a tenant is entitled to get a sale of his holding in execution of a decree set aside on the ground that the holding is non-transferable, he, nevertheless, is bound to take the objection at the earliest possible moment: such an objection cannot be entertained in second appeal after the sale has taken place. [p. 646, col. 2.]

A mortgagee from a judgment-debtor is a representative of the judgment-debtor for the purpose of an application under section 47 of the Code of Civil Procedure, and he cannot raise an objection which the judgment-debtor is incompetent to raise, as he is bound by all the equities enforceable against the judgment-debtor. [p. 646, col. 2; p. 647, col. 1.]

Appeals against the orders of the District Judge, Durbhanga, dated the 10th January 19 8, affirming that of the Munsif, Samastipur, dated the 17th September 1917.

Messrs. *Rai Tribhuwan Nath Sahai* and *Janak Kishore*, for the Appellants.

Mr. *Murari Prasad*, for the Respondent.

JUDGMENT.

MULLICK, J.—The plaintiff brought a suit against the defendant for money and on 1st May 1915 attached before judgment the holding of the defendant. The suit was decreed on the 30th November 1915. On the 6th July 1916 the defendant gave a mortgage of part of the holding to Sri Krishna Rai. On the 11th July 1916 execution of the money-decree was taken out by the plaintiff and the holding was attached for the second time on the 16th July 1916. Notice under Order XXI, rule 66, Civil Procedure Code, for settling the sale proclamation was served upon the defendant on the 4th August 1916, and the holding was sold on the 30th November 1916 and was purchased by the decree-holder. An application was then made by the defendant to set aside the sale. A similar application was also made by the mortgagee. Both applications were dismissed by the Munsif and there were appeals to the District Judge with a like result.

The present defendant and the mortgagee have preferred second appeals to this Court, namely, Appeals Nos. 71 and 70 of 1918.

Appeal No. 71.—In this appeal there is a finding of fact, which is fatal to the appellant. It is found that the tenant-defendant was served with notice of the sale proclamation under Order XXI, rule 66. In so far as his application under Order XXI, rule 90, Civil Procedure Code, attacks the sale on the grounds of irregularity and fraud in publishing and conducting the sale, there is no second appeal against the learned Judge's order. The tenant, however, is competent to prefer a second appeal in so far as the application was one under section 47, Civil Procedure Code.

Now, this objection as to non-transferability, which is the ground on which he could come in under section 47, was an objection which it was competent for him to take, firstly, when the attachment before judgment was made, secondly, when the attachment was made in the execution proceedings, and thirdly, when he was called upon to settle the sale proclamation. The law is that a tenant is entitled to get a sale set aside on the ground that the holding was non-transferable, but he must make his objection at the earliest possible time. In this case, it being found as a fact that the tenant was served with notice under Order XXI, rule 66, he ought, at least, to have come in then and made his objection with regard to the non-transferability of the holding. Not having done so, he cannot be heard in this Court. His appeal is, therefore, dismissed with costs.

Appeal No. 70.—Then let us turn to this appeal. Here it is contended that there is no bar in law to a man's purchasing a share in a non-transferable occupancy holding. This is conceded, and it is open to the mortgagee to apply under section 47 as a representative of the judgment-debtor. But the mortgagee was admittedly a purchaser *pendente lite* and

is, therefore, bound by all the equities enforceable against the judgment-debtor. Therefore, he is not competent now to raise the objection, which the judgment-debtor has been found incompetent to raise.

His appeal, therefore, must also be dismissed with costs.

THORNHILL, J.—I agree.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 8 OF 1920.

February 12, 1920.

Present:—Pandit Kanhaiya Lal, A. J. C.

SHAMBHU DAYAL—PLAINTIFF—APPLICANT

versus

DURGA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 107, applicability of —Contract to sell goods not ascertained—Sale, whether complete—Delivery, failure to accept—Re-sale —Damages, measure of.

On 18th August 1919 *D.* entered into an agreement with *S.*, the owner of an oil mill, for the purchase of 101 maunds of castor oil at Rs. 31-12-0 per maund to be delivered at Cawnpore in 8 days, *S.* despatched a portion of the oil on the 21st August and the remainder on the 23rd August to a firm at Cawnpore, and called upon *D.* to take delivery after having the oil weighed at the shop of that firm. *D.* failed to take delivery, and further refused a telegram from *S*, warning him that if he did not take delivery in 2 days the oil would be sold at the prevailing rate, and that he would be liable for damages caused by re-sale. On 13th September *S.* sold the oil for Rs. 26 a maund and brought the present suit to recover as damages the difference between the contract rate and the price realised by re-sale:

Held, that the plaintiff was not entitled to the damages claimed, as the transaction did not amount to a complete sale, but was merely a contract to sell, that the sale could not have become complete until the quantity of the oil sold was separated and taken to Cawnpore and was weighed or was otherwise ready for delivery within the knowledge and with the consent of *D.* and that *S.* was merely entitled to the difference between the rate agreed and the market rate prevailing on the date of the breach. [p 648, col. 1.]

Held, further, that to such a case the provisions of section 107 of the Contract Act did not apply. [p. 648, col. 1.]

Application to revise the order of the Additional Judge, Small Cause Court, Lucknow, dated the 1st December 1919.

Mr. H. N. Misra, for the Applicant.

Mr. *Mukund Behari Lal*, for the Opposite Party.

JUDGMENT.—The plaintiff has a castor oil mill at Lucknow. On the 18th August 1919 the defendants agreed to purchase 101 maunds of castor oil from the plaintiff at Rs. 31-12 0 per maund to be delivered to them at Cawnpore and paid Rs. 101 as earnest money. The delivery of the oil was to be made in eight days.

The plaintiff despatched a portion of the oil on the 22nd August and the remainder on the 23rd August 1919, apparently to the address of a firm called Sidhgopal-Sheogopal at Cawnpore, and informed the defendants that they should get the oil weighed at the shop of that firm and take delivery. The defendants did not, however, take delivery. On the 4th September 1919 the plaintiff sent a telegram to the defendants, asking them to take delivery of the oil deposited with the firm of Sidhgopal-Sheogopal at Cawnpore within two days and warned them that if they did not do so, he would sell the oil at the prevailing rate and sue them for damages. The defendants refused to accept the telegram which came back undelivered.

On the 13th September 1919 the plaintiff sold the oil to Diwan Chand at Rs. 26 per maund. In the present suit he seeks to recover Rs. 493 2 0 as damages from the defendants after giving credit for the earnest money which he had received. The Court below dismissed the claim. Its finding is that inasmuch as the plaintiff had failed to prove the difference between the rate agreed and the market rate prevailing on the 26th August 1919, no damages could be awarded to him.

In order to determine whether the damages should be awarded according to the rate prevailing on the date of the breach of the contract of purchase or on the date on which the re sale took place, it is necessary to ascertain whether the sale of the oil was complete on the date on which the earnest money was paid. If it was a mere contract to sell, section 107 of the Indian Contract Act (IX of 1872) has no application, because as pointed out in

Angulia & Co. v. *Sassoon & Co.* (1), no sale can be complete unless there is an ascertainment of the goods sold or an appropriation thereof by the vendor with the assent of the vendee. Section 80 of the Indian Contract Act provides that where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done. Section 82 declares that where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained. The illustration appended to that section shows that if a person agrees to sell to another 20 tons of oil out of his cisterns, which at that time contain more than 20 tons, no portion of the oil in these cisterns becomes the property of the person who agrees to purchase, till that oil is ascertained or set apart by weighment or otherwise. Section 83 lays down that where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

It is not possible to say whether the plaintiff had at his mill 101 maunds of castor oil on the date on which he entered into the contract of sale. Even if he had, the sale could not have become complete until the quantity to be sold was separated and taken to Cawnpore and was weighed or was otherwise ready for delivery within the knowledge and with the assent of the defendants. In *Yule & Co.* v. *Mahomed Hossain* (2) it was held that section 107 applied only to the purchaser subject to the lien of the vendor for the unpaid purchase-money. In such a case the vendor is entitled to receive the difference between the contract price and the price fetched at the re-sale. In *Jamal* v. *Mcolla Dawood Sons & Co.* (3), where a certain person had agreed to purchase certain shares to be delivered by a certain date but subsequently refused to do so in consequence of the shares having since largely fallen in value, their Lordships of the Privy Council observed: "If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach, if the market falls, nor is he liable to the purchaser for the profit, if the market rises." They pointed out that the decision in *Rodocanachi* v. *Milburn* (4) that the market value at the date of the breach was the decisive element was upheld in the House of Lords in *Williams Brothers* v. *Ed. T. Agius Limited* (5) and that though in the former case the breach was by the seller to deliver, the proposition was equally true where the breach was committed by the buyer. They further said that section 107 of the Contract Act dealt with cases where a seller had lien on goods or had stopped them in transit, but not where goods had not passed from the possession and ownership of the seller himself. In fact there can be no re-sale unless there has been a sale. Where there has been a contract, its rescission in certain circumstances gives the party injured by the breach a right of action under section 73 of the Contract Act. The decisions in *Mcll Schutte & Co.* v. *Luchmi Chand* (6) and *Best* v. *Haji Muhammad Sait* (7) do not apply, because in each of those cases a power of re-sale in case of refusal to take delivery was expressly reserved by the contract of sale. In *Iraq Narain* v. *Mul Chand* (8) and *Basdeo* v. *John*

(1) 13 Ind. Cas. 705; 39 C. 568 at p. 580; 16 C. W. N. 593.

(2) 24 C. 124; 1 C. W. N. 71; 12 Ind. Dec. (N. S.) 748.

(3) 31 Ind. Cas. 949; 43 C. 493; 20 C. W. N. 105; 30 M. L. J. 73; 14 A. L. J. 89; 19 M. L. T. 80; 3 L. W. 181; 23 C. L. J. 137; (1916) 1 M. W. N. 70; 18 Bom. L. R. 315; 9 Bur. L. T. 8; 43 I. A. 6 (P. C.).

(4) (1886) 18 Q. B. D. 67; 56 L. J. Q. B. 202; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100.

(5) (1914) A. C. 510; 83 L. J. K. B. 715; 110 L. T. 865; 19 Com. Cas. 200; 58 S. J. 377; 30 T. L. R. 351.

(6) 25 C. 505; 2 C. W. N. 283; 3 Ind. Dec. (N. S.) 335.

(7) 23 M. 18; 8 Ind. Dec. (N. S.) 407.

(8) 19 A. 525; A. W. N. (1897) 150; 9 Ind. Dec. (N. S.) 846.

Smidt (9) there was a sale of specific goods which was complete in itself.

Here there was no complete sale. There was only a contract to sell and the plaintiff cannot consequently recover the difference between the contract price and the price fetched at the re sale which took place much later. As there is no evidence on the record to show what the market-rate was at Cawnpore on the date of the breach of the contract, the Court below is directed to determine, after taking such relevant evidence as the parties may adduce,

(1) What was the prevailing market-rate at Cawnpore on the date on which the contract was broker, namely, the 26th August 1919?

(2) To what damages, if any, is the plaintiff entitled?

Two months' time will be allowed for a return of the findings and ten days from the date of the findings will be allowed to the parties for filing objections.

Issues remitted.

(9) 22 A. 55; A. W. N. (1899) 172; 9 Ind. Dec. (N. s) 1068.

PATNA HIGH COURT.

CIVIL REVISION NO 19 OF 1920.

April 30, 1920.

Present:—Mr. Justice Coutts and Mr. Justice Adami.

Musammat LACHMIBATI KUMARI—PLAINTIFF—PETITIONER

versus

NANDKUMAR SINGH AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—High Court, power of, to interfere with inter-locutory orders.

The High Court will not interfere under section 115, Civil Procedure Code, with an interlocutory order when there is another remedy open to the applicant and no irreparable harm will be suffered by the interlocutory order.

Application against the order of the Subordinate Judge, Monghyr, dated the 10th January 1920

Mr. *B. C. Jhunjhunwala*, for the Petitioner.

Mr. *Shivanandan Rai*, for the Opposite Party.

JUDGMENT.

COUTIS, J.—This an application made in revision against the order of the Subordinate Judge of Monghyr directing Additional Court-fee to be paid.

An exactly similar case to the present one was decided by Roe and Jwala Prasad, JJ. in *Bhubneshwari Prasad* v. *Mohan Lall* (1). In that case, following the decision in *Chandramani Koer* v. *Pasdeo Narain Singh* (2), the learned Judges remarked that "although in *Banke Behari* v. *Ram Bahadur* (3) a Divisional Bench of this Court had interfered with an interlocutory order of this description, but generally the *cursus curiæ* of the Calcutta High Court and of this Court has always been not to take action under section 115, when there is another course open and no irremediable harm can be suffered by the interlocutory order." I agree with the view taken in the case of *Bhubneshwari Prasad* v. *Mohan Lall* (1) and for the reasons given in the case, which I have just quoted, I would dismiss the application with costs. Hearing fee two gold *mohurs*.

ADAMI, J.—I agree.

Application dismissed.

(1) 55 Ind. Cas. 786; 1 P. L. T. 5.
(2) 49 Ind. Cas. 442; 4 P. L. J. 57.
(3) 44 Ind. Cas. 891; (1918) Pat. 223; 4 P. L.W. 281; 4 P. L. J. 191.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 174 OF 1918-19.

January 7, 1920.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

SHEOGHULAM KOERI—APPELLANT

versus

PERMESHRI LAL—RESPONDENT.

U. P. Land Revenue Act (III of 1901), ss. 3 (1), 4 (12) (b)—Agra Tenancy Act (II of 1901), s. 2 (4)—Sir land, status of, whether affected by subsequent passing of Agra Tenancy Act—Interpretation of Statutes—"So far as may be", meaning of.

Land which has once acquired the status of "*sir*" before the Agra Tenancy Act came into force might lose its status by the passing of that Act and by the change of definition therein, if it does not satisfy the requirements of the new definition. [p. 65, col. 1.]

SHEOGHULAM KOERI *v.* PERMESHRI LAL.

A land is not "*sir*" within the meaning of section 4 (12) (*b*) of the U. P. Land Revenue Act if it was not in a proprietor's personal cultivation immediately before the commencement of that Act. [p. 651, col. 1.]

In interpreting a Statute, where there is no ambiguity in the language used, it must be accepted as it stands, and a Court is not justified in questioning whether the meaning conveyed by the language used was what was in reality intended by the Legislature. [p. 650, col. 2; p. 651, col. 1.]

The expression "so far as may be" in section 3 (1) of the U. P. Land Revenue Act or in section 2 (4) of the U. P. Tenancy Act means "unless a different intention appears from the wording of the Act itself" or "unless it would be inconsistent with the provisions of the Act." [p. 651, col. 1.]

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 2nd of June 1919, in the case of ejectment.

JUDGMENT.

FEARD, S. M. (*January* 6, 1920).—The plot in suit was in 1311 recorded as the *khudkasht* of 31 years of the respondent with appellant as his sub-tenant of eleven years' standing. It is obvious from this that the plot had not been cultivated continuously for 12 years by the proprietor himself immediately before the commencement of the Land Revenue Act, III of 1901, on the 1st January 1902. For this reason the Assistant Collector decided that it was not *sir* within the definition of section 4 (12) (*b*) of the Land Revenue Act. It has not been suggested at any time that the land is *sir* under section 4 (12) (*a*) or section 4 (12) (*c*). The Assistant Collector, therefore, held the defendant-respondent to be an occupancy tenant. It is true that the land was recorded as *sir* at the recent settlement, but as the Assistant Collector points out, this was not a judicial decision and the entry was under *Mahesh Prasad* v. *Radhika Prasad* (1) subject to disproof. The Commissioner in first appeal has held that for the purposes of section 4 (12) (*b*), Land Revenue Act, if *sir* rights have been acquired at a previous time it is not necessary that the land should have been in the proprietor's personal cultivation for 12 years immediately before the commencement of the Tenancy Act, and he found that the proprietor had in fact required *sir* rights during the period of his recorded *khudkasht* cultivation before the respondent came on to the land as cultivator in 1299. The question, therefore, is whether those previously acquired but not recorded *sir* rights are to be disregarded because the proprietor had not continuously cultivated for 12 years immediately before the Tenancy and Land Revenue Acts of 1901 came into force on 1st January 1902. This view was held by the Board in Petition No. 185 of 1914-15 decided by Messrs. Holms and Campbell (2). They point out that if this view be not taken, the word "immediately" in the definition has no meaning. They refer to a previous decision in Petition No. 6 of 1905-7 *Sukhnandan Singh* v. *Bhagwan Dat Dube* (3), as showing that Sir Duncan Baillie had been of the same opinion, but, on reference to the decision they quote, I find that it was not Sir Duncan Baillie's decision but a decision of Messrs. Cruickshank and Reynolds, who discussed the point and came to the entirely opposite conclusion holding that section 3 (1) of the Land Revenue Act, III of 1901, and section 2 (4) of the Tenancy Act, II of 1901, distinctly preserve under these new Acts rights acquired under the old Act and that although the absoluteness of section 2 (4), Act II of 1901, is modified by the words "as far as may be" used later in this sub section, nevertheless *sir* rights acquired under the old Act would hold good under the new Acts notwithstanding the use of the word 'immediately' in this definition in section 4 (12) (*b*) of the new Revenue Act. They did not consider what was meant by inserting the word 'immediately' in this definition. So far from being of the opinion ascribed to him by Messrs. Holms and Campbell in their decision in Petition No. 185 of 1914-15, Sir Duncan Baillie seems to have followed Messrs. Cruickshank and Reynolds, for in Petition No. 8 of 1912-13, *Baiju Ahir* v. *Musammat Lachhimia Koer* (4), he distinctly held that land which has once acquired the status of *sir* before the Tenancy Act came into force cannot lose its status simply by the passing of the Tenancy Act and by the change of definition therein.

I have given the point careful consideration. I am of opinion that the earlier decisions were unsound and that the view taken by Messrs. Holms and Campbell in the later decision is correct. It is a well-known rule of interpretation that where

(1) Sel. Dec. No. 17 of 1912.

(2) 2 U. D. 38.
(3) 2 U. D. 180.
(4) 2 U. D. 385.

there is no ambiguity in the language used, it must be accepted as it stands, and we are not justified in questioning whether the meaning conveyed by the language used was what was in reality intended by the Legislature. The words "immediately and before the commencement of this Act" were not in the N. W. P. Land Revenue Act (XIX of 1873), and it must be presumed that they were deliberately inserted in the U. P. Land Revenue Act (III of 1901). The Legislature had power to alter the definition of "*sir*" so as to exclude land which under the old definition had acquired the character of *sir*, and we must take it that it deliberately did so. The wording of section 4 (12) of Act III of 1901 is absolutely clear and is capable of only one interpretation. Section 3 (1) of Act III of 1901 or section 2 (4) of Act II of 1901 do not help the respondent, as in both these sections there is also a saving clause, namely, "so far as may be". The words "so far as may be" can only be construed to mean "unless a different intention appears from the wording of the Act itself" or "unless it would be inconsistent with provisions of the Act," and we cannot regard them as overriding the precise wording of section 4 (12) (*b*) where the emphatic word "immediately" is used. The respondent, therefore, cannot claim that the land in suit is "*sir*" within the meaning of section 4 (12) (*b*), Act III of 1901, on the ground that it may have become his *sir* by many years of personal cultivation in the period antecedent to the introduction of Act III of 1901: the claim is barred by the fact that it was not in his personal cultivation immediately before the commencement of that Act.

I would, therefore, allow the appeal and setting aside the Commissioner's appellate decision would restore the decision of the Assistant Collector with costs to the appellant throughout.

HARRISON, J. M.—(*January* 7, 1920). —I had discussed this case with my colleague before he wrote his judgment, which represents our joint conclusion. I agree in the order proposed.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2043 OF 1916.

May 7, 1920.

Present:—Mr. Justice Broadway and Mr. Justice Dundas.

FITHA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat DEVKEE AND OTHERS—DEFENDANTS—RESPONDENTS

Punjab Courts Act (III of 1914), s. 41—Custom—General rule, whether abrogated by special custom—Appeal, second—Certificate, whether necessary.

Plaintiffs, the sister's son and grandson of one *N*, the last male owner, sued for a declaration that a gift made by defendant No. 1 in favour of one *M*, the deceased husband of defendant No. 2, shall not affect their reversionary rights, alleging that both under Hindu Law and by custom they were entitled to succeed to the property in suit. The Court, holding that the plaintiffs had established a special custom which entitled them to succeed to the property, decreed their claim. On appeal the District Judge held that the special custom had not been proved and dismissed the plaintiffs' suit. An application for the grant of a certificate under the Punjab Courts Act was also dismissed. The plaintiffs filed a second appeal in the High Court:

Held, that the question for decision before the lower Appellate Court was whether the general rule of custom had been abrogated by a special custom and, therefore, no second appeal was competent without a certificate. [p. 652, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur and Kangra, at Hoshiarpur, dated the 26th March 1916, reversing that of the Senior Subordinate Judge, Kangra, dated the 16th November 1914.

Mr. *M. L. Puri*, for Bakhshi *Tek Chand*, for the Appellant.

Lalas *Hargopal* and *Fakir Chand*, for the Respondents.

JUDGMENT.—A preliminary objection has been taken by Mr. Hargopal for the respondents that this appeal is not competent owing to the want of a certificate.

The plaintiffs appellants in the case sued for a declaration that a certain alienation by way of gift made in favour of one Mangu, the deceased husband of *Musammat* Omanpatti, the principal defendant respondent, would not affect their reversionary rights. The plaintiffs were the sister's son and grandson of Naurang, the last male owner, *vide* pedigree table (page 4 in the printed book). Their contention was that both under the Hindu Law and by custom they were entitled to

succeed to the property in suit. The trial Court held that the plaintiffs had established a special custom which entitled them to succeed to the property and granted them a decree accordingly. On appeal the learned District Judge took a different view and held that the special custom set up had not been proved. The plaintiffs' suit was accordingly dismissed. An application was put in by them before the District Judge for the grant of a certificate under section 41 of the Panjab Courts Act relating to the special custom in question. This application was, however, dismissed on the 24th April 1916.

The preliminary objection must, in our opinion, prevail. A perusal of the judgment of the learned District Judge clearly shows that it has been held that the general custom prevalent in the province is that a sister's son and grandson have no *locus standi* to challenge an alienation of this nature. Mr. Mukand Lal Puri contended that this decision was wrong and had been arrived at on a question that was never properly before the lower Appellate Court. Reference was made to *Nur Ali* v. *Bahawal* (1) for the proposition that in such circumstances a second appeal was competent without a certificate. With this decision we have no quarrel, but we do not consider that it has any application to the case before us. The question for decision in the Court below was whether the general rule of custom by which sisters and their issue are usually excluded from succession had been abrogated by a special custom and, therefore, the question on which a decision was arrived at was properly before that Court. It may be that the decision is incorrect but an examination of it is not possible for want of the necessary certificate. We accordingly allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

(1) 31 Ind. Cas 386; 34 P. R. 1916; 54 P. W. R. 1916.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 95 OF 1918-19.

December 20, 1919.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

SHEOPUJAN RAI—APPELLANT

versus

MANOG GIR—RESPONDENT.

Hindu Law—Adoption—Sister's son's son, adoption of, validity of—Adopted son, whether can succeed to occupancy rights.

Although the adoption of a sister's son's son may amount to a breach of caste custom, it nevertheless, is not illegal or void. [p. 653, col. 1.]

An adopted son can succeed to an occupancy right, and is not liable to ejectment as a non-occupancy tenant. [p. 653, col. 1.]

Second appeal from the order of the Commissioner, Benares Division, dated the 9th of May 1919, in the case of ejectment.

JUDGMENT.

HARRISON, J. M.—(*December* 19, 1919).—In this case the Commissioner has held that the adoption of the appellant by the last occupancy tenant, Ram Barat Rai, was invalid, the appellant being his sister's son's son (or son of his *bhanja*). This finding is disputed as a matter of law in this appeal, it being contended that there is no bar to the adoption of such a relation. It is admitted that the sister's son (father of the appellant) could not have been adopted, but it is pointed out that the prohibition only extends to the sister's son, mother's son, and daughter's son. This is based upon the precept of Hindu Law that a person should not be adopted whose mother the adoptive father could not himself have married.

I infer that the Commissioner laid stress on the clans to which the parties belonged. Ram Barat Rai was of the Kausik clan, while the adopted boy was a Sengar and the Commissioner's view seems to be that his mother being also a Sengar could not legally have been married to Ram Barat Rai, for a Kshattriya woman by custom must marry in a clan higher than her own. But this is only a custom of the caste and need not necessarily create a legal bar. I find that the principle of *factum valet* in the stronger case of the adoption of an only son of his father was upheld in an exhaustive judgment by the Privy Council in the case reported as

SHWE HMAN v. MA E MYA.

Sri Balusu Gurulingaswami v. *Sri Balusu Ramalakshmamma* (1), although the adoption might be regarded as sinful. This judgment affirmed that of the Allahabad High Court *Beni Prasad* v. *Hardai Bibi* (2) in the same case to the same effect. Here if there had been a marriage between the adoptive father and the mother of the boy it would, at the worst, have been no more than a breach of caste custom or practice, and although the adoption may be held reprehensible among Kshattriyas, it would probably not be held sinful even by the opinion of the brotherhood. I cannot regard it as illegal and void.

It is settled law that an adopted son can succeed to an occupancy right and the appellant was not liable to ejectment as a non-occupancy tenant. I would, therefore, allow the appeal, set aside the decree of the Commissioner, and restore that of the Assistant Collector with costs to the appellant in all Courts.

FERARD, S. M.—(*December* 20, 1919).—I agree, Ram Barat could have married the appellant's mother. It would not have been unlawful, though she was of a higher clan than Ram Barat and only one degree outside the incestuous bar. Ram Barat's adoption of appellant was, therefore, valid. In the case quoted by my colleague as analogous the outrage to Hindu feeling must have been considerably greater than in the present case but the Privy Council held the adoption legal.

Appeal allowed.

(1) 21 A. 460; 1 Bom. L. R. 226; 3 C. W. N. 427; 22 M. 398; 9 M. L. J. 67; 26 I. A. 113; 7 Sar. P. C. J. 830; 9 Ind. Dec. (N. S.) 1001 & 8 Ind. Dec. (N. S.) 286.

(2) 14 A. 67; A. W. N. (1892) 161; 7 Ind. Dec. (N. S.) 415.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 195 OF 1918.

April 10, 1919.

Present:—Mr. Justice Maung Kin.

SHWE HMAN—APPELLANT

versus

MA E MYA AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Contract—Separate covenants, breach of, whether constitutes one cause of action—Suit in respect of one breach—Subsequent suit in respect of other breach, whether maintainable.

Where in a contract there are two covenants to be performed at different times, but both secured in the same manner, a breach of both the covenants constitutes one cause of action, and if a suit is brought in respect of one breach only, a subsequent suit in respect of the other breach is barred under rule 2 of Order II of the Civil Procedure Code. [p. 656, col. 1.]

Mr. *Ko Ko Gyi*, for the Appellant.

Mr. *Maung Gyi*, for the Respondents.

JUDGMENT.—Defendants mortgaged a piece of land for Rs. 700 in *Tabaung* 1273 B. E., with the covenant that both principal and interest were to be paid in *Tabodwe* of the following year. Defendants through their Counsel allege before me that there was a subsequent oral agreement to the effect that interest was to be paid annually and the principal on demand. This was not alleged in the pleadings, nor has either of the lower Courts referred to it. Counsel further alleges that in a previous suit for the recovery of the third year's interest on the mortgage, the subsequent oral agreement was referred to. But I cannot see that the allegation was made in the same form as it has been before me. Under the circumstances I am bound to say that the alleged subsequent oral agreement cannot be allowed to be set up. But the fact remains that the plaintiffs did not foreclose the mortgage but went on receiving interest for two years, and when default was made in the payment of the interest for the third year, they sued and got a decree for it in Civil Regular No. 159 of 1915 of the Township Court of Myanaung. After that the defendants paid interest for two years more, and when they made default in the payment of the interest for the sixth year, the present suit for the principal and interest due on the mortgage was filed.

Both the lower Courts have held that the suit was barred under Order II, rule 2, of the Civil Procedure Code. The reason would seem to be that the plaintiff should have sued for the principal as well in the first suit as it also had fallen due.

Order II, rule 1, of the Code provides that "every suit shall include the whole

of the claim which the plaintiff is entitled to make in respect of the same cause of action," and further that "if a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted." The rule means that every suit shall include the whole of the claim arising from one and the same cause of action, and not that every suit shall include every cause of action which the plaintiff may have against the defendant. It is clear that there may be different causes of action arising out of the same transaction, in which case the plaintiff may sue on any one of them and his subsequent suit on any one or all of the other causes of action will not be barred under the rule.

The law as stated above is perfectly simple, but it has often been found difficult to apply, owing to the difficulty of ascertaining what the cause of action is in a given case.

In this case there would seem to be two covenants, namely (1) to pay the principal in *Tabodwe* of the year following the year of the mortgage, and (2) to pay interest so long as the principal remains unpaid. At the date of the previous suit both the covenants had been broken and both the principal and interest had fallen due, but the plaintiff based his claim on one of the covenants only, namely, the covenant to pay interest. The covenants arise under one transaction, the contract of mortgage. If a breach of each covenant gives rise to a separate cause of action, the present suit does lie. If a breach of both the covenants constitutes but one cause of action, it is barred, because the plaintiff by suing for interest only in the previous suit had split up his cause of action.

In his commentaries on the Civil Procedure Code of 1882, in notes under section 43 (now Order II, rule 2), Hukm Chand says at page 535:—"Where there are more covenants than one in a contract which are to be performed at different times, the breach of each constitutes a single and independent cause of action on which a separate suit may be brought. When a suit is brought, however, on any contract after there has been a breach of several covenants, the breach of them all is considered a single cause of action. All the covenants to be performed before the suit is brought are deemed joined into one by the contract and the breach of all the covenants enforceable before that time deemed as one entire breach. And on a contract containing various undertakings the plaintiff suing for the breach of one is held thereby to waive his rights to the others."

So, both the covenants under the mortgage having already been broken at the date of the previous suit, plaintiff's cause of action then was the breach of both of them and he should have sued for all his remedies.

Hukm Chand, however, goes on to state at page 542:—"This principle is not applicable when the covenants are so different in their nature as to be considered separate contracts, in which case the breach of each covenant will be a separate cause of action. So also the breach of a covenant in a mortgage-bond to pay interest each year which covenant is not confined to the fixed period of the mortgage and is distinct from, and independent of, the claim of the mortgagee to recover the principal sum and the performance of which is secured in a different manner, gives rise to a distinct cause of action which can be sued upon without suing for the principal, and a decree obtained on such bond for overdue interest does not bar a subsequent suit to recover the principal and interest by sale of the mortgaged property." And he quotes as his authority for these remarks the case of *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar* (1).

In that case it was held that the covenant to pay the interest was separate and apart from the covenant to pay the principal, and the ground seems to me to be that the performance of the former covenant was secured in a different manner to the performance of the latter covenant. The material portion of the bond in that case was as follows:—"In security for the above (the principal sum) I mortgage the property . . , and as I have kept with me the possession of the property I have agreed to pay interest . . . and the period of this mortgage is fixed at five years. As to assessment . . . I will pay the same to Government directly,

(1) 21 B. 267 at p. 268; 11 Ind. Dec. (N. S.) 181.

and I will continue to pay Rs. 75 every year as interest. *In the year in which interest will remain unpaid I will deliver the property into your possession without any objection.*" The words I have italicised show the special way in which the performance of the covenant to pay interest was secured. That was the reason why it was held that the particular covenant to pay interest was considered as separable from the rest of the terms of the mortgage. This Bombay case is relied on by the learned Counsel for the plaintiff, but I am unable to see how that ruling covers the present case. Both the covenants in the present case are secured in the same manner, that is by the mortgaged property. There is no special security in favour of the one or the other. In my judgment the covenants cannot be said to be separable after their breach. I am strengthened in my view by the observations of Chatterji and Rattigan, JJ., in *Ganga Ram* v. *Abdul Rahman* (2) with reference to the Bombay case. They say as follows:—"The learned Chief Justice draws a distinction in favour of allowing the claim to proceed on the ground that the covenant to pay interest, which was not confined to the fixed period of the mortgage, was distinct from, and independent of, the claim of the mortgagee to recover the principal sum, and its performance was secured in a different manner. 'Its breach....,' he says, 'gives rise to a cause of action which can be sued upon without suing for the principal.' If the distinction is well founded, which is not very clear to our minds, the case is not on all fours with the present case, and should be excluded from consideration." The facts of the Punjab case are similar to those before me. In that case when the suit for interest was brought, the whole of the principal sum had fallen due and both the principal and interest were secured by the mortgage, there being no special security in favour of the one or the other. It was held that a subsequent suit for the principal and interest was barred. The ground of the decision was that when several breaches of covenants made under one contract have occurred, the cause of action of the various breaches merges into one and renders it obligatory upon a plaintiff to include all claims to which he is entitled under his contract in one action. The principle laid down in this case was followed in another Punjab case (Rattigan and Shah Din, JJ.) reported as *Kundan Mal* v. *Sardar Allah Dad Khan* (3). In that case the second suit was also for interest only. It was argued by Counsel that, although a suit for the principal may be barred, a suit for further interest on the covenant to pay interest was not barred, but the Court held that interest being accessory to the principal, it follows that a subsequent suit for interest, although accrued due after the decision of the previous suit, is equally barred.

In *Hikmatullah Khan* v. *Imam Ali* (4) the same principle was adopted. Straight, J., in whose judgment Brodhurst, J., concurred, observed on the apparent hardship upon the plaintiff entailed by his ruling:—"I cannot help saying in passing that I feel that the conclusion at which I have arrived will have the unfortunate result of enabling those defendants to escape from the payment of a debt which in all honour and conscience they undoubtedly owe to the plaintiff. But there is no rule of procedure which is founded in better reason and good sense than that which prohibits persons, who bring suits, from what is called splitting their demands."

The learned Counsel for the plaintiff relies very strongly upon *Badi Bibi Sahibal* v. *Sami Pillai* (5). But that case is distinguishable from the present, inasmuch as there the date agreed upon for the payment of the principal sum had not arrived when the previous suit for interest was filed. The bond was as follows:—"We (the obligors) shall pay interest at 7 per cent. per annum before the 30th October of each year; we shall pay in full the principal amount on 30th October 1878 after clearing off the interest and redeem this deed: should we fail to pay the interest regularly according to the instalments, we shall at once pay the principal together with the amount of interest." Default was made in the payment of interest in 1876, and in 1877 the plaintiff sued for the interest then due, expressly stating in the plaint that he agreed to accept payment

(2) 28 P. R. 1907; 93 P. L. R. 1908; 140 P. W. R. 1907.

(3) 5 Ind. Cas 821; 19 P. R. 1910; 36 P. W. R. 1910; 167 P. L. R. 1910.

(4) 12 A. 203 at p. 203; A. W. N. (1890) 87; 6 Ind. Dec. (N. S.) 878.

(5) 18 M. 257 at p. 261; 5 Ind. Dec. (N. S.) 529.

of the principal and the subsequent years' interest at the times fixed in the deed, and he obtained a decree. The plaintiff in 1883 sued for both principal and interest. It was held that the suit was not barred under section 43 of the old Code. As regards the covenant to pay the principal and interest due, directly default was made in the payment of any year's interest, though the time fixed for the payment of the principal had not arrived at the time of the default, Muttusami Ayyar, J., observed as follows:—"The alternative provision in Schedule A is one that was inserted for the exclusive benefit of the plaintiff. He had, therefore, an option to sue either for the first year's interest only or for the same together with the principal amount." I, therefore, hold that the Madras case does not apply.

In the result I would hold that the suit was barred under Order II, rule 2, of the Civil Procedure Code. The appeal is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES

SECOND CIVIL APPEAL No. 258 OF 1918 19.

January 30, 1920.

Present:—Mr. Harrison, J. M.

HARDUTT SINGH—APPELLANT

versus

JAIKARAN SINGH—RESPONDENT.

Lease, construction of—Istimrari *lease, duration of.*

A lease, described as *istimrari*, which contains no specific clauses referring to succession and transfer, is good only for the lifetime of the lessee, and, by itself, is no defence to a notice of ejectment against the successors of the lessee.

Second appeal from the order of the Commissioner, Fyzabad Division, dated the 29th of May 1919, in the case of ejectment.

JUDGMENT.—This is a second appeal in a case in which the plaintiff-respondents contested a notice of ejectment. For the purposes of this appeal it is sufficient to say that they relied upon a perpetual lease executed in 1867 and claimed that in any case the present rent is favourable.

There can be little doubt that the land was originally held under the Patta relied upon, but there is nothing in it to suggest that it was heritable or transferable. The only word in it which can suggest anything of the sort was *istimrari*, but it has been constantly held that in the absence of specific clauses referring to succession and transfer such a lease is good only for the lifetime of the lessee. The original lessee is admittedly dead and the plaintiffs-respondents are his successors by inheritance. In my opinion, therefore, the lease by itself is no defence to a notice to ejectment against the present plaintiffs.

There remains the question whether the rent is favourable. Both the parties are Thakurs and this alone is almost sufficient to raise a presumption of privilege in favour of the tenants, though apparently at the settlement no caste privilege was definitely recognised. The rent is, however, extremely low, the area in suit being more than 26 acres and the rent only Rs. 10-3-0, whereas the circle rate for the land to which the plots in suit belong is Rs. 9 per acre. On that basis the rent should be at least Rs. 24. The lower Courts have found as a fact that the rent is favourable within the definition of section 107 (*i*) of the Oudh Rent Act and the Commissioner has found as the same rent has prevailed for a long period, its lowness is not accidental but deliberate.

I find no reason to disagree with the Commissioner's finding and I dismiss the appeal with costs.

Appeal dismissed.

JOGESH CHANDRA *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 944 OF 1919.
November 28, 1919.
Present:—Mr. Justice Chaudhuri
and Mr. Justice Newbould.
JOGESH CHANDRA LAHIRI—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), s. 9—Sale of morphia to patients by approved medical practitioner without license—Offence.

An approved medical practitioner is entitled under the Bengal Morphia Rules to possess a certain quantity of morphia drugs for use in his practice but not for sale. A medical practitioner who sells morphia, which he has prescribed to one of his patients, without a license is liable to conviction under section 9 of the Opium Act. [p. 660, col. 1.]

Rule against the order of the Deputy Magistrate, Rangpur, dated the 8th July 1919.

FACTS will appear from the judgment of the First Court and the petition to the High Court.

The following is the judgment of the First Class Magistrate, Rangpur:—

"The case for the prosecution is that the accused sold, without any license, from his dispensary at Nawabganj, a certain quantity of morphia in the form of Liq. Morphia Hydro. and a certain quantity of opium in the form of Tinct. Opii in contravention of rules made and notified under section 5 of the Opium Act, Act I of 1878.

In connection with some other excise article, the dispensary premises of the accused were searched on the 14th June last and among other things, three prescriptions were seized, the first prescription, Exhibit 1, bears date 22nd May 1919 and contains the item Liq. Morphia Hydro. The second prescription, Exhibit 2, dated 13th June 1919, was for Tinct. Opii, while the third prescription, dated 5th June 1919, contains among other drugs Liq. Morphia Hydro.

Three charges have accordingly been framed against the accused under section 9 of Act I of 1878 and as the three offences were committed within the space of twelve months from the first to the last of these offences, they are being tried together at one trial under section 234 (1) of the Criminal Procedure Code.

Altogether 5 witnesses have been examined by the prosecution and no evidence has been called by the accused. In his statement before the Court the accused says that he is a qualified medical practitioner and the articles which are the subject matter of the present case were used by him for his own patients.

It may be remarked here in passing that in Notification No. 562 S. R., dated 2nd March 1918, under section 5 of the Opium Act, "Qualified medical practitioner" has been defined to mean "any person registered or who is entitled to be registered as medical practitioner under any Medical Act in force in India."

No evidence has been adduced to show that the accused has been registered or is entitled to be registered as aforesaid. The fact that he practises as a doctor is a presumption but certainly nothing more than a presumption in favour of a registrable qualification. Every medical practitioner is not a qualified medical practitioner under the Act.

It has been urged by the defence that the charge relating to the sale of Tinct. Opii, as per prescription, Exhibit 1, is sufficiently answered by rule 53 of the notification which runs as follows:—A qualified medical practitioner may use intoxicating drugs in the course of his practice or may compound or dispense the same for the use of his own patients for *bona fide* medical purposes.

As stated above, it is doubtful on the evidence before the Court whether the accused is a qualified medical practitioner in the sense intended by the Legislature. I am, however, inclined to give him the benefit of the doubt. P. W. No. 3 Hem Chandra Bhattacharjea has stated that the prescriptions are in the handwriting of the accused It is clear, therefore, that the accused can claim immunity under rule 53 quoted above.

In the rule just quoted "Intoxicating drugs" mean according to section 2 (10) of the Notification No. 562 S. R. "every preparation or admixture of opium or of the poppy but does not include smoking preparations *morphia or its allied compounds* or poppy heads." The rules relating to morphia are contained in Notification No. 561 S. R. dated 2nd March 1918 made

and published under rule 5 of the Opium Act, 1878.

In these rules, hereinafter called the Bengal Morphia Rules, 1918, the provisions relating to sale are contained in sections 19 and 20. In these there is no provision corresponding to rule 53 of Notification No. 562 S. R. All sales under the Bengal Morphia Rules must be either by a licensed dealer or by a licensed chemist. No man can, therefore, sell morphia without a license.

The learned Pleader for the defence has placed a good deal of emphasis on provision 6 of the Bengal Morphia Rules which says "An approved practitioner may possess for use in his practice but not for sale morphia drugs not exceeding in the aggregate 120 grains."

It has been urged that "use in practice" is equivalent to "sale to his own patients." This contention the Court is unable to accept on the following grounds:—

First, the provision of rule 6 relates exclusively to the possession of morphia drugs and cannot in any way govern the substantive law relating to their sale which is regulated exclusively by the provisions of rules 19 and 20 under the heading V.—Sale.

Secondly, rule 6 states that "an approved practitioner may possess for use in his practice *but not for sale*," An emphatic distinction is made here between use in practice and sale. The argument that use in practice is a modified form of sale to one's own patients does not seem to be a sound one.

Thirdly, there is no provisions in the Bengal Morphia Rules corresponding to rule 53 of the Notification No. 562 S. R. If the Legislature intended to permit sale of morphia drugs by an approved practitioner to his own patients they would have provided for it explicity as they have done in the case of opium and intoxicating drugs.

Fourthly, rule 53 of the Notification No. 562 S. R. provides for

(1) Use in practice,

(2) Compounding for the use of one's own patients.

(3) Dispensing for the use of one's own patients.

A clear distinction has been made between case No. (1) and the other two cases. It would be logical to follow this distinction in interpreting rule 5 of the Bengal Morphia Rules.

Lastly, it is easy to note the distinction between use in practice and serving on a prescription to a man's patient. The former comprises cases where morphia administered to a patient on the spot, *e.g.*, in surgical operations or injunctions by the medical attendant. In the latter case it is a matter of pure chance that the prescribing doctor happens to have a dispensary of his own. His duty as a physician ends with drawing up the prescription. The patient is at liberty to obtain the medicine in the usual course at a chemist's shop duly licensed to sell under the Act.

Sale of morphia, therefore, without a license is clearly a contravention of the Bengal Morphia Rules, and as such punishable under the Act.

The prescriptions, Exhibit 1 and Exhibit 1 (2), show that morphia was supplied from the dispensary of the accused. The accused has not shown by the production of his account books or by examining his patients that no consideration passed for the supply of these drugs and the presumption is that they were not given away free of charge. On one of the prescriptions Exhibit 1 (2) is entered the word *gratis*. This is a piece of rebutting presumption on which the accused is entitled to the benefit of the doubt. But the fact that no such entry is made on the other prescription, Exhibit 1, is a strong presumption that its contents were not supplied *gratis*. Morphia Hydro, was certainly sold on this prescription Exhibit 1 dated 22nd May 1919. P. W. No. 2 says that accused has no license. No license has been hitherto produced. The accused is, therefore, found guilty on this charge under section 9 of Act I of 1878 and sentenced to pay a fine of rupees fifty only, in default one week's simple imprisonment.

The accused is acquitted in respect of the remaining two charges."

An appeal to the Sessions Court having been rejected, the accused applied in revision to the High Court.

The following are the material portions of the petition :—

"That the petitioner is a qualified and leading medical practitioner in the town

of Rangpur, where he has kept up a persistently honest reputation during the last 16 years of his practise and been elected to represent the locality on the Municipal Board.

2. That on the 14th June last the Superintendent and some other officers of the Excise Department raided his dispensary, held a search at which the petitioner rendered ungrudging assistance and took into custody three prescriptions dated respectively 22nd May 1919, 13th May 1919 and 5th June 1919.

3. That three test cases were then started against the petitioner under section 9 of the Opium Act and the petitioner was acquitted in such two of them as related to the last two of the said prescriptions.

4. That the prescription dated 22nd May 1919 was drawn up for one of the petitioner's patients who had undergone a surgical operation and was couched substantially in the following terms :—

R1. Liqr. Morphia Hydrochlor. m. X.
Aqua ... ... cz. 1V.
One dose to be taken as directed.

R2. Absorbent cotton 1 Packet.

5. That the total quantity of morphia contained in the said Recipe No. 1 was equivalent to the eleventh part of a grain, that the market price thereof is half a pice and that the price levied for the said prescription which had been served at the petitioner's dispensary was eight annas only.

6. That the charge formulated against petitioner in regard to the said prescription was that he had accepted consideration for the said item of morphia contrary to the provisions of the Bengal Morphia Rules.

7. That the prosecution furnished no evidence which could establish that the said sum of 8 annas or any part thereof was appropriated against the price of the said morphia.

8. That the learned Magistrate who tried the petitioner on the said charge discussed the law on the subject without properly considering in detail the evidence on record, and convicted the petitioner under section 9 of the Opium Act and sentenced him to pay a fine of Rs. 50 or in default to undergo one week's simple imprisonment.

9. That the petitioner thereupon moved the learned Sessions Judge of Rangpur for a reference to this Hon'ble Court under section 438, Criminal Procedure Code.

10. That the learned Sessions Judge held that the question of law was not free from doubt but accepting the interpretation placed thereon by the trying Magistrate refused the said motion on 2nd September 1919.

12. That being aggrieved by the said conviction and sentence the petitioner begs to move your Lordships on the following, amongst other,

GROUNDS.

I. For that in the absence of any evidence proving that the said sum of eight annas or any part thereof was charged against the price of morphia contained in the said prescription, the learned Magistrate has erred in law in convicting the petitioner under section 9 of Act I of 1878,

II. For that the market price of the said morphia being only half a pice, the learned Magistrate ought to have found that the said sum of eight annas was accepted as the price of the absorbent wool.

III. For that the facts found do not warrant a conviction under section 9 of the Opium Act.

IV. For that the interpretation put upon the word 'Use' in the Morphia Rules is too narrow and is not borne out by the context and by the frame of the Act.

V. For that learned Magistrate ought to have held that the said term included both use for consideration and use for no consideration and that the real limitation enacted by the clause in question was directed as against the class of persons to whom a qualified medical practitioner could sell morphia.

VI. For that the learned Magistrate ought to have held that there was no infringement of the opium rules by the petitioner.

VII. For that having regard to the *bona fide* manner in which the petitioner acted throughout the search and the trial and the uniform reputation for honesty and rectitude that the petitioner has borne during the course of his long practice, and to the almost negligible value of the morphia

used and alleged to have been charged for, the sentence passed upon the petitioner is too severe."

Babu *Girija Prosonna Sanyal*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.—This Rule has been granted limiting it to the ground that "the facts found do not warrant a conviction under section 9 of the Opium Act." The facts found are that the accused sold morphia as evidenced by his prescription, dated the 27th May 1919. And that it was not supplied *gratis*.

We think that the Magistrate was right in convicting the accused. We consider his judgment to be good and very well considered. Rule 6 expressly states that an approved practitioner may possess morphia for use in his practice but not *for sale*. The Magistrate is quite right in saying that there is a clear distinction between use in practice and sale to one's patients. We agree with the view expressed by him.

The Rule is, therefore, discharged and the conviction and sentence affirmed.

Rule discharged.

PATNA HIGH COURT.

CRIMINAL REVISION No. 69 OF 1920.

March 1, 1920.

Present:—Mr. Justice Jwala Prasad.

NIRGHIN MAHTON—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Penal Code (Act XLV of 1860), s. 193—Evidence Act (I of 1872), s. 80—Perjury, trial for—Prosecution, duty of—Recital in judgment, whether can take the place of deposition—Admissibility of recital—Sanction to prosecute, refusal to grant by trial Court—Sessions Judge, interference by, when justified.

In a prosecution under section 193, Penal Code, it is the duty of the prosecution to prove conclusively that the statement made by the accused was necessarily a false statement. [p. 661, col. 1.]

The recital in a judgment of a statement made by a witness cannot take the place of a record of the deposition of the witness, nor can such recital be accepted as evidence under section 80 of the Evidence Act, and it, therefore, cannot form the basis of a prosecution under section 193 of the Penal Code. [p. 662, col. 1.]

Where a trial Court which has the advantage of seeing a witness in the box, and is cognisant of the full facts in connection with the case, refuses to sanction the prosecution of the witness, the Sessions Judge should not, unless a clear case is made out against the witness, too readily adopt a different view and grant sanction. [p. 662, col. 2; p. 663, col. 1.]

Criminal revision against the order of the Sessions Judge, Patna, dated the 31st January 1920.

Messrs. *S. P. Varma*, *Sami* and *Ram Prasad*, for the Petitioner.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.

JAWALA PRASAD, J.—The petitioner has been convicted under section 193, Indian Penal Code, of having made falsely the following statement:—"There was no dispute in survey between me and the accused in respect of this orchard. Before the Attestation Officer, I did not say that the deed was a *farzi* one."

Nirghin Mahton, the petitioner, gave his evidence as a prosecution witness in a criminal case brought against Misri Lal by one Bulaki Sahu under section 323, Indian Penal Code, before Babu Dharikshan Singh, Deputy Magistrate, on 4th April 1919. In cross-examination on behalf of Misri Lal, he admitted having executed a sale-deed in favour of Misri Lal in respect of an orchard for Rs. 100 and denied that this sale-deed was a *farzi* one. Being further cross-examined he made the statement quoted above. The passage consists of two distinct statements. The Courts below have held that both the statements are false. The learned Sessions Judge has dealt with them together. I would prefer to deal with them separately.

As to the first statement—"There was no dispute in survey between me and the accused in respect of this orchard"—it is clear from the statements both by Misri Lal and Qanoongo Ram Gobind Sahay (P. W. No. 3) that there was no dispute between the petitioner and Misri Lal during the survey. Misri Lal clearly states that there was no *tanaza* at the time of *khanapuri* which took place 2 years ago (1917) and that the petitioner filed a *tanaza* (dispute) for the first time on the occasion of the

attestation in 1919. Qanoongo Ram Gobind Sahay also says the same thing. He clearly states that the survey operations terminated with the stage of *khanapuri* in the year 1917 and that the dispute was filed at the attestation. He says that up to the stage of *khanapuri* it is survey operation and the subsequent stages are the settlement operations. He, therefore, makes a clear distinction between the survey and the settlement stages. No doubt the petitioner filed a *tanaza* at the attestation after the settlement stage had commenced, and the survey operations had ceased two years before that in 1917. The Courts below also recognized this distinction, but overruled the contention of the accused by the observation that these people generally understand by the word 'survey' the whole operation. When there is a distinction between the survey and the settlement stages as is recognized by the expert witness Qanoongo, the accused may fairly contend that he was strictly true in his statement "there was no dispute in survey between me and the accused in respect of this orchard." There is no evidence on the record that the people generally understand by the word 'survey' the attestation stage also which is a part of settlement operations, much less is there any evidence that the accused actually did understand so by the word 'survey' or that he was not making the distinction which actually exists between survey and settlement operations. Moreover, the statement quoted above was made in answer to a question in cross examination and apparently the question must have been—Was there any dispute between him and the accused in survey—and if the answer of the accused was "no," the above statement would appear in the form in which it finds place in the evidence of the accused. The question then arises in what sense the learned cross-examiner used the word 'survey,' whether he used it in the technical sense in which it is used by the survey authorities, or in the more popular sense. There is no evidence on the record of this case as to the meaning of the word 'survey' in the question put by the cross-examiner. It lay upon the prosecution to prove conclusively that the statement in question made by the accused was necessarily a false one. The prosecution has, to my mind, failed to discharge this onus and the accused cannot be convicted upon a dubious interpretation of the word 'survey.' The prosecution has, therefore, failed to prove that the statement in question was necessarily false.

As to the second statement, namely, "Before the Attestation Officer, I did not say that the deed was a *farzi* one," its falsity rests entirely upon the judgment of the Assistant Settlement Officer, dated the 15th January 1919, Exhibit A, in the body of which at one place the following passage occurs:—

"Nirghin Mahton 1st party who says that the sale deed, dated the 2nd December 1913, in favour of Isri Lal is a *farzi* one and does not substantiate it by any evidence."

It is obvious that the above is not a record of the verbatim statement or a translation of the verbatim statement made by accused on an examination of him by the Attestation Officer. The Attestation Officer during his investigation might have put some question to the petitioner and he might have made some statement to him. It is not clear whether the above passage in the judgment of the Attestation Officer is quoted from the statement of the petitioner actually made before him, or it is a statement of the petitioner's case taken from the dispute list prepared by the Qanoongo five days before the judgment of the Attestation Officer. In any case, the recital in the judgment cannot certainly take the place of a record of the deposition of the petitioner. The Qanoongo admits that there is no record by the Attestation Officer that the petitioner was examined on solemn affirmation or that his deposition was explained to him. He is positive that the deposition was not signed by the accused. Apparently the Qanoongo himself does not remember, and cannot possibly be expected to remember, the exact statement made by the witness when he himself did not examine the petitioner or record his statement. He does not pretend to know the exact words in his examination-in-chief and it is clear that he has simply to rely upon the passage quoted above in the judgment of the Assistant Settlement Officer in order to prove what the statement of the petitioner was before the latter officer. This is clear from the following statement

in his cross-examination on behalf of the petitioner:—

"Nirghin stated before the Attestation Officer that the sale-deed which he had executed in favour of Isri Lal was a *farzi* one".

It is the case of the prosecution that the word "Isri" in the above statement is not that of the petitioner. According to the Qanoongo the above is a faithful record of what the petitioner stated before the Assistant Settlement Officer, for he does not say that the petitioner stated Misri Lal, and that the Assistant Settlement Officer by mistake recorded 'Isri Lal.' If the Qanoongo is correct, then the case of the prosecution has no legs to stand on. The Courts below, however, explain it away by holding that Isri Lal must be a mistake for 'Misri Lal.' Be that as it may, the record of the statement of the petitioner in the judgment is not very faithful. It does not purport at all to be a deposition of the petitioner, for the recital above is incomplete. It has not been proved by the best evidence in the case, namely, that of the Assistant Settlement Officer, who recorded it, and in a case of this kind it is not permissible to prove the statement by secondary evidence, such as that of the Qanoongo. What was stated by the witness to the Assistant Settlement Officer could only be proved by him or by a record of the deposition of the petitioner with all the formalities required by law. The recital in the judgment cannot be accepted as evidence under section 80 of the Evidence Act. Besides, the attention of the petitioner was not drawn to the statement in question while he was being cross-examined in the Court of the Deputy Magistrate Babu Dharikshan Singh, when he is supposed to have made a contrary statement, and no chance was given to him to explain it or to correct himself, for it was open to the petitioner to correct himself at any stage of his examination before Babu Dharikshan Singh. The learned Assistant Government Advocate concedes that the attention of the petitioner was not drawn to the previous statement said to have been made by him on the strength of which the petitioner has been convicted. It is obvious that the attention could not have been drawn to it because the dispute list itself was not in the hands of the cross-examiner at the time when the statement in question, the subject-matter in charge, was made by the accused. The *tanaza* and the decision of the Assistant Settlement Officer, Exhibit 2, were filed in the Court of the Deputy Magistrate on the 15th April 1919, while the witness was examined on the 4th April 1919. It has not, therefore, been proved in this case that the second statement also, namely, "Before the Attestation Officer I did not say that the deed was a *farzi* one" made by the petitioner before Babu Dharikshan Singh is false.

The result is that the conviction of and the sentence passed against the petitioner must be set aside and the fine, if already paid, should be refunded.

It may not be out of place to allude here to the way in which the prosecution was started in this case. The Deputy Magistrate before whom the petitioner was examined refused to give sanction to Misri Lal to prosecute the petitioner for perjury on very strong grounds, namely, that there was no *mala fide* intention on the part of the petitioner in making the statement in question, that Misri Lal was a man of fighting temperament, and sanction was applied for to wreak vengeance on the petitioner who had ventured to depose against him and finally that the case was not a fit one in which sanction should be given. The learned Sessions Judge, to whom Misri Lal appealed against the order of the Magistrate refusing sanction, agreed with the Magistrate that it was not a fit case in which sanction should be given to the complainant, but he himself directed the prosecution of the accused under section 476 of the Code of Criminal Procedure. No doubt discretion is vested in the Sessions Judge to direct prosecution under section 476 of the Code and this Court declined at that stage to interfere with that discretion. It is clear, however, that the learned Sessions Judge would have been well advised if he had used his powers sparingly in this case. When the trial Court, which had the advantage of seeing the petitioner in the box and was cognizant of the full facts in connection with the case in which the petitioner was examined, did not think it right to give sanction for

prosecution, the learned Sessions Judge should have been chary in taking a different view unless the case was clearly made out against the petitioner. He had the record with him and had he fully considered the matter, he would not have perhaps himself started the prosecution in this case. There was at least a clear case of doubt as to whether the statement made by the accused was false and the benefit of the doubt should have been given to the petitioner and he should not have been put on his trial on an off chance of conviction.

Conviction and sentence set aside.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 208-B of 1919.

August 25, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge.

MAHOMED HOSAIN—APPLICANT

versus

MA PWA HNIT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Muhammadan Law—Maintenance, order for—Divorce, effect of—Period for which order effective.

A Muhammadan wife obtained an order for maintenance, and applied to the Court for the recovery of arrears due thereunder. The husband pleaded that he had divorced her, and was, therefore, no longer bound by the order. The wife denied knowledge of the divorce, which she alleged was pronounced in her absence and which come to her knowledge only when her husband raised the plea:

Held, that the order of maintenance would become inoperative on the expiration of the divorced wife's *iddat*, and that, in this case, that period should not be deemed to have expired until the expiry of three months from the date on which she was made cognisant of the divorce. [p 664, col. 1.]

Mr. *Rahman*, for the Applicant.

Mr. *Vakharia*, for the Respondent.

JUDGMENT.—The applicant Mahomed Hosain was ordered on the 17th November 1917 to pay Rs. 25 a month for the maintenance of his wife Ma Pwa Hnit and Rs. 15 a month for the maintenance of his three children by her. On the 12th August 1918 Ma Pwa Hnit applied to the Magistrate for the recovery of arrears of maintenance money on the above order. On the 3rd September 1918 the applicant filed a petition pleading that he had divorced her on the 19th July 1918 and, therefore, that he was no longer bound to pay for her maintenance. The Magistrate held that there was no valid divorce and he dismissed the applicant's petition. The applicant then filed a petition in the Sessions Court in revision, and the learned Sessions Judge has submitted the proceedings to this Court with his opinion that the applicant divorced the respondent according to Muhammadan Law on the 19th July 1918 and that he was entitled to have the maintenance order cancelled on the expiry of three months from that date, *i.e.*, the expiry of the period of *iddat*.

Both parties were represented by Counsel at the hearing of the case in this Court. For the respondent it is not now urged that the divorce is invalid, but it is urged that the wife was not cognizant of the *talak* which was pronounced in her absence, and secondly, that the respondent was not shown to be in a state of "purity" at the time of its pronouncement.

The applicant's case was that although the *talak* was pronounced in the respondent's absence, she was informed of the divorce by letter. She denies receiving any letter about it and it cannot be held that she did receive such a letter. The law is clear that the repudiation to be effective must come to the wife's knowledge, and it cannot be held in this case that she became cognizant of it till the 3rd September 1918 when the applicant filed his petition against the continuance of the maintenance order.

The condition as to "purity" appears to be essential in the case of Shias, but not in the case of Mahomedans governed by the Hanafi School of Law (*vide* Amir Ali's Muhammadan Law, 4th Edition, Volume 2, page 56). The parties in this case are said to be Sunnis, *i.e.*, belonging to the Hanafi School. But, in any case, it has never been pleaded by the respondent that she was not in a state of "purity" at the time of the divorce. It is a matter specially within her own knowledge, and in the absence of any plea to the contrary I think it is right to assume that she was in a state of "purity."

According to the ruling in the Allahabad

case of *Din Muhammad, In the matter of the petition of* (1) which was followed in *Maung Ba Shwe* v. *Ma Nyun* (2), the order of maintenance does not become inoperative until the expiration of the divorced wife's *iddat* or term of probation. In the present case the *iddat* should not be deemed to have expired until the expiry of three months from the date on which Ma Pwa Hnit was made cognizant of the divorce, *viz.*, three months from the 3rd September 1918. Her maintenance is, therefore, payable by the applicant up to the 3rd December 1918.

The order of the 1st Additional Magistrate, Wakema, dated 24th February 1919, in Criminal Miscellaneous Case No 48 of 1918, is modified accordingly; that is to say, the applicant must continue to pay his wife's mainterance up to 3rd December 1918. The payment of Rs. 25 for the wife should cease from that date, the original order for maintenance continuing only as regards the monthly payment of Rs. 15 for the three children.

Order modified.

(1) 5 A. 226; A. W. N. (1882) 237; 3 Ind. Dec. (N. S) 193.

(2) 9 Ind. Cas. 457; 4 Bur. L T. 13; 12 Cr. L. J. 82.

PATNA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 29 OF 1920.

April 28, 1920.

Present:—Mr. Justice Jwala Prasad.

REKHA AHIR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Apprehension against fair and impartial trial—Delay in examining complainant—Disregard of preliminaries prescribed by Code, effect of.

In dealing with applications for the transfer of cases each case must be decided upon its own circumstances. [p. 666, col. 1.]

It is not every kind of apprehension that will entitle an accused person to a transfer of the case against him; there must, upon the record, be reasonable grounds for apprehending that the trial would not be fair and impartial. Inordinate delay in examining the complainant, or a disregard of the preliminaries prescribed by the Code of Criminal Procedure for dealing with complaints, and awaiting the consideration of the evidence in another case with which the accused has no concern, in order to decide whether any action should be taken upon the complaint, are matters which afford reason to the accused to apprehend that he will not have a fair and impartial trial, and such a case is a proper one in which to direct a transfer. [p. 666, cols. 1 & 2.]

Criminal revision against the order of the District Magistrate, Chapra, dated the 9th March 1920, refusing to transfer a case pending against the petitioner in the Court of the Sub Deputy Magistrate, Gopalganj.

FACTS appear from the following order of the Deputy Magistrate, Gopalganj, dated the 3rd March 1920.

"Accused Rekha Ahir only appears. The service report of summonses against the remaining accused read: they have been hung up and served. The learned Pleader on behalf of the present accused raises the question of my jurisdiction in trying the case on the following grounds:—

1. That the summons was not issued on hearing the complainant on examination but upon the evidence of the other case and that this Court has taken cognizance of the complaint under section 190 (*c*), Criminal Procedure Code, and if it has not, the examination of complainant was necessary.

2. That his case, according to my order dated 30th January 1920 should have been seen after the disposal of the other case and as such the order passed on 19th February was illegal.

(3) That the complainant should have been examined at once and not after a long time on 21st February.

The cognizance of this complaint, the protest petition being treated as complaint, was already taken by the Sub-Divisional Magistrate and I have no such power as a Subordinate Magistrate. I examined the complainant under section 200, clause (*c*), as this must be done according to my interpretation and impression. The evidence of the other case led me to hold that there is a *prima facie* case against the accused in this case. I think the time taken to consider and pass the orders dated 19th February and 21st February acted as a substitute of a preliminary enquiry for proceeding with a trial. The order dated 30th January was not a judgment and I think I am entitled to review it, being an ordinary order of this proceeding. The time taken is not long, as the full facts in the written statement of the accused in the other case were given on 14th February and the case diary was not

shown to me till I heard the argument. I find that the grounds urged are not sound and legally justified."

Messrs, *A. B. Mukherjee* and *Rai Guru Saran Prasad*, for Mr. *B. N. Mitter*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

JWALA PRASAD, J.—Upon the information of one Kuldip Rai, lodged on 15th November 1919, two occurrences were disclosed: one between himself and Chandra Khan in the field of the latter judgment-debtor, and the other between the complainant's men and some other persons in Bishunpura Bazar. The complaint in both the cases was one and the same, but the place of occurrence and the accused were different in both the cases.

The Sub-Inspector submitted his report in respect of both the occurrences, holding that the first occurrence was proved in respect of which he submitted a charge-sheet, and that the second was not proved.

The accused in the first case were upon the charge-sheet put on their trial and the case was made over to the Sub-Deputy Magistrate of Gopalganj for disposal. The witnesses for the prosecution in that case were examined between the 27th and the 29th November. On the latter date, the complainant put in a petition, before the Sub-Divisional Officer of Gopalganj, expressing his dissatisfaction with the report of the Police as regards the second occurrence. That complaint was transferred to the same Deputy Magistrate who was holding trial in the first case, for disposal.

On the 30th January the Sub-Deputy Magistrate, without examining the complainant, ordered the case to be put up after the disposal of the first case. The arguments in the first case finished on the 14th February. On the 19th February the Magistrate made the following order in the second case:—

"Considered the evidence in the other case. Issue notice to Kuldip Rai to appear on 21st February 1920 for his examination."

On the 21st February, the complainant was examined on oath, and the accused in that case was summoned under sections 147 and 323, Indian Penal Code, fixing the 3rd March for hearing. That was the date fixed for the delivery of judgment in the first case, but the judgment was not delivered and was adjourned to 18th March.

The accused in the second case objected to the trial of their case on the ground that cognizance was not properly taken and that they were summoned not upon the merits of the complaint, nor upon any enquiry held under section 202 of the Code of Criminal Procedure, but that they were summoned upon the impression of the Magistrate on the evidence recorded in the first case with which the accused in the second case had no concern.

The Magistrate overruled this contention, observing as follows :—"The evidence of the other case led me to hold that there is a *prima facie* case against the accused in this case. I think the time taken to consider and pass the orders dated 19th February and 21st February acted as a substitute of a preliminary enquiry for proceeding with a trial."

It is thus clear that but for what was disclosed in the trial of the first case the Magistrate would not have thought of taking any action upon the complaint in the second case.

The petitioners moved this Court against the order of the Magistrate summoning them, on the ground that it was illegal. That petition was summarily rejected. They then made the present application for transfer of the case to the file of some other Magistrate. This application was admitted and has now been put up for hearing. I have, therefore, to consider whether there is sufficient ground for transferring the case from the file of the Sub-Deputy Magistrate to that of some other Magistrate.

The petitioner urges that there is reasonable ground for his apprehension that he will not receive a fair trial at the hands of the Magistrate. The learned Assistant Government Advocate strenuously opposes this application. In support of his contention, he cites the authority of *Amrit Mondal* v. *Emperor* (1) decided

(1) 37 Ind. Cas. 159; 1 P. L. J. 299, 18 Cr. L. J. 95; (1917) Pat. 30; 3 P. L. W. 70.

by a Bench of this Court. That decision related to a counter case and it was held there that there was no reasonable ground for apprehension, merely because the Judge in a former case had expressed certain views as to which of the two versions was correct. The learned Vakil on behalf of the applicant distinguishes that case from the present one upon the ground that the case on the evidence of which the Magistrate summoned the accused was not a counter-case to the present one.

Without expressing any opinion as to whether this distinction is real or otherwise, I think that in a case of transfer each case is to be decided upon its own circumstances. It is true that every kind of apprehension will not entitle an accused person to a transfer of his case, but that upon the record there must be reasonable ground for an apprehension that the trial would not be fair and impartial. In the present case the Magistrate had inordinately delayed the examination of the complainant when the complaint was transferred to him on the 30th January. The Code requires that the complainant should be examined as soon as the complaint is presented, though there is no limit of time prescribed for it, and when a complaint is transferred under section 192 of the Code to another Magistrate without the complainant having been examined by the Magistrate taking cognizance of it, the Magistrate to whom the case is transferred is equally required to forthwith reduce the examination of the complainant on oath to writing. If the Magistrate had then examined the complainant, he would have been in a position to determine solely upon the merits of the complaint whether the accused should or should not be summoned, and if he had distrusted in any way the truth of the case he would have started an enquiry under section 202 of the Code. There was absolutely no reason for the Magistrate to disregard these preliminaries prescribed by the Code and to await the consideration of the evidence in another case in order to decide whether any action should or should not be taken upon the complaint in question. And when after a lapse of three months after the first information was lodged, which the Police on local inspection had reported to be untrue, and when long after the complaint was filed in Court, the Magistrate suddenly, upon something that transpired in a case with which the accused had no concern, thinks of starting a prosecution against the accused and summoning him without in any way enquiring as to the truth or otherwise of the belated complaint, it cannot be said that the accused had not reason to apprehend that the Magistrate was unduly prejudiced against him. The other case was over on the 14th February and the Magistrate had considered the evidence in that case so far as the charge against the present accused was concerned, yet he did not like to let the accused know his own views of the evidence, by delaying the delivery of his judgment in that case and putting it off from day to day until three months have already elapsed. Why this concealment from the accused? The accused was entitled to know the clear views of the Magistrate upon the evidence in the other case which led him to believe the truth of the present complaint. If the judgment in that case were delivered, the accused would perhaps have been in a better position to judge of the ground upon which the Magistrate acted in that case for summoning him in the present case. He would then have been perhaps in a better position to meet the grounds upon which the evidence in that case was held by the Magistrate to bear upon the truth or otherwise of the present case.

These grounds may not be sufficient to impugn any real bias in the mind of the Magistrate against the petitioner, yet they are sufficient to raise a reasonable apprehension in the mind of the accused as to his receiving fair and impartial trial.

To my mind, strong grounds have been made out for the transfer of this case, and I, therefore, direct that this case be heard by some other Magistrate available at Gopalganj, or by any other Magistrate near that Sub-Division either at Sewan or at Chapra, to be selected by the District Magistrate of Saran.

Application allowed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 219 OF 1920.

May 10, 1920.

Present:—Mr. Justice Shadi Lal, Chief Justice, and Mr. Justice Wilberforce.

SUNDAR SINGH AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Approver—Statement made at end of trial, value of—Corroboration—Statements extorted by Police under threat of implication, value of.

An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief for various reasons, but the uncoroborated statement of an approver taken at the end of the trial is of no value whatever. [p. 668, col. 2.]

Statements of witnesses extorted by the Police under threats of implication in the crime cannot fail to detract from the value of their evidence, especially where they had no reason for refraining from deposing against the culprits. [p. 668, col. 1.]

Appeal from the order of the Sessions Judge, Gurdaspur, dated the 26th February 1920.

Bakhshi *Tek Chand* and Lala *Diwan Chand Saini*, for the Appellants.

Mr. *Herbert*, Government Advocate, for the Respondent.

JUDGMENT.—In this case the Sessions Judge of Gurdaspur, agreeing with the Assessors, has convicted Sundar Singh and Harnam Singh of the murder of one Udham Singh on the night of the 13th of October last and has sentenced them to be hanged. We have heard their appeals argued exhaustively by Mr. Tek Chand and the sentences of death are also before us for confirmation. The third accused in the same case, Hazara Singh, became an approver after the conclusion of the prosecution evidence and was discharged.

Briefly the story for the prosecution is that the two brothers, Sundar Singh, and Harnam Singh, had been much troubled in civil and criminal litigation by Udham Singh. There had been one criminal case between them in which some of the family of the accused were fined under section 323 in 1914, and there had been three pre-emption cases of which one was pending on the date of the murder. On the day before the murder a Local Commissioner had visited the village in order to ascertain the cost of a well sunk on the land in dispute, and on this occasion abusive language is said to have passed between the parties. Embittered by this litigation the two brothers, Sundar Singh and Harnam Singh, are said to have determined to remove their troublesome enemy and to have obtained the assistance of their cousin Hazara Singh. They, therefore, visited his *bara* where he was sleeping, early in the night, and after killing him there took his body on a mare to the river, some ten miles away, and cut it up in small pieces and threw it in the river. Their crime was witnessed by four persons, Amir *chowkidar*, Kharak Singh, Natha Singh, and Gurbattu. There was also much other evidence produced of persons who saw them going to and coming back from the river after the occurrence, and there was also evidence of the discovery of the bones of the deceased and of other articles belonging to him or to the murderers. Finally there was a detailed statement of the approver. Mr. Tek Chand has in very scathing language criticised the whole of this evidence and asks us to hold that it is false from the beginning to the end. He does not, however, seriously press his ground of appeal that Udham Singh has not been murdered. The whole of the case, as Mr. Herbert for the Crown admitted, depends upon the credibility of the eye-witnesses and the approver and we will, therefore, begin by examining their evidence. At the time of the murder the moon had apparently just risen and it was easy, therefore, for persons well acquainted with the accused to recognise them from a short distance. There were several people sleeping in the vicinity and of these four are said to have been awakened by the noise and to have seen the murderers. As is shown by the plan, the witnesses were standing round the scene of the occurrence. None of them interfered and the accused were able to take away the body unmolested. Immediately after their departure the relations of the deceased, *lambardars* and other villagers arrived and after some sort of pursuit Lachman Singh, the first cousin of the deceased, went with Amir *chowkidar* and others to report the case to the Police. Inspite, however, of the presence of the alleged eye-witnesses on the spot before his departure and his knowledge which he must have obtained

from them, he made a report that his suspicion fell upon nine persons among whom the three accused were included. This statement was not contradicted by Amir *chowkidar*, who was present. It is suggested that Amir and other witnesses did not disclose their knowledge out of fear. We find it difficult, however, to accept this theory as the culprits had long departed, and as none of the eye-witnesses, except Gurbattu, were well disposed to the accused. The above circumstances are in no way in favour of their credibility, and our distrust of their evidence is further increased by the circumstances in which they came forward to give their evidence. According to the statements of the witnesses themselves, none of them disclosed their knowledge on the arrival of the Police and eventually only after some Police pressure. It may be noted that no proper invetigation began till the 15th. Natha Singh says that he made his statement on the 16th. Kharak Singh says that he did not speak out till 4 or 5 days after the occurrence, and then only after having denied all knowledge and after having been threatened by the Sub-Inspector of Police that he himself would be implicated unless he made a statement. The same was the case with Gurbattu. The *zimnis* show that Natha Singh and Kharak Singh made their present statements on the 16th, and this is probably correct, but there is no information on the record to this effect as although the Sub-Inspector says he enquired from them on this date, he does not say that they made their present statements on the 16th. The fact that the statements of the witnesses were extorted by the Police under threats of implication in the crime cannot fail to detract from the value of their evidence and this is especially the case when none of them, except, perhaps, Gurbattu, had any reason for refraining from deposing against the culprits. As for Amir *chowkidar*, it is obvious that his present statement is worthless and it has been rightly discarded by the Court below. We notice also that on the 15th he said to the Police that he had seen four murderers but could not identify them.

The Sessions Judge did not trust Gurbattu and we agree with his opinion regarding this witness. He, however, believed Kharak Singh and also Natha Singh to a modified extent. We do not believe Natha Singh to any extent, as he is badly disposed towards the accused and would certainly have spoken against them at once. We are not also inclined to trust Kharak Singh in view of the first report, and his subsequent denial of all knowledge, and the fact that he made his final statement under Police pressure.

We do not believe any of the eye-witnesses, and there remains the statement of the approver made, as we have mentioned, at the conclusion of the trial. He was aware of the statements made by the witnesses and whatever his previous knowledge, he was in a position to make the statement which he did, and he had every inducement to make it. His statement threw no new light on the case and no material corroboration of it was possible. An approver's evidence is in itself tainted evidence, though in some cases it may be worthy of belief for various reasons, but we hold without hesitation that the uncorroborated statement of an approver taken at the end of the trial is and must be of no value whatever, and we have some difficulty in understanding why the Sessions Judge tendered a pardon to Hazara Singh.

The evidence of the eye-witnesses and the approver being disbelieved, it is obvious that the prosecution case must fail, but there are some other pieces of evidence relied on by the Sessions Judge which require a brief discussion. In the first place Sundar Singh is said to have pointed out the place where the body of the victim was cut up into pieces and thrown in the river, and from this place humman bones were said to have been found. The Sessions Judge held that the pieces of bones found were undoubtedly those of a human being, but as Mr. Tek Chand points out, this finding is in no way warranted by the medical evidence. The Doctor said that he could give no information as to 25 pieces of bones, but that one piece might have formed part of the temporal bone and that he was uncertain on this point. There is, therefore, doubt as to the nature of the bones found.

In the second place Mr. Tek Chand contests the admissibility of the statement said to have been made by Sundar Singh, which led to the discovery. He points out that Hazara Singh had admittedly given full information before Sundar Singh made his statement. It is not necessary, however, for us to discuss the legal admissibilty of this evidence, as it is not shown that any discovery was made in consequence of Sundar Singh's statement. At the same place a *jhul* and a rope belonging to Hazara Singh were said to have been found, but as pointed out by Mr. Tek Chand, this evidence would only tell against Hazara Singh. However, there appears to us considerable doubt as to the identity of these articles. Regarding the *jhul*, there is only the statement of one witness which appears worthy of little credit, while the mother and the brother of Hazara Singh both denied that it belonged to him.

There is also some evidence regarding the recovery of a saddle said to have been used on the mare when going to the river and a *jhul* belonging to the deceased. They are said to have been found in the *chari* field of Bahadur Singh. But this recovery was made in the absence of the Police and through one Tara Singh, who is very hostile to the accused, It is not surprising that the *jhul* bore marks of human blood but such marks were absent on the saddle. We do not think this evidence of any value.

Finally there remain the statements of the persons who saw the accused going to and coming back from the river. The evidence of most of them has been disbelieved by the Sessions Judge and rightly so, in our opinion. He thinks, however, that Bhagat Singh and Nathu *chuhra* might have seen Hazara Singh and Sundar Singh returning from the river. Bhagat Singh, however, is obviously a hostile witness and he was produced by Tara Singh and other enemies of the accused, while Nathu *chuhra* is a servant of Bhagat Singh. There are other reasons for disbelieving this witness which need not be mentioned.

After a careful hearing of the case and a perusal of the evidence and the Police diaries, we are unable to be satisfied as to the guilt of the appellants and we, therefore, accept their appeal and acquit them.

Appeal accepted.

PATNA HIGH COURT.

CRIMINAL REVISION No. 119 OF 1920.

April 23, 1920.

Present:—Mr. Justice Sultan Ahmed.

Sheikh **NURUL HASSAN**—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust by servant—Trust, nature of, to be established—Transaction involving adjustment of accounts—Retention of money, whether offence.

Accused was employed as agent by the complainant to collect on his behalf the taxes of the Union Committee. He was to receive as remuneration 10 per cent. of the collections, and was to hand over the collections, less his remuneration, to his master or to pay the money into the treasury, no period being fixed for the latter purpose. It was alleged that while in charge of the collections he failed to account for a certain sum of money collected by him. He was accordingly convicted of criminal breach of trust under section 406 of the Penal Code:

Held, that in such cases the nature of the trust should be established; that as the accused was entitled to deduct his remuneration from the collections, and as no period was fixed for payment into the treasury, a charge of criminal breach of trust could only be maintained after an adjustment of accounts, the mere fact that he retained the sums collected not being conclusive proof of criminal breach of trust, and that the conviction was, therefore, not maintainable. [p. 670, cols. 1 & 2.]

Criminal revision against the order, dated 21st February 1920, of the District Magistrate, Bhagalpur, against the order of the Deputy Magistrate, 2nd class, Madhepura, dated 8th January 1920.

Mr. *Khurshed Hasnain*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

SULTAN AHMED, J.—This is an application on behalf of one Shaikh Nurul Hassan against his conviction and sentence under section 406 of the Indian Penal Code. The case for the Crown is that he between the 18th August 1918 and the 27th March 1919, being entrusted with the collection of taxes of the Madhepura UnionCommittee, committed

breach of trust in respect of Rs. 53-2. The facts in the case are not very much disputed. It appears that the accused was employed as agent by Rameshar Marwari to collect on his behalf the taxes of the Union Committee. The remuneration of the accused was fixed by Rameshar Marwari to be 10 per cent of the collection. It appears that before the 12th October 1919 one Sudama Prasad was employed by Rameshar for this purpose. His services having been dispensed with on that date Nurul Hassan, the present accused, was appointed as Rameshar's agent, and the case for the Crown is that during the time that he had been in charge of the collection of the taxes he committed criminal breach of trust with respect to Rs. 53 2. On these facts the accused was convicted under section 406, as stated above, and sentenced to four months' rigorous imprisonment. An appeal having been preferred, the conviction and sentence were upheld. This application has now been filed in this Court, and a Divisional Bench of this Court issued a Rule to show cause why the conviction and sentence of the petitioner should not be set aside. The learned Vakil appearing on behalf of the petitioner mainly contends that the petitioner could not be convicted under section 406, Indian Penal Code, unless it was found that he dishonestly misappropriated or disposed of the money in violation of any direction of law prescribing the mode in which such trust was to be discharged or of any legal contract, express or implied, that touched on the discharge of such trust. Rameshwar Marwari who was cross-examined in the case stated as follows:—"I had instructed Nurul Hassan to bring the collection amount to me or deposit that in the treasury. I had not fixed any period for depositing the collection money into the treasury". It is obvious that the accused was a servant of Rameshar Marwari and had nothing to do with the Union Committee, and if he deposited the sums collected by him into the treasury he did so on behalf of his principal Rameshar and, therefore, it is absolutely clear that if there was any trust that trust was created by Rameshar, and before the conviction under section 406 of the Indian Penal Code can be maintained, it is necessary to know the terms under which that trust was created. On the evidence of Rameshar Marwari, which I have quoted above, it is obvious that Rameshar had not fixed any period for the deposit of the collection money into the treasury. Then secondly on the facts found the accused had to receive 10 per cent. of the collections as his remuneration, and it appears from the prosecution evidence that the previous agent Sudhama Prasad used as a matter of fact sometimes to deduct his remuneration of 5 per cent. from the collection that he used to make. Unfortunately no reference has been made to this evidence either in the judgment of the trial Court or the judgment of the lower Appellate Court. If this evidence is accepted, then the accused would be entitled to a deduction of 10 per cent. of the collection as his remuneration. On the evidence of Rameshar quoted above and also on the evidence that Sudhama Prasad used to retain 5 per cent. as his remuneration, in my opinion no charge of criminal breach of trust can be maintained without an adjustment of accounts between Rameshar and the petitioner. The conviction and sentence of the petitioner must, therefore, be set aside.

It was held in the case of *Mathura Prasad* v. *Emperor* (1) that "the retention of money by a servant or clerk for fifteen months after its receipt raises a very serious doubt of *bona fides* against him, but the mere retention is not conclusive proof of criminal misappropriation or criminal breach of trust". If there had been evidence on the record that Rameshar had fixed any period for depositing the collection money into the treasury, surely the conviction of the accused would have been upheld, but in the absence of that evidence the conviction must be set aside. The result is that the conviction of the accused under section 406 is set aside. He will now be discharged from his bail.

Conviction set aside.

(1) 40 Ind. Cas. 203; 18 Cr. L. J. 655.

LAHORE HIGH COURT.

CRIMINAL REVISION APPLICATION No. 1612 OF 1919.

May 8, 1920.

Present:—Mr. Justice Dundas.

SRI NAWAS AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 131, 135—"Soldier," meaning of—Definition in Articles of War, scope of.

The word "soldier" in section 135 of the Indian Penal Code must be interpreted as in the Explanation to section 131 of the Code.

The definition of the word "soldier" given in the Indian Articles of War is expressly confined to those Articles and is a very limited one.

Application, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Ambala, dated the 27th January 1919, affirming that of the Magistrate, 1st Class, Ambala, dated the 30th November 1918.

Mr. *Jai Gopal Sethi*, for the Petitioners.

JUDGMENT.—On consideration I have come to the conclusion that the word "soldier" in section 135, Indian Penal Code, must be interpreted as in the Explanation to section 131.

The definition given in the Indian Articles of War is expressly confined to those Articles and is a very limited one:

There is apparently no doubt that Chajju was enlisted at the time and no question as to the facts.

The petition is, therefore, rejected.

Petition rejected.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 59 OF 1920.

April 30, 1920.

Present:—Mr. Justice Scott-Smith.

ABDUL KARIM—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—Information, necessity of, before initiation of proceedings—Magistrate, whether can issue process on his own knowledge—Procedure.

Prior to the initiation of proceedings under section 107, Criminal Procedure Code, information must be given against a person from whom it is sought to take security. [p. 672, col. 1.]

Where the petitioner made an application under section 107, Criminal Procedure Code, against one *A.* and the Magistrate, on taking his statement, recorded an order that the petitioner was a quarrelsome fellow and called upon him to show cause why he should not be bound down, and eventually did place him on security under section 107:

Held, (1) that it was quite illegal for the Magistrate to issue notice to the petitioner merely because he considered from his own statement that he was a quarrelsome person: [p. 672, col. 1.]

(2) that no information such as is required by section 107 having been given to the Magistrate, the initiation of the proceedings was *ultra vires*. [p. 672, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Ambala, dated the 10th December 1919, affirming that of the Magistrate, 1st Class, Ambala, dated the 25th November 1919.

Sayad *Mohsin Shah*, for the Petitioner.

JUDGMENT.—This is an application by Abdul Karim for revision of an order of a First Class Magistrate, which has been confirmed by the District Magistrate, placing him on security under section 107 of the Criminal Procedure Code. The petitioner himself made an application against Abdullah and others, saying that they bore him enmity and asking that they might be bound over under section 107. Upon this the Magistrate took his statement and at the conclusion thereof recorded an order that he was himself a quarrelsome fellow, and called upon him to show cause why he should not be bound over under the aforesaid section. Evidence was subsequently recorded against him and the order complained of was made. The Magistrate in his order says that the petitioner fights and quarrels with everybody and that the facts show that there is

a fear of a breach of the peace from him. The District Magistrate in his order merely finds that the petitioner is a quarrelsome person, not that there is any fear of his committing a breach of the peace.

In revision it is urged that it was illegal for the Magistrate to issue notice to Abdul Karim, when no information had been given against him and merely because the Magistrate thought after taking his statement that he himself was a person who should be bound over. Section 107 (1) shows that a Magistrate can only act against a person upon receiving information that he is likely to commit a breach of the peace or to disturb the public tranquillity and so on. Sub-section 2 lays down that proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such Magistrate's jurisdiction and so on. These two sub sections make it quite clear that prior to the initiation of proceedings information must be given against a person from whom it is sought to take security. In the present case no information was given against the petitioner to the effect that he was likely to commit a breach of the peace or to disturb the public tranquillity, and it was quite illegal for the Magistrate to issue notice to him merely because he considered from his own statement that he was a quarrelsome person. In *Jaiprakash Lal, In the matter of the petition of* (1) it was held that "information" of the kind mentioned in section 107 must be clear and definite, directly affecting the person against whom process was issued, and should disclose tangible facts and details so that it might afford notice to such person of what he was to come prepared to meet. Here there was obviously no information such as is required by the section before the Magistrate, and, therefore, I hold that the initiation of the proceedings was *ultra vires*.

I accordingly allow the revision and set aside the order calling upon the petitioner to execute a bond under section 107.

Revision allowed.

(1) 6 A. 26 (F. B.); A. W. N. (1883) 208; 3 Ind. Dec. (N s.) 641.

LAHORE HIGH COURT.

CRIMINAL REFERENCE No. 615 OF 1920.

June 3, 1920.

Present:—Mr. Justice Shadi Lal, Chief Justice.

MOULA AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Public Gambling Act (III of 1867), s. 13—Place exposed to public view, whether public place.

Where the accused were found gambling at a place near a public street and exposed to public view, but which was not part of the public street:

Held, that they could not be convicted of gambling in a public place.

Case reported by the Sessions Judge, Rawalpindi, with his No. 294 of the 6th April 1920.

FACTS.—The petitioners have been convicted under section 13, Act III of 1867, of gambling and have been sentenced to fifteen days' rigorous imprisonment by Khan Bahadur Seth Adamji, Honorary Magistrate, 1st Class.

GROUNDS.—The evidence is to the effect that the gambling was at the side of the road, and from the plan it appears that the petitioners were not on the road though no doubt in sight of it. *Kashi Ram* v. *Emperor* (1) is in point. I forward the proceedings with a recommendation that if the Hon'ble Judges think fit, the conviction may be set aside. The petitioners are at present on bail.

ORDER.—It appears that the place where the petitioners were gambling is near a public street and exposed to public view. But it is not a part of the public street. Accordingly I hold that the conviction under section 13 of the Gaming Act III of 1867 cannot be sustained and accepting the recommendation made by the Sessions Judge, I quash the conviction and direct that the petitioners be discharged from their obligations under the bail bonds.

Conviction quashed.

(1) 17 P. R. 1882 Cr.

GANPAT *v.* LALAMIYA.

PRIVY COUNCIL,

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

November 4, 1919.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

GANPAT—APPELLANT

versus

LALAMIYA—RESPONDENT.

Grant—Sanad—*Proprietary interest—Grantee, dispossession of—Suit for re-possession, maintainability of.*

A person holding a full proprietary interest under a grant of a *sanad* from the Government who is dispossessed of that property is entitled to maintain a suit for re-possession into that property. [p. 675, col. 1.]

Appeal from the decision of Mr. Mitra, A. J. C. and Mr. Prideaux, A. J. C. Central Provinces, Berar Jurisdiction, in First Appeal No. 20 B of 1916, dated the 5th September 1917.

FACTS appear from the following judgment of Mittra, A. J. C. and Prideaux, A. J. C.

"The material facts of this case may be very briefly stated. The village in dispute was granted in *izara* under the Waste Land Rules of 1865. In 1888 the defendant No. 1 held an eight-annas share, the other eight-annas being held by Kondba and Ganaji, sons of Sadoba. In execution of a money decree against the latter their half share in the village was attached and the C form sent to the Collector under the provisions of section 320 of the Civil Procedure Code, 1882. For the satisfaction of the decree the Collector granted a lease for ten years on 1st July 1893. The term of the lease expired in 1903. The lessee was to pay annually an instalment towards the decree, and this amount was payable on the 15th of March at the end of each year. In 1897 Kondba and Ganaji sold their share in the *izara* village to one Mundley, who in his turn in 1902 sold it to the plaintiffs. The plaintiffs' case is that they were in possessions for two years till 1904, when the defendants dispossessed them. During the pendency of the suit the plaintiff No. 4 sold his rights to Sulamsa who was eventually made a defendant. This sale, according to the plaintiffs, was *benami* for the defendant Bapu. The plaintiffs, therefore, claim possession of a six-annas share of the village, one of the original plaintiffs having retired from the case. The main defence is that the sales in favour of the plaintiffs and their predecessor were effected during the pendency of the Collector's management in execution of the decree above referred to, and were, therefore, void under section 325 (A) of the Civil Procedure Code of 1882 which governs the case. The lower Court has decreed the plaintiffs' claim, and this appeal has been filed by the defendant Bapu and his sons.

It is contended on behalf of the appellants that the plaintiffs have no valid title by reason of the provision of section 325 (A), and in support of this contention a recent Full Bench ruling of this Court has been relied upon [*Salu Bai* v. *Bajat Khan* (1)]. A majority of the Judges in that case held that section 325 (A) creates a personal incompetency in the judgment-debtor, and a transfer without the written permission of the Collector during the pendency of the execution proceedings is absolutely void. One of us who was a dissenting member of the Court was of opinion that the disability was created in order to give an unrestricted power of management to the Collector, and that such transfers could be enforced after the Collector's management comes to an end, so as not to affect any title created by the Collector. The decision of the majority is, however, binding upon this Court, and we have to see whether that decision helps the appellant in the circumstances of the case.

The lower Court has found that the plaintiffs were in possession for sometime prior to 1904. We agree with this finding which receives additional support from a statement made by the defendant as a witness in a previous suit (Exhibit P-14).

The contest in the Full Bench case was between the parties to the transfer or their representatives. The defendants do not claim title under Kondba and Ganaji. Upon the finding that the plaintiffs had prior possession they are entitled to be restored to that possession. The Full Bench decision was not meant to lay down that any person after the search of the revenue records is at liberty to oust all existing occupiers of land transferred to them, without the

(1) 42 Ind. Cas. 200; 13 N. L. R. 1[illegible]

written permission of the Collector, and thereafter to claim a decree confirming the ouster as a reward of this discovery.

It is admitted before us that in 1893 a *sanad* conferring proprietary rights after the expiry of the thirty years' lease was granted to Mundley and the defendant Bapu jointly. We have also before us the revenue records showing that such a *sanad* was issued. It is argued on behalf of the respondents that the legal title to the property was vested in their predecessor Mundley by reason of the grant and that that title is now free from the infirmity which attached to the original title by the sale-deed of 1897. It is argued that there may be equities, subject to the law of limitation, between the original lessees and Mundley and his successors, but to all intents and purposes, the plaintiffs have the legal estate vested in them to borrow the language of English law. On behalf of the appellants it is argued that the grant of proprietary right was part of the bargain entered into between the Government and the original *izaradars*, and that it lay upon the *izaradars*, upon compliance with the terms of the *izara*, to elect whether they would be proprietors or patels. Upon the view which we have taken it is not necessary to express any opinion on the questions raised.

We agree with the appellants that Exhibits P-4 and P-5 refer to sanction obtained under the rules governing the *izara* which prohibit a transfer of rights without the permission of the Deputy Commissioner. The heading as given to the proceedings 'revenue case, class 2', supports this contention.

There is some force in the argument advanced on behalf of the respondents that every presumption should be made in their favour on the ground that their title remained undisputed, and was in fact admitted by the defendant Bapu on the occasion when the *sanad* was granted. It is also pointed out that in 1908 the present defendant No. 1 brought a suit for specific performance of an agreement to sell against the present plaintiffs, and in this suit the title of the present plaintiffs as a subsisting title was admitted. It is also pointed out that the records of the revenue case in execution of the decree have been eliminated, and it is impossible to say definitely whether the judgment-debtors Kondba and Ganaji, on whom lay the duty to apply for sanction, did or did not obtain written permission from the Collector. The respondents also say that, as they were not original parties to the transfer, they have no personal knowledge of the matter.

We agree with the appellants' contention that there was no estoppel by reason of the defendant's pleadings in the previous suit for specific performance.

The defendant Bapu then believed that the plaintiffs had a good title. He has since discovered the flaw in the title. His representation in the previous suit has not altered the plaintiffs' position for the worse, and hence there is no estoppel against the defendant.

It is unnecessary in this litigation to decide between the two defendants whether the sale made during the pendency of the suit was *benami* or not. We, therefore, leave this question open for future adjudication.

As regards the claim for the *gadhi* and the houses, they are within the ambit of the village, and although they are not specifically mentioned in the plaintiffs' sale-deeds, they would pass to them, as the whole of the half share of Kondba and Ganaji was sold without any reservation in favour of the vendors. The principle embodied in section 8 of the Transfer of Property Act would apply to such a case. We see, therefore, no force in this ground of appeal.

As regards the calculation of mesne profits it is admitted that there is an arithmetical mistake in the judgment of the lower Court. Nothing has been said before us which would induce us to differ from the actual findings of the lower Court upon which the calculation has been made. The respondents' contention that they are entitled to mesne profits for six years is wrong. Their suit is based upon the allegation of an ouster. The defendant on that view is a trespasser. Therefore, the limitation applicable to such a suit is governed by Article 109 of the Limitation Act. The case relied upon by the respondents was a case where a co-owner brought a suit against another co-owner as agent of the proprietary body. There is no

analogy between the cases, and we think the decision of the lower Court is correct.

The decree of the lower Court will be modified by substituting Rs. 3,791-15-3 for Rs. 8,333-14-8. Costs in proportion to success and failure. We further direct that the words 'defendants Nos. 1 to 4' be substituted for 'defendants' in clauses 1 and 2 of the lower Court's decree".

JUDGMENT.

LORD SHAW.—Their Lordships have not heard any sound reason for recalling the decree of the Court below.

In the judgment of the Appellate Court, dated the 5th September 1917, there occurs this passage:—"It is admitted before us that in 1898 a *sanad* conferring proprietary rights after the expiry of the thirty years' lease was granted to Mundley and the defendant Bapu jointly." The expiry of the thirty years occurred in the year 1895. Their Lordships further add this sentence:—"We have also before us the revenue records showing that such a *sanad* was issued." In these circumstances it follows that the right of property vested in Mundley and the defendant Bapu rests for its origin of title upon the *sanad* granted in 1898.

It has been stoutly argued before their Lordships that the *sanad* was not produced, and a certain citation was made of Order XLI, rule 27, applicable to the introduction of fresh documentary evidence in an appeal Court. In the opinion of their Lordships such an argument cannot have any application to the procedure which took place in the present case. There was no application made for the introduction of new evidence. What the learned Judges very properly did in the Appellate Court was to take stock of an admission made before them which was cardinal to the matter under discussion. No suggestion or attempt has been made in the candid argument before the Board to recall that admission. It stands.

In the result accordingly, the situation simply is this:—That a person holding a full proprietary interest under a grant of a *sanad* from the Government has been dispossessed of that property, and the present suit is for the purpose simply of repossession into that property so granted. There is nothing more in the case, in the view of their Lordships, than that simple point, and their Lordships see no occasion to enter into any of the other matters discussed in the careful judgments before them.

They affirm the judgment of the Court below, and will humbly advise His Majesty in that sense; the judgment to be affirmed with costs of the appeal.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 886 OF 1918.

July 23, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

SOLAI AMMAL—DEFENDANT No. 1—APPELLANT

versus

JOGI CHETTY AND OTHERS—DEFENDANTS Nos. 3 AND 4 AND—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 28, Sch. I, Art. 47—Scope of Art 47—Criminal Procedure Code (Act V of 1898), s. 146—Possession proceedings—Attachment of property and appointment of Receiver—Suit challenging Magistrate's order by party aggrieved—Limitation—Failure to sue within time—Extinguishment of remedy.

The suit contemplated in Article 47 of Schedule I to the Limitation Act is one for possession by a party against whom an order is passed by a Magistrate The principle underlying Article 47 is that as possession is outstanding, the party who is out of it should sue within three years to recover it. If he fails to sue within that period then under section 28 of the Limitation Act his right to possession is extinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 12 of 1917, and Appeal Suit No. 180 of 1916, of the District Court, Ramnad, (Appeal

Suit No. 80 of 1916, Subordinate Court Ramnad), preferred against the decree of the Court of the District Munsif, Sathur, in Original Suit No. 533 of 19.3.

Messrs. *C. V. Ananthakrishna Aiyar* and *S. Doraiswamy Aiyar*, for the Appellant.

Mr. *T. Ethiraja Madaliar*, for the Respondents.

JUDGMENT.—This second appeal can be disposed of on a short point. The 1st defendant and defendants Nos. 2 and 3 had disputes concerning the possession of certain property whose income is the subject-matter of this litigation. The Magistrate was appealed to. He held that the evidence as to possession on both sides was unsatisfactory and directed under section 146 of the Code of Criminal Procedure, that a Receiver should be in charge of it. This was on the 30th January 1909. Subsequently a suit was brought by defendants Nos. 2 and 3 against the 1st defendant in December 1911, partly for a declaration and partly for possession, the declaration relating to the property now in question and possession to property which the 1st defendant was alleged to have trespassed on. The suit was eventually withdrawn without obtaining permission to sue again. After the date of this withdrawal, the Receiver appointed by the Magistrate delivered possession of the properties to the 1st defendant in March 1913. The present plaintiff obtained a money-decree against defendants Nos. 2 and 3 and attached the suit property which represents the income which was in the hands of the Receiver and which he handed over to the 1st defendant in April 1913. The 1st defendant intervened with a claim petition which was allowed. The suit is for a declaration that the plaintiff is entitled to attach the income as belonging to defendants Nos. 2 and 3. The lower Appellate Court decreed the plaintiff's claim. We are unable to agree with it.

We are not, as at present advised, prepared to agree with the contention of Mr. Ananthakrishna Aiyar that the withdrawal of the suit operates as a bar against the plaintiff agitating the right of defendants Nos. 2 and 3. Having regard to the frame of that suit and to the observations in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1) it is doubtful whether anything more than the remedy was barred by the withdrawal of the suit. However that may be, in our opinion, the claim of defendants Nos. 2 and 3 was extinguished by the combined operation of Article 47 of the Limitation Act and of section 28. In Article 47, the suit contemplated is one for possession by a party against whom an order was passed by the Magistrate. It may be that to such a suit it is not necessary that the Receiver should be a party. The principle underlying the article is that, as possession is outstanding, the party who is out of it should sue within 3 years to recover it. If he fails to sue within that period then under section 28 the right to possession is extinguished. This is substantially the view that was taken in *Palidugu Parasuramayya* v. *Valli Ramachandradu* (2) and we think that the decision in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1) does not affect this rule.

As defendants Nos. 2 and 3 had no subsisting right on the date of the attachment, there was nothing for the plaintiff to attach and the suit should have been thrown out on this short point. We reverse the decree of the lower Appellate Court and dismiss the suit. Plaintiff will pay the costs of the 1st defendant in the Court of the first instance alone. As the lengthy trial was necessitated by the failure of the 1st defendant to raise the proper issue in time, we do not think he is entitled to any costs either in the lower Appellate Court or in this Court.

M. C. P.

Appeal allowed.

(1) 26 M. 410.

(2) 21 Ind. Cas. 564; 38 M. 432; 14 M. L. T. 392; (1913) M. W. N. 871.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REFERENCE No. 77 OF 1919 20.

January 23, 1920.

Present:—Mr. Ferard, S. M., and Mr. Harrison, J. M.

MAHABIR PRASAD SINGH

versus

Musammat MANKI.

Landlord and Tenant—Merger, doctrine of, applicability of—Rent, right to recover.

The doctrine of merger can only be applied when the interest in the superior right definitely covers the subordinate right.

Where the plaintiff has the right to collect the entire rent of a fixed-rate holding while the defendant has only a mortgagee interest in the holding and an entirely separate interest in the proprietary right the doctrine of merger does not apply and the plaintiff is entitled to collect the entire rent.

JUDGMENT.

HARRISON, J. M.—This reference is made by the Commissioner with reference to an appellate decree of the Collector in a suit for arrears of rent. The suit related to a fixed-rate holding in Pargana Kaswar Raja most of which is mortgaged to various persons. Among the mortgagees are the co-sharers in the village, but the proprietary right of one of those co-sharers is mortgaged to the other, Arjun Prasad Singh. The Assistant Collector held that the two mortgagees, being also co-sharers in the proprietary right could not be sued as tenants. The Collector on appeal held that the doctrine of merger which had been tacitly though not expressly applied to the two mortgagees of the tenancy by the Assistant Collector could only be applied to Arjun Prasad Singh the only one of the two in actual possession of the proprietary right by virtue of the mortgage from Mahabir Singh. He, therefore, gave a decree against Mahabir Singh but not against Arjun Prasad Singh. The Commissioner is of opinion that Arjun Prasad Singh also should have had judgment given against him and I agree with him. The doctrine of merger can only be applied when the interest in the superior right definitely covers the subordinate right. Here the plaintiff is found to have the right to collect the whole rent of this fixed rate holding, while Arjun Prasad Singh has only a mortgagee interest in the holding

and an entirely separate interest in the proprietary right. The finding is contested by a separate petition in this Court but without any force in my opinion.

I think the circumstances stated by the Commissioner warrant interference in revision and I would modify the decrees of the lower Courts by giving a decree against Arjun Prasad Singh on the same terms as against the other defendants.

The plaintiff should get his costs of this reference from Arjun Prasad Singh and proportionate costs against him in the Collector and Assistant Collector's Courts.

FERARD, S. M.—I agree.

Decree modified.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No 118 OF 1919.

August 15, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

SHWE HPAN AND OTHERS—APPELLANTS

versus

MA CHIT NYEIN—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 16—Award—Parties dissatisfied—Remedy proper—Suit to set aside award, whether maintainable.

Where an arbitrator is appointed under the Second Schedule to the Civil Procedure Code a suit to set aside the award is not maintainable as being contrary to the plain intention of the law. The proper remedy in such a case is an application submitted to the Court to set aside the award.

Mr. *M. C. Naidu*, for the Appellant.

JUDGMENT.—The appellants were parties to two awards made by an arbitrator appointed by the District Court, Moulmein. Being dissatisfied with the awards they applied under paragraph 16 of the Second Schedule, Civil Procedure Code, to set aside the awards, but their application was refused and the Court pronounced judgment and passed decree in accordance with the awards. Under paragraph 16 (2) no appeal lies against the decrees. But the appellants sought to re open the matters in dispute by suing to set aside the awards. The District Court held that such a suit will not lie.

BRAJA SUNDAR DAS v. JAGANNATH DHAL.

No case has been cited in which such a suit has been entertained, and such a suit appears to be contrary to the plain intention of the law. Article 158, First Schedule, Limitation Act, allows a period of ten days for an application to set aside an award submitted to the Court. No further appeal is allowed except in so far as the decree passed by the Court may be in excess of or not in accordance with the award, which is not the case here. As Lord Macnaghten observes in *Ghulam Jilani* v. *Muhammad Hussan* (1), large powers are given to the Court with the view of making the awards in such cases as this complete, operative and final and it would render these provisions of the law nugatory to permit a party to go behind the decree of the Court and bring a suit to set aside the award on which the decree is based and which is merged in the decree. The appeal is, therefore, dimissed under Order XLI, rule 11.

Appeal dismissed.

(1) 4 Bom. L. R. 161; 12 M. L. J. 77; 29 I. A. 51; 6 C. W. N. 226; 29 C. 167; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

PATNA HIGH COURT.

CUTTACK CIRCUIT COURT.

SECOND CIVIL APPEALS NOS. 25—28 OF 1919.

April 15, 1920.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Adami.

BRAJA SUNDAR DAS—PLAINTIFF—APPELLANT

versus

JAGANNATH DHAL AND OTHERS—DEFENDANTS—RESPONDENTS

Bengal Patni Regulation (VIII of 1819), s. 11 (3)—Bengal Rent Recovery Act (VIII of 1865), s. 16—Sales under Acts—Purchaser, right of—Khudkasht raiyats, *whether can be ejected*—Khas *possession, suit for—Alternative relief claimed—Procedure—Court, duty of.*

In sales under the Bengal Patni Regulation and the Bengal Rent Recovery Act, the purchaser acquires the property free from incumbrances but he is not entitled to eject *khudkasht raiyats* or resident and hereditary cultivators. [p. 680, col. 1.]

Where in a suit to recover *khas* possession or in the alternative for the assessment of fair and equitable rent, the Court finds that the plaintiff is not entitled to *khas* possession, it ought to determine fair and equitable rent payable in respect of the lands in suit. [p. 680, col. 2.]

Appeal against a decision of the District Judge, Cuttack, dated the 8th February 1919, reversing that of the Sub-Judge, Cuttack dated the 22nd May 1919.

The Hon'ble Mr. *M. S. Das* and Mr. *Bichitranand Das*, for the Appellant.

Messrs. *Biswanath Sinha* and Rai *Janaki Nath Bose* Bahadur, for the Respondents.

JUDGMENT.—These four appeals arise out of four suits in ejectment tried analogously in the Court of first instance. The plaintiff and the *pro forma* defendants purchased the entire 16 annas of the estate called Taluqa Minpur Zemindary, bearing Touzi No. 423 in Pargana Tisania, District Cuttack. The lands in suit appertain to Mouza Injanpur, one of the Mouzas comprised within the said Taluqa. By an award of *Panchayet*, dated the 26th March 1873, the plaintiff's ancestor got by partition with the ancestors of the *pro forma* defendants the Mouza Injanpur allotted to them, and since then they are in possession of the entire 16 annas of the said Mouza. The Zemindar, to whom the Mouza originally belonged previous to the purchase by the plaintiff and his co sharers, had granted the Mouza as *Khore poshak* for maintenance to a relation of his, called Jodhi Mangraj. The Mouza thus became a *sikmi* tenure of Jodhi Mangraj. In the family of Jodhi Mangraj, the law of lineal primogeniture prevailed, whereby the senior branch of the family held the entire Mouza as *sikmi* tenure-holder and the lands in suit were given to the ancestors of the principal defendants, the junior members of the family, by way of maintenance at a nominal rental of Re. 1 per man.

In 1903 the plaintiff obtained a rent decree against the then tenure-holder, Bishambhar Dayal, for arrears of rent then due, and in execution of the said decree, the tenure was brought to sale under Bengal Act VIII of 1865 and purchased by the plaintiff on 18th March 1905.

The case of the plaintiff is that he purchased the tenure free from all incumbrances and the lands in suit held by the principal defendants are an incumbrance on the tenure, which under section 16 of Act VIII of 1865 the plaintiff is entitled to avoid. Consequently the plaintiff brought the present suit for recovery of possession with mesne profits. In the alternative the

plaintiff prayed that if it be held that he is not entitled to recover *khas* possession of the land, then a fair and equitable rent according to the prevailing rate be assessed on the lands in suit.

The principal defendants in their written statement pleaded that the sale of the tenure under Act VIII of 1865 was invalid and illegal and the plaintiff did not acquire any title thereby, inasmuch as Jodhi Mangraj and his descendants, to whom the Mauza was granted as *khore-poshak*, were the *sikmi* Zemindars of the Mauza paying revenue thereof due to Government through the Zemindar of the Mahal and that no relationship of landlord and tenant existed between them and the Zemindar of the Mahal. They also pleaded that they paid rent for the lands in suit to the plaintiff at a rate which remained uniform for over 50 years, and hence they are not liable to any assessment of fair and equitable rent, and *thirdly*, they contended that even if it be conceded that the plaintiff purchased the *sikmi* Zemindary right, he himself being a Mahal Zemindar, the *sikmi* right ceased to exist and the defendants having become intermediate tenure-holders or *parja* (tenants) under the plaintiff, the latter cannot get any other relief except rent.

The contentions of the defendants gave rise to several issues, the principal ones being

"Is the plaintiff's alleged purchase of the *shikmi* Zemindary legal and valid, and could the property be sold under Act VIII of 1865? (Issue No. 4).

"Is the disputed property an incumbrance under the law? Is the plaintiff entitled to avoid it by virtue of his auction-purchase? (Issue No. 5).

"Is the plaintiff entitled to recover *khas* possession of the property in suit? (Issue No. 6).

"To what relief, if any, is the plaintiff entitled?" (Issue No. 7).

Issues Nos. 1, 2 and 3 relating to limitation, estoppel and maintainability of the suit need not be mentioned, for they do not now arise.

The Subordinate Judge decided all the issues in favour of the plaintiff. With regard to the status of the defendants, he held that they were under-tenure-holders and not *raiyats* or hereditary and resident cultivators and that their interest in the lands was an incumbrance under section 16 of the Act, which the plaintiff was entitled to avoid. The Subordinate Judge accordingly decreed the claim of the plaintiff.

On appeal, the District Judge disagreed with the Subordinate Judge on his finding as to the status of the defendants, and held that the defendants were resident and hereditary cultivators and belonged to a class for the protection of which the clause in section 16 of Act VIII of 1865 was expressly designed, and dismissed the suits of the plaintiff. The plaintiff has, therefore, come to us in second appeal.

In the settlement record, which was finally published on the 13th August 1897, the defendants in the several suits were recorded in respect of the lands held by them to have the status of "*biratharan khud-kasht*." In the last revisional settlement *khatian*, which was finally published on 18th November 1911, the status of the defendants was recorded to be that of *madhya sattadhikari babat bradarana khud-kasht* that is, intermediate tenure-holders in respect of *biratharana khudkasht*.

The District Judge has shown that in Second Appeal No. 25 the defendants have 13·68 acres, out of which 11·47 acres are in their *khas* cultivation; in Second Appeal No. 26, the defendants hold 17·66 acres, out of which 9·66 are in their *khas* possession and the rest is held by tenants, who pay half produce rents; in Second Appeal No. 27, the defendants hold 8·45 acres out of which 6 acres are in their *khas* possession, and in Second Appeal No. 28 the defendants hold 30·18 acres, out of which 12·10 acres are in their *khas* possession and the remaining are held by tenants paying cash and *bhaoli* rents. The purpose of the tenancy, for which the land was given originally to the defendants, is not known. The small areas held by the defendants, greater portions of which are in their *khas* possession, as well as the fact that the defendants have their dwelling houses also on the portions of the holding, go to show that the land must have been originally let out to them for purposes of cultivation. The Subordinate Judge has also held that the "defendants have their dwelling houses on some portions and cultivate some other portions and realise *dhooli* [illegible] rent

from sub tenants in occupation of yet other portions."

The District Judge was hence justified in holding that the defendants were resident and hereditary holders in respect of the disputed lands and that the entry of their status in the last revisional Survey Record of Rights as intermediate tenure holders is incorrect and has been sufficiently rebutted by the evidence in the case. This is a finding of fact and cannot be challenged in second appeal.

It is noteworthy that in both the Settlement Records of 1897 and 1911, the entry is "*khudkasht*" in the former as "*biratharan khudkasht*" and in the latter as "intermediate tenure-holders in respect of *biratharan khudkasht*." The word '*khudkasht*' in the Regulation relating to the permanent settlement applied to *raiyats*. The permanent tenants settled in village were called *khudkasht raiyats*, that is, *raiyats* cultivating the land of their own village or the village in which they resided. They were distinguished from the *Paikasht* tenants, that is, the temporary tenants, residents of another or neighbouring villages. The former were protected from eviction and the latter were treated as tenants-at will: *vide* Field's Introduction to Regulations, pages 24, 25 and 40. Regulation VIII of 1793 clearly prohibited the proprietors of lands or farmers or persons acting under their authority to cancel *pattas* of *khudkasht raiyats* except upon proof that they were obtained by collusion. The rights of the *khudkasht raiyats* were accordingly protected on sales of *patni talugas* by clause 3 of section 11 of Regulation VIII of 1819, and on sales of under-tenures sold for arrears of rent by section 16 of Act VIII of 1865. In sales under both these Acts the purchaser acquires the property free from incumbrance but he is not entitled "to eject *khudkasht raiyats* or resident and hereditary cultivators." In the case of *Kowntee Debee* v. *Hirdoy Nath Durreepa* (1) as well as in the case of *Jogeshwar Mazumdar* v. *Abed Mohomed Sirkar* (2) relied upon by the appellant, the finding of fact was that the persons claiming the benefit of the Patni Regulation and the Rent Recovery Act respectively were not proved to be *khudkasht raiyats* that is resident and hereditary cultivators of the lands in suit and, therefore, those authorities do not apply to the present case, where the finding of fact of the District Judge is that the defendants were *khudkasht* or resident hereditary cultivators. The direct authority applicable to the present case is that of *Sheikh Mahomed Assanoollah Chowdhry* v. *Shamshir Ali* (3) where it was held that the defendants having for more than 12 years cleared and cultivated the land and built houses thereon were hereditary and resident cultivators and their interest was protected from the operation of section 16 of Act VIII of 1865. The finding of the Courts below that the defendants are resident and hereditary cultivators and have dwelling houses on portions of the land and the description of the lands in suit as *khudkasht* in the Survey Record of Rights expressly bring the defendants within the meaning of the words "*khudkasht* or resident and hereditary cultivators" in section 16 of the Act. The plaintiff is not, therefore, entitled to recover *khas* possession and the decision of the lower Appellate Court must, therefore, be upheld.

It is, however, contended on behalf of the appellant that in case the plaintiff was not entitled to recover *khas* possession, the Court below ought to have determined fair and equitable rents payable by the defendants to the plaintiff in respect of the lands in suit, as contained in relief *ga* of the plaint. This contention must prevail. The Subordinate Judge in deciding issue No. 1 held that the plaintiff was entitled to make the alternative prayer for determination of fair and equitable rent in the present suits. In the lower Appellate Court the defendants did not contest the finding of the Subordinate Judge on that point and the only contention urged by them was with respect to Issue No. 5 as to the right of the plaintiff to recover *khas* possession. The finding of the Subordinate Judge, therefore, became final. The point has been raised by the plaintiff in the grounds of appeal before us. The learned Vakil on behalf of the respondents does not seriously dispute the plaintiff's right

(1) 16 W. R. 203.
(2) 3 C. W. N. 13.
(3) 4 C. L. R. 165.

to an assessment of fair and equitable rent. The case must, therefore, go back to the Court of the Subordinate Judge for determination of fair and equitable rent payable by the defendants to the plaintiff.

On the principal question these appeals have failed and hence the respondents are entitled to their costs.

Order accordingly.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 109 OF 1918.

July 21, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

LE MAUNG—DEFENDANT—APPELLANT

versus

MA KWE BY HER GUARDIAN *ad litem* MA ME PU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Buddhist Law, Burmese—Inheritance—Daughter taken away by divorced mother, right of, to inherit as member of natural father's family.

It is a well-established rule of Buddhist Law in both Upper and Lower Burma that a daughter taken away by her mother on divorce loses her right of inheritance as a member of her natural father's family. [p. 682, cols. 1 & 2.]

Mr. *May Oung*, for the Appellant.

Mr. *Thein Maung*, for the Respondents.

JUDGMENT.

TWOMEY, C. J.—The appellant defendant Maung Le Maung was twice married, first to Ma E Nyun who died four or five years before this suit was filed leaving a son, Maung Ba Wan. After Ma E Nyun's death, Maung Le Maung married Ma Me Pu and by her had a daughter, Ma Kwe, born in January 1913. In July 1915 Le Maung and Ma Me Pu effected a divorce by mutual consent before the village elders and Ma Me Pu received property worth Rs. 1,000 on leaving Le Maung's house. She took with her her infant daughter, Ma Kwe, and she has since married another husband. Le Maung did not marry again. Ba Wan continued living with his father, Le Maung, until he died of plague in January 1918. About three years before his death he had inherited a sum of Rs. 9,400 as his share of the estate of his mother Ma E Nyun's father, U Sin, and he had also received certain jewellery from U Sin in the letter's lifetime.

The minor Ma Kwe, through her mother Ma Me Pu as next friend, sued her father Le Maung for the property left by her step-brother Ba Wan claiming to be Ba Wan's sole heir under the Buddhist Law of inheritance. Le Maung in defence pleaded that he was the sole heir of his son.

The District Court held that the case was governed by the decision of the Privy Council in *Ma Hnin Bwin* v. *U. Shwe Gone* (1) and that Ma Kwe should succeed to her step brother's estate in preference to his father, the defendant. The learned District Judge considered that although Ma Kwe is only a step-sister she is entitled to succeed to the whole estate in the absence of a brother or sister of the whole blood. He also considered that as Ma Kwe was an infant at the time of her mother's divorce, the fact that she was taken away by her mother at that time does not debar her from inheriting her brother Ba Wan's estate, and he cited *Ma Thet* v. *Ma San On* (2), in support of this view. The suit was, therefore, decreed in favour of the plaintiff. The defendant Le Maung appeals.

The learned District Judge is probably right in holding that the ruling in *Ma Hnin Bwin's case* (1) may properly be applied in favour of brothers and sisters of the half blood when there are no full brothers or sisters. This would be in accordance with "the fundamental principle that inheritance should not ascend if it can be helped." *Ma Gun Eon* v. *Maung Po Kywe* (3).

The District Judge has, however, not considered the limitations which their Lordships put upon their decision in *Ma Hnin Bwin's case* (1). The balance of authority in the *Dhammathats* was found to be upon the side of sisters and brothers of the deceased being preferred to the parents (according to the general rule laid down in the extract from *Manugye*

(1) 23 Ind. Cas. 433; 8 L. B. R. 1; 7 Bur. L. T. 105; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 112; 16 M. L. T. 142; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; (1914) M. W. N. 449; 41 I. A. 121 (P. C.).

(2) 2 L. B. R. 85.

(3) 2 U. B. R. (1897-01), 63 at p. 73.

in section 311 of the Digest). But while adopting this general rule and applying it to the case before them, their Lordships pointed out as a salient feature in that case that the deceased and her sister Ma Hnin Bwin had for years lived a life separate from and independent of their father, and their Lordships desired that *Ma Hnin Bwin's case* (1) should not be held as dealing with or affecting parental rights in cases where the family continues to live together. They referred to the traditional patriarchal powers of Burmese parents over their households and suggested that a consideration of these powers "may lead to conclusions which hold no place in rules of succession to the estate of children who have left the father's establishment and become separately settled in life." It is clear that their Lordships meant to leave us unfettered in disposing of such a case as the present where the estate in dispute is that of a boy who lived with and was controlled and supported by his father up to the time of his death at the early age of 13. The texts indicating the wide extent of parental authority are cited in the judgments of the Appellate Bench of this Court in *U Shwe Gon* v. *Ma Hnin Bwin* (4). But the principle that inheritance, if possible, should not ascend is of general application and the rule of succession deduced by their Lordships from the *Dhammathats* is wide enough to cover all cases. No actual textual authority has been cited to us which would warrant special differentiation in favour of parents with whom the deceased child has lived, and I doubt if we can differentiate merely by inference from the texts showing the power of parents over their children in former times. These texts appear to be more in the nature of moral precepts than positive rules and none of them touch the question of inheritance.

It is, however, unnecessary for us to pronounce definitely in the present case on the point discussed above, for the plaintiff respondent Ma Kwe's suit must fail on another ground, namely,—because she ceased to be a member of her father the appellant's family at the time of her mother's divorce. Here we are on surer ground. It is a well established rule of Buddhist Law in both Upper and Lower Burma that a daughter taken away by her mother on divorce loses her rights of inheritance as a member of her natural father's family. *Mi Thaik* v. *Mi Tu* (5), *Ma Gywe* v. *Ma Thi Da* (6), *Ma Sein Nyo* v. *Ma Kywe* (7), *Ma Pon* v. *Po Chan* (8). The rule was relaxed in *Ma Thet* v. *Ma San On* (2) (the case cited by the District Judge) because in that case there had been no division of property at the time of the divorce and it was shown, moreover, that filial relations between father and daughter had been resumed and contained for many years after the separation. In the case of *Maung Pe* v. *Ma Myitta* (9) the learned Judicial Commissioner (Sir Herbert White) was loth to press the rule against a child of tender years who had no opportunity of exercising a reasonable choice at the time of her mother's divorce. (But can we assume that the choice of continuing or resuming filial relations would rest with the daughter rather than the father, if the girl were of mature understanding?) There also, though the parents were divorced, there was evidence that the deceased was on very affectionate terms with his daughter, that she had been to stay with him, and that she had never been regarded as cut off from his family. In another Upper Burma case, *Mi Nyo* v. *Mi Nyein Tha* (10), it was pointed out that notwithstanding the general rule, children taken away by a divorced wife would succeed to their father's estate in the absence of all other heirs, (*i. e.*, on the principle that descendants who would otherwise be disqualified are allowed to share in inheritance in default of a better heir, *vide*, Maunkye, Richardson's Edition, page 316). And so in the present case, if it were a question of inheriting from Maung Le Maung, we might properly consider the claims of Ma Kwe if she were the only surviving descendant by blood. But this is not the question. Ma Kwe is a possible heir to Maung Le Maung if she survives him and especially if filial relations are in the meantime resumed between them. But her present position is that she is a member

(4) 9 Ind. Cas. 442; 5 L. B. R. 231 at p. 236; 4 Bur. L. T. 1.

(5) (1885) S. J. L. B. 184.
(6) 2 U. B. R (1892-96), 194.
(7) 2 U. B. R. (1892-96), 159.
(8) 2 U. B. R. (1897-01), 116.
(9) (1900) 2 Chan Toon's L. C. 220.
(10) 2 U. B. R. (1904-06), Buddhist Law, Inheritance 15.

of her mother's new family and not a member of her father's family at all. The severance of the tie binding her to her father necessarily involves severance also of the tie connecting her with her father's son by his earlier marriage. It is clear that she could not supplant her father in the succession to his son Ba Wan's estate even if we were to regard the Privy Council ruling in *Ma Hnin Bwin's case* (1) as of universal application.

On these grounds I would set aside the District Court decree and dismiss the plaintiff's suit with costs in both Courts.

ROBINSON, J.—I concur.

Decree set aside.

ALLAHABAD HIGH COURT.

TESTAMENTARY CASE No. 16 OF 1917.

November 11, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

In the Goods of D. MACINTYRE.

Will—Scotch Law—Holograph writing without witnesses, whether Will.

A holograph writing proved to be in the handwriting of a person who at the time of his death was a domiciled Scotchman, constitutes a valid Will according to Scotch Law, even though there are no witnesses to such writing.

FACTS.—David MacIntyre, Agent at Meerut of the Allahabad Bank, died at Meerut, and the Administrator General of the United Provinces obtained from the High Court Letters of Administration to his estate as in the case of an intestate. Subsequently, a document was discovered among the papers of the deceased, to the following effect:—

"Allahabad Bank, Meerut, 21st January 1913. Any property which I possess to be divided equally between my three sisters Jessie Percy MacIntyre, Helen Anne MacIntyre and Mary MacIntyre, the survivor or survivors. D. MacIntyre."

The document was entirely in the handwriting of the deceased and as he was a domiciled Scotchman, the Administrator-General was of opinion that, according to Scotch Law, the document was a valid testamentary instrument. He accordingly applied to the Court for amendment of the Letters of Administration granted to him by annexing thereto, the Will propounded. The Administrator-General proved the document to be in the handwriting of the deceased, and that the domicile of the deceased was Scotland. In support of the legal point as to whether, according to Scotch Law, the document was or was not a Will, he placed before the Court the opinion of the writer to the Signet of Edinburgh, from which the following is an extract, *viz*:—

"By the Common Law of Scotland a holograph Will is valid wherever made and needs no witnesses. The person founding on the deed as holograph must prove that it is so either by the evidence of persons who saw it written or by evidence as to handwriting which satisfies the Court."

JUDGMENT.—Upon reading the papers before us including the affidavit of James W. Moncrieff writer to the Signet, we are of opinion that the paper-writing, dated the 21st of January 1913, is in the handwriting of the deceased D. MacIntyer, and that according to Scotch Law it constitutes a valid Will and that the said David MacIntyre was a domiciled Scotchman at the time of his death. We accordingly cancel the grant of Letters of Administration previously directed to be issued to the Administrator General and in lieu thereof direct that Letters of Administration with the aforesaid document of the 21st of January 1913, as the last Will of David MacIntyre annexed do issue to the Administrator-General.

Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 30 OF 1915.

April 17, 1918.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

June 6, 1918.

Present:—Mr. Fawcett, A. J. C.

MANGHIRMAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JETHANAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Yajman vriti, *nature of*—*Co-owner of*

MANGHIRMAL *v.* JETHANAND.

vriti *performing ceremonies and appropriating fees—Trespass—Damages, suit for, by other co-owners, whether maintainable—Priest, whether can be dismissed by* yajman.

A *yajman vriti* is a religious office to which fees are attached. [p. 684, col. 2]

Where one co-owner of a *vriti* performs the religious ceremonies of a *yajman* and appropriates the fees, the other co-owners of the *vriti* can sue him to recover their share of the fees [p. 685, col. 1.]

Where the act of the co-owner performing the ceremonies amounts to an ouster of the other co-owners, the latter can sue the former for damages as a tortfeasor [p. 685, col. 1.]

A *yajman* has no right to dismiss a priest except for serious misconduct or upon the latter being outcasted. [p 685, col. 2.]

The law allows a co-owner to sue another co-owner for trespass, if the latter has ousted him and such ouster covers an act inconsistent with the enjoyment of the property by both. [p. 688, col. 2.]

Second appeal against the decision of the Joint Judge, Sukkur.

Mr. *Futehchand Asudomal*, for the Appellants.

Mr. *Rupchand Bilaram*, for the Respondents.

JUDGMENT.

PRATT, J. C.—(*April* 17, 1918).—The plaintiffs claimed in this suit to be the owners of the Yajman Vrithi of the Chabria caste. They alleged that the defendant had wrongfully performed the religious ceremonies of one of their Yajmans and sued to recover Rs. 35 11-0, the fees payable for the ceremonies, and for an injunction restraining him from performing such ceremonies in future. The defendant replied that he was a Sarswat Brahmin and that the Sarswats were the original owners of the Vriti; that the plaintiffs who were Pushkarana Brahmins had been admitted to an equal share in the Vriti; that a Yajman might employ either a Pushkarana or a Sarswat as he pleased; that the Bhat caste had resolved not to employ Pushkaranas but to have all the ceremonies performed by Sarswats and to give them their half fees and give the Pushkarana half fees to charity. He admitted that he had received half fees for ceremonies and asserted that he was entitled to do so under the resolution of the Punchayet.

The Sub-Judge found that the Vriti originally belonged exclusively to the plaintiffs' family but that the defendant's family had subsequently been admitted to a share in the Vriti; that the ceremonies were performed by either family and that the fees were divided equally except the Goudan fee which was divided in the proportion of Rs. 5-0-0 to the plaintiffs' and Re. 1-0-0 to the defendant's family. Nevertheless he held that the plaintiffs could not make the defendant responsible for the action of the Chabria Puncha and that as the half fees had been paid to the defendant personally for his benefit and for services personally rendered, the plaintiffs were not entitled to recover them.

This decision was affirmed on appeal by the District Judge.

The plaintiffs come to this Court in second appeal, and it seems obvious that the decision of the lower Courts is not a logical deduction from the findings on which it is based.

Both the Courts have found that there is a religious office to which fees are attached and that this office is held by the Pushkaranas, the plaintiffs, and the Sarswats of whom the defendant is one and that these two families share the fees or emoluments of the office. They have also found that the Sarswats have performed the services of the office for less than the customary or official fee.

How can this be justified on the ground that the fee was paid to the Sarswats for their personal benefit? If the Sarswats have received a personal fee, then they have performed the ceremonies in their personal capacity and not as holders of the office. This act of the Sarswats is a trespass on the office; and the fact that they might have performed the ceremonies as holders of the office and for the official fee does not mitigate or alter the character of the trespass. Plaintiffs seem to me to be clearly entitled to damages for the intrusion on their rights.

The defendant-respondent seeks to support the decision of the lower Courts on various grounds.

It is suggested that the suit is barred from the cognizance of the Courts by Regulation II of 1827. But this plea cannot be sustained for no interference in caste questions is involved in the suit which is merely a dispute between two priestly families as to their fees.

It is next urged that religious offices such as the one in suit are invalid not being supported either by Hindu Law or

custom. This objection was not raised in the lower Courts and both parties contested the suit on the footing that the religious office which they each claimed was valid.

The plea that the office is invalid is suggested by the case of *Gour Mani Debi* v. *Chairman of the Panihati Municipality* (1). That case, so far as it is based on custom, must be limited to the office then set up, the right to read Mantras at the particular burning Ghat. And so far as it is based on Hindu Law it proceeds on texts which have not in Western India the authority of the texts cited in Colebrook's Digest, Volume I, page 377, on which the Bombay decisions proceed. I think we must treat it as settled law that religious offices such as the one in suit have their origin in custom and are recognised both by Hindu Law, *Krishnabhat* v. *Kapabhat* (2), *Ghelabhai* v. *Hargovan* (3), and by the Legislature (Regulation V of 1827, section 1) as fixed property or immoveable property. Offices which involve the performance of religious duties are recognized as the subject-matter of civil litigation by section 7 of the Civil Prosedure Code and by decisions of all the High Courts. There is a conflict of decisions in cases in which the emoluments of the office are voluntary gratuities, and the tendency of the Courts is to recognise only such of those as are attached to a particular shrine or place, *Tholappala Charlu* v. *Venkata Charlu* (4) and *Channu Dut Vyas* v. *Babu Nandan* (5). But in regard to offices such as the one in suit to which fees are attached, and by which services are rendered, there is no conflict and they are recognised by all the Courts: See *Muhammad Yussub* v. *Sayid Ahmed* (6), *Vithal Krishna Joshi* v. *Annat Ramchandra* (7), *Dinanath Abaji* v. *Sadhashiv Hari Madhave* (8), *Limba* v. *Rama* (9), *Waman Jagannath Joshi* v. *Balaji Kusaji Patil* (10), *Ghelabhai* v. *Hargovan* (3), *Krishnama* v. *Krishnasami* (11), *Kali Kanta* v. *Gouri Prosad Surma* (12).

It is next suggested that no fees are attached to the office and that the payments are voluntary, but this is a question of fact concluded by the judgments of the lower Courts. Both the Courts have found that the fees are fixed and attached to the office, and this was even recognised by the resolution of the Chabria Punchayet that half fees were to be paid to the Sarswats.

Lastly it is contended that the resolution of the Punchayet was equivalent to a dismissal of the plaintiffs who are, therefore, no longer holders of the office. If the holder of the office were liable to be dismissed at the caprice of the Yajman, it is difficult to understand how the office could be (as it admittedly is) hereditary. The plaintiffs have not been charged with any disqualifying offence. In the case reported as *Manghirmal* v. *Vithalram* (13) a majority of the Judges of this Court, differing from me, held that the Vritti was not partible and refused to recognise any alientation of a share. The Punchayet wished the plaintiffs to effect the alienation inspite of the judgment of this Court, and on their refusing to do so passed a resolution excluding them. The resolution is in truth an attempt to evade a judgment of this Court and is not the result of any misconduct of the plaintiffs. The Calcutta High Court has held that it is contrary to public policy for the Court to interfere to prevent th dismissal of a priest, *Rama Kant* v. *Gobind Chunder* (14) followed in *Gour Mani Debi* v. *Chairman of the Panihati Municipality* (1). But the Bombay High Court has held that it is contrary to the custom of the country for a Brahmin to dismiss his Upadhya, *Ramchunder Bapooje* v. *Ramchunder Lakshmun* (15) and that an hereditary priest cannot be dismissed unless he is Patita The objection of the public policy raised by the Calcutta High Court is met in Bombay by

(1) 6 Ind. Cas. 864; 14 C. W. N. 1057; 12 C. L. J. 74.
(2) 6 B. H. C. R. (A. C. J.) 137.
(3) 12 Ind. Cas. 928; 36 B. 94; 13 Bom. L. R. 1171.
(4) 19 M. 62; 5 M. L. J. 207; 6 Ind. Dec. (N. s.) 748.
(5) 6 Ind. Cas. 223; 32 A. 527; 7 A. L. J. 529.
(6) 1 B. H. C. R. (App.) xviii.
(7) 11 B. H. C. R. 6.
(8) 8 B. 9; 2 Ind. Dec. (N. s.) 6.
(9) 13 B. 548; 7 Ind. Dec. (N. s.) 863.
(10) 14 B. 167; 7 Ind. Dec. (N. s.) 570.
(11) 2 M. 62; 6 I. A. 120; 3 Ind. Jur. 322; 3 Suth P. C. J. 620; 6 C. L. R. 201; 4 Sar. P. C. J. 28; 1 Ind. Dec. (N. s.) 315.
(12) 17 C. 906; 8 Ind. Dec. (N. s.) 1149.
(13) 13 Ind. Cas. 225; 5 S. L. R. 107.
(14) (1882) Bengal S. D. A. 398; 12 Ind. Dec. (O. s.) 310.
(15) 9 Harr. 537.

refusing to grant an injunction in such cases following the judgment of Melvill, J. in *Raja* v. *Krishnabhat* (16). In this way the holder of the office is by the award of the damages secured from pecuniary loss and at the same time the Court declines to foist upon any Yajman the services of a particular priest.

The fees which the plaintiffs were deprived of by the defendant's intrusion are admittedly Rs. 23-8-0.

I would, therefore, refuse an injunction but grant the plaintiffs a decree for the sum.

CROUCH, A. J. C.—(*April* 17, 1918).—In the suit out of which this second appeal has arisen, plaintiffs sued to recover Rs. 25-11-0, alleging that they were solely entitled to the 'Vriti' or fees paid to Brahmins for performing certain ceremonies, paid by (*inter alia*) one Ramdas Lalchand, that the amount claimed had been wrongfully received from Ramdas by the defendant, and should be handed over to the plaintiffs. Plaintiffs also pray for an injunction prohibiting defendants from interfering with their Vriti. The suit was obviously one for the recovery of money wrongfully received by the defendants on plaintiffs' behalf.

Plaintiffs are Pushkarana Brahmins, and defendants are Sarswat Brahmins. The defendant in his written statement contends that with the consent of the Yajmans of the Chabria caste—to which Ramdas Lalchand belongs—ceremonies were performed by Pushkarnas or Sarswats indifferently, that the Yajmans were at full liberty to summon whom they chose to perform any particular ceremony, that there had been an agreement or understanding to which the Yajmans were parties that half of the Vriti should be enjoyed by Pushkarnas and half by Sarswats, that in Assu 1968 the whole Bradri of the Chabrias declared that Pushkaranas should not be called for ceremonies, but that only Sarswats should be summoned and that the half to which the Pushkarnas have been entitled was to be devoted to the feeding of cows and other charitable objects. Defendants denied that they had received any money on behalf of the plaintiff.

In their rejoinder, plaintiffs asserted that they were the Gur Brahmins of the Chabrias while the Sarswats were only the "Thani" or local Brahmins, that plaintiffs had the legal right to officiate at all Chabria ceremonies, and to receive the dues, though they admitted that a portion of them were payable to the Thanis.

The simple issue of fact in the case was:—Did defendant receive the amount claimed or any part of it, on behalf of the plaintiffs? But for the plaintiff it is contended that a large and a far more difficult question is involved: Are the Pushkarna Brahmins legally entitled to receive all Vriti paid by the Chabrias for Brahmin ceremonies, they giving a portion to the Sarswats?

The first issue drawn by the original Court was—is the plaintiffs' right to the plaint Vriti ancestral and ancient? and the finding was in the affirmative. But this finding is of little value, for the Court confused two quite different matters, (1) the nature and extent of the rights of the several members of a Brahmin joint family with regard to the dues which they are able to collect, and (2) the rights which the Brahmins have as against their Yajmans to enforce payment of Vriti. As between the several members of a Brahmin family their Vriti, the dues actually collected and the chance of collecting such dues in future, constitutes an element of property, but as against any particular Yajman, no Brahmin, in my opinion, has any right which can correctly be termed "property," that is, he has no right in them. In *Ghelabhai* v. *Hargovan* (3) the learned Judge Chandavarkar accepting the position laid down by Couch, C. J., that if the office of a priest be hereditary, the dues pertaining to it must be shared as immoveable property, goes on to hold that the hereditary office is, therefore, immoveable property. But it by no means follows that because for certain purposes 'Vrit' may be conveniently compared to immoveable property, it must, therefore, be termed as immoveable property.

The original Court found that plaintiffs were the Gurs, and the defendant was Thani, and that both Gurs and Thanis have been called in by the Chabrias to perform ceremonies, the plaintiffs having no exclusive right to do so,

(16) 3 B. 232; 2 Ind. Dec. (N. S.) 156.

that prior to Asau 1968 the Gurs and Thanis shared all dues but 'Gaudan,' equally, the Gurs taking Rs. 5-0-0 and the Thanis Re. 1-0-0 of the 'Gaudan' which amounted to Rs. 6-0-0; that the Chabria Punchayet had passed a resolution not to employ the plaintiffs and to pay to the defendant only such portion of the Vriti as he would have been entitled to under the old practice; that defendant had not received more than he was personally entitled to; that Ramdas was under no obligation to call in the plaintiffs to perform ceremonies, for even under the system set up by the plaintiffs, he had the right to call in either a 'Gur' or a 'Thani'; that defendant had received in dues Rs. 18-8-0, being half of Rs 37-0-0 the total amount due under the old system; and that under the old system of distribution Rs. 5-0-0 of this would have been handed over to the Gurs, but that defendant was under no liability to hand it over because it had been paid to him in his individual capacity; that it was a condition of the Thanis' employment that they should acquiesce in the Gurs' share of the Vriti being devoted to the feeding of cows, etc. The injunction was refused on the ground that no exclusive right in the plaintiffs had been established and the suit was dismissed with costs.

The lower Court drew no issues, and it is not clear from the judgment what were the grounds of appeal. But the argument put before the Court was that the Thanis were merely the local agents of the Gurs, and were bound to hand over to the principals all dues received for distribution. This was quite a new case: but the Court went into the question and found that no agency was established. It held that no money had been received by defendant for the plaintiff. The appeal was dismissed.

In this Court, Mr. Fatehchand for the appellants frankly admits that he can make out no case for money received by defendant on behalf of the plaintiffs. He has concentrated his efforts on endeavouring to persuade the Court that if plaintiffs were the hereditary priests of the family of Ramdas Lalchand, they had a legal right to collect such dues as would have been paid to them in the ordinary course had they been called in to perform the ceremonies actually performed by defendants. And in the last resort he asserts that the defendant was partner of plaintiffs and bound to account for all receipts.

But it has been found, and is not now disputed, that defendant was as much entitled as plaintiffs to officiate as priest to the family of Ramdas, and equally entitled to receive dues, though in one special instance a less amount. He has no right to have defendant prohibited from attending the household of Ramdas or any other Chabria, or from receiving dues. The only question is whether defendant can be compelled to hand over any portion of the fees which he has already received or may hereafter receive. Plaintiffs have failed to make out their original allegation that all the money received by defendant was their property, that defendant was tortiously in possession of Rs. 35-11-0 belonging to them. They were equally unsuccessful in their attempt to prove receipt as agent; this is a question of fact on which both the lower Courts have held against them. The entirely new suggestion that there was a partnership is inconsistent with the pleadings, and with the memo. of appeal to this Court. No attempt has been made to show that a partnership was alleged before the original Court and that there is any evidence whatever to establish it. The mere fact that separate suits have been filed in respect of each Yajman from whom dues were received not only contradicts the theory of a partnership, but makes it impossible for the Court to take accounts as in a partnership.

We cannot cast defendant in damages as a trespasser, for both the lower Courts have held that he rightfully performed the ceremonies. I would dismiss the appeal with costs.

FAWCETT, A. J. C.—(*June* 6, 1918).—The difference of opinion which has led to this case being referred to me is on the question whether the plaintiffs have any right to recover damages from the defendant as a trespasser. The facts found have been sufficiently stated in the two judgments which differ on this point. It is quite clear that (as stated by Crouch, A. J. C.) the plaintiffs cannot sue for the fees actually received by the defendant, or any part thereof, as

if it were money had and received by the defendant to the plaintiff's use, since he only received his proper fees (*plus* a gratuity of Rs. 4 in respect of the Gaudan ceremony) for ceremonies rightfully performed by him. But the plaint does not base the claim to relief on any specific allegation that the defendant received the fees to the plaintiff's use. It asserts generally that the defendant was not entitled to the fees and was bound to return them to the plaintiffs according to law. It is, therefore, wide enough to be treated as a suit against the defendant as a trespasser in the Vrit office, which plaintiffs claim to belong to them and to entitle them to certain payments as fees appertaining to the office. As such it is a suit of a similar kind to the one relating to the office of Kazi of Bombay, *Muhammad Yussub* v. *Sayed Ahmed* (6). Such a suit, as pointed out in that case at page xx is one for disturbance to an office, or (as it would now be classed) for trespass. And as shown in that case at pages xxxv—xxxvi, such an action cannot be maintained unless the sums claimed as fees are certain fixed payments annexed to the discharge of official duties and not mere gratuities of uncertain amount and of no legal obligation. In this particular case there can be no doubt that the fees received in respect of the ceremonies performed are fixed fees attached to the office, and I agree with the Judicial Commissioner on this point.

The exclusive right to officiate set up by the plaintiffs has been disproved, but the fact of their having claimed too much should not be held to preclude them from any relief to which they may be entitled on the proved facts, when the pleadings are wide enough to cover the latter claim, see *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (17). The mere failure to prove the case set up does not, therefore, necessarily deprive the plaintiffs of any right to relief they otherwise may have against the defendant. On the facts found I can see no reasonable alternative to the view that the relationship between the Gurs (plaintiffs) and the Thanis (of which defendant is one) was that of co owners of the Vrit, the dues attached to the office being shared by them (equally except in two particular cases), and the actual officiator who receives the fees being a trustee for the payment of their share in such fees to the other co owners. If plaintiffs are entitled to relief on this basis, the pleadings are clearly wide enough to cover their claim to it; for the issues Nos. 2, 6 and 7 in the trial Court raise the essential points in a general form and there is no question of defendant being taken by surprise.

The main question, therefore, is whether defendant, though being a co-owner, is liable to plaintiffs for damages as a trespasser. The cases of *Muhammad Yussub* v. *Sayad Ahmed* (6), *Sitarambhat* v. *Sitaram Ganesh* (18) and *Vithal Krishna Joshi* v. *Anant Ramchandra* (7) are all cases of strangers in an office without any right; and such cases do not, therefore, exactly cover this question of defendant's liability. The learned Additional Judicial Commissioner in his judgment says that the defendant rightly performed the ceremonies and cannot, therefore, be treated as a trespasser. But it seems to me that this is not a necessary conclusion. The law allows a co owner to sue another co-owner for trespass, if the latter has ousted him and such ouster covers an act inconsistent with the enjoyment of the property by both: See Halsbury's Laws of England, Volume XVII, page 866, Article 1525, and Underhill's Law of Torts, 7th Edition, Article 111 at page 360. In this particular case the defendant in his written statement seeks to justify his action by the resolution of the Punchayet, and there is no doubt that the joint effect of that resolution and defendant's conduct in acting upon it and taking only the fees due to him instead of all the fees due for the ceremonies is to oust the plaintiffs from the office in regard to the particular fees that would otherwise have come to them. If then, this resolution of the Punchayet was not justified, the defendant has on the admitted facts clearly so conducted himself as to be liable to be sued by the plaintiffs as joint tort-feasor; and that being so, judgment can be recovered from him alone for the whole amount of the damages (Halsbury's Laws of England, Volume XXVII,

(17) 28 A. 482 at p. 496; 10 C. W. N. 626; 3 S. L. J. 360; 3 C. L. J. 481; 1 M. L. T. 143; 8 Bom. L. R. 397; 16 M. L. J. 269; 33 I. A. 81; 8 Sar. P. C. J. 918.

(18) 6 B. H. C. R. 250.

Articles 955, 957 at pages 487-498; Underhill's Law of Torts, 7th Edition, Article 35, page 112; and Pollock's Law of Torts, 7th Edition, page 194).

It has next to be decided whether the resolution of the Panchayet was a valid one or not, because if the caste had the power to exclude the plaintiffs from employment and so virtually dismiss them from the office, then no question of tort or trespass arises. The Joint Judge appears to have held that the Panchayet had such power. The learned Judicial Commissioner has given reasons to the contrary in his judgment while Crouch, A. J. C. does not discuss the point. Mr. Rupchand for respondent has asked me to hold that the case of *Ghelabhai* v. *Hargovan* (3), which is against him, was wrongly decided and that the right view is the one adopted by the Calcutta and Madras High Courts, *viz*, that under Hindu Law the exclusive right claimed by a priest to officiate at ceremonies of a family, because his ancestors had before him performed similar ceremonies, is not enforceable at law, *Gour Mani Debi* v. *Chairman of the Panihati Municipality* (1) and *Ramakrishna* v. *Ranga* (19).

In one sense it is not necessary for me to decide whether such a claim is or is not enforceable by law, because this is not a suit for declaration that plaintiffs have an exclusive right to officiate, and even the injunction sought is not one to restrain defendant from officiating, but from receiving fees to which he is not entitled. As pointed out in the learned Judicial Commissioner's judgment, preventive relief which would have the result of forcing a particular priest on a Yajman is generally refused by the Bombay Courts, though the hereditary priest is saved from a pecuniary loss by being allowed to recover from the usurper of his office the fees wrongfully received for officiating. The decision in *Ghelabhai's case* (3) goes further than this and says a Hindu is legally bound to accept the ministrations of a hereditary family priest, unless the latter has become Patita (outcaste) or has declined to officiate. Whether the Yajman is so bound or not, is not a point directly arising in this case. But the plaintiff's right to recover damages depends on their being rightful co-owners of the Vrit, and if they have been lawfully dismissed by the Panchayet, so as to be no longer rightful holders of the office, their case falls to the ground. Mr. Rupchand's contention that the view taken in *Ghelabhai's case* (3) is erroneous, must, therefore, be gone into.

The question turns upon whether there is adequate authority for holding that an hereditary family priest has by custom certain rights against the family which neither the family nor the caste has power to annul except on the specific grounds already mentioned. The Bombay view is based mainly on the Smriti of Narada and the dissertation thereon of Jaggannanatha, which are contained in Colebrook's Digest, Volume I, pages 375, 377. The Smriti plainly forbids a Yajman from forsaking an hereditary priest, who is ready to officiate and is guilty of no grievous offence. The dissertation among other things lays down that the uninterrupted performance of sacrifice by father and son as family priests succeeds to make them hereditary priests whithin the meaning of the Smriti without proof of any specific appointment of the father and his descendants as family priests for ever. The above seems to me to justify the Bombay view which is based on it. Nothing in Mr. Rupchand's arguments meets the fact that the Smriti does contain a direct prohibition which logically invests an hereditary family priest with certain rights against the family; and I can see no sufficient reason for venturing to differ from Mr. Justice Chandavarkar's reasoning and conclusions. The main point on which a difference of opinion has arisen is whether it is politic and in accordance with Hindu Law that, a Yajman should be bound to employ a particular priest, though he is an hereditary family priest. Mr. Justice Chandavarkar says the rights given to an hereditary family priest are quite in consonance with Hindu Law and notions. Mr. Justice Mookerji in *Gour Mani Debi's case* (1) thinks otherwise and cites texts against forcing a priest on a Yajman. Where such high authorities on Hindu Law differ on a point like this it is difficult for an European Judge to say which view should be accepted as correct. But I think the difficulty is sufficiently

(19) 7 M. 424; 2 Ind. Dec. (N. S.) 879.

solved by applying the principles laid down by the Privy Council in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (20). It is there said: "The duty, therefore, of an European Judge, who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law, clear proof of usage will outweigh the written text of the law." The Smriti of Narada as an authority of antiquity is of greatweight (*cf.* Mayne's Hindu Law, 5th Edition, page 31) and the doctrine based on it by the Bombay High Court Judges is fairly deducible from it. But from the meagre and general nature of its contents it is necessarily open to attack, and the main question is whether the interpretation put on it in Bombay has been sanctioned by usage. This must, I think, clearly be answered in the affirmative, so far as the Bombay Presidency is concerned, for such rights have been asserted and recognized by the Courts from very early days. Thus in the case of *Ramchunder Bapooji* v. *Ramchunder Lakshmun* (15) cited in *Vithal Krishna Joshi* v. *Anant Ramchandra* (7) it was said that the view "that a Brahmin may employ whom he likes as his Upadhya, (*i e*, family priest) is opposed to the custom of the country" and other cases to the same effect are mentioned at page 8. On the other hand the Bengal Full Bench decision of 1852, referred to in *Gour Mani Debi* v. *Chairman of the Panihati Municipality* (1) and the texts referred to in the same case at page 1064* (which have not the same force in Western India as they have in Bengal) may have prevented a similar usage from there growing up or at any rate the question of usage does not appear to have been given any weight. And the Madras decision in *Ramakristna* v. *Ranga* (19) is mainly based on the ground that no usage had been alleged or proved, entitling the plaintiff to the right claimed by him. So far as Sind is concerned, there is no reason to think that the usage in this Province differs from that in the rest of Bombay Presidency. In *Gur Sukhraj* v. *Gur Chandiram* (21) the Bombay decisions in the Kazi's similar cases were cited and approved; and that case and the one of 1870 cited in *Manghirmal* v. *Vithalram* (13) show that there is nothing new in the Vrit rights set up by plaintiffs but (strangely enough) disputed by the defendant, who benefits by them. For these reasons, I concur with the view of the learned Judicial Commissioner.

It follows that the Panchayet could not legally dismiss the plaintiffs merely because the latter refused to effect an alienation which this Court has refused to recognise. The dismissal was not due to any misconduct of the plaintiffs but was a patent form of "boycotting" and the evidence adduced by defendant with a view to showing plaintiffs' unfitness to officiate has been rightly disbelieved by the Sub-Judge.

The justification set up by the defendant on the basis of the Panchayet resolution, therefore, fails. The Sub-Judge, however, has expressed the opinion that "When the Yajmans refuse to give anything for the Guru now, the Thanis are helpless and have to submit to the terms imposed by the Yajmans." This is relevant to the question of defendant's liability as a joint tort feasor, but it is based on the evidence of only one witness (Gidan) and it is doubtful if the real facts are before the Court. It has also to be considered whether this plea would in any case legally justify the commission of tort under the principles of Common Law summarised in Halsbury's Laws of England, Volume XXVII, Articles 913-916, 967 and 977 at pages 469, 470, 492, 498. I think the answer is clearly in the negative. Even assuming that, if the Thanis had refused to act on the resolution of the Panchayet, there would have been imminent risk of injury to themselves yet their acting upon the resolution was clearly not *bona fide* and reasonably done with the sole intention and in pursuance of the duty of obviating such risk, (Halsbury's Laws of England Volume, XXVII,

(20) 12 M. I. A. 397 at p. 436; 1 B. L. R. P. C. 1; 10 W. R P.C 17: 2 Sar. P. C. J. 361; 2 Suth. P. C. J. 135; 20 E. R. 389.

(21) 1 Selected Decision of Sind Sadar Courts 353 at p. 357.

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page 499). This is clear from the defendant's pleadings that the plaintiffs became interested in the Vrit only about 30 years ago, that no Brahmin has any legal right over the Vrit and that the resolution was a valid one. In the face of these assertions it would not be open to defendants to set up the inconsistent plea that the resolution was acted on by the Thanis, merely because their rights were threatened with risk of injury if they did not do so.

Concurring, therefore, with the Judicial Commissioner, I reverse the Sub-Judge's decree in dismissing the suit and grant the plaintiffs a decree for recovery of Rs. 23 8 0 from the defendant with half their costs throughout. I do not allow them full costs as the plaint overstated their legal rights, and their Pleaders have not, even in this Court, put the defendant's liability on its real basis.

Decree of the Sub Judge reversed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 212 OF 1919.

February 10, 1920.

Present:—Pandit Kanhaiya Lal, A. J. C.

Mirza ATHAR HUSAIN—PLAINTIFF—APPELLANT

versus

IDU SHAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption suit—Pre-emptor indebted—Good faith.

The facts that a pre-emptor is indebted, is a minor and is not possessed of any means to enable him to purchase any new property are no justification for the inference that a suit brought on his behalf is not brought in good faith.

Appeal from the decree of the Subordidate Judge, Gonda, dated the 29th November 1919, confirming that of the Munsif, Gonda, dated the 15th November 1918.

Mr. *Haider Husain*, for the Appellant.

Babu *Ram Chandra*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The only question for consideration is whether the suit was brought in good faith. The Courts below found against the plaintiff. The sole ground on which that view is based is that the plaintiff was indebted and was a minor, that the suit had been brought under the guardianship of a woman named *Musammat* Idan, who was in the keeping of Haider Husain, his uncle, and that the plaintiff was not possessed of any means to enable him to purchase any new property.

The inference raised from the above premises is, however, not justified. A man may be indebted and yet may be anxious to get new property by further borrowing or obtaining financial assistance from his relations, if he considers the bargain sufficiently profitable. The Courts below rely on the decision in *Maharani* v. *Ram Adhar* (1). But as pointed out in *Ram Sahay* v. *Jagdamba Singh* (2) the circumstances of that case were entirely different. There the pre-emptor was found to have parted with her own interest and to have had no possible personal object in pre-empting the share which was sold by her husband's nephew. The learned Counsel for the plaintiff-appellant states that it would be possible for the plaintiff to pay the money required for pre-emption without transferring any portion of his property, for which the permission of the District Judge would be necessary. Haider Husain is the certificated guardian of the plaintiff, and it makes no difference to the defendant vendee whether the plaintiff is supplied the purchase money for pre-emption by Haider Husain or gets it otherwise. In *Bindeshuri Singh* v. *Pandit Balraj Sahai* (3) the mere fact that the suit was instituted at the expense of another person and that the person claiming pre-emption was merely a nominal plaintiff acting on his behalf was held to be immaterial.

The plaintiff is admittedly a co-sharer in the sub division and *mahal* in which the property sold is situated. The defendant vendee is a stranger. The real consideration settled and paid has been found to have been Rs. 600.

(1) 13 Ind. Cas. 508.

(2) 37 Ind. Cas. 163; 19 O. C. 153 at p. 158; 3 O. L. J. 683.

(3) 10 O. C. 49 at p. 56.

NARAIN DAS v. BAIJ NATH SAHAI.

The appeal is, therefore, allowed and the claim decreed for pre emption on payment of Rs. 600 within one month from this date. The plaintiff appellant will get his costs here and hitherto from the defendant vendee, who will bear his own costs throughout.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 151 OF 1919.

August 29, 1919.

Present:—Pandit Kanhaiya Lal, A. J. C.

Lala NARAIN DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BAIJ NATH SAHAI—PLAINTIFF—RESPONDENT.

Mortgage—Interest, rate of, fixed and certain—Mortgagee, right of, to receive profits in excess—Construction of document.

Where under a mortgege-deed the rate of interest which the mortgagee is to receive is fixed and certain he is not entitled to any portion of the usufruct which might be in excess of that rate, and the mortgagor is entitled to maintain a suit for accounts to be taken of the profits realized by the mortgagee from the mortgaged property. [p. 693, col. 1]

It would require very clear words to induce a Court to put upon a mortgage-deed such a construction as would entitle the mortgagee to claim interest and such portion of the usufruct as might be in excess of it. [p. 693, col. 1.]

Where a mortgage-deed provided that the net profits of the mortgaged property, which were estimated at a certain fixed amount, would go towards the payment of interest at the stipulated rate due to the mortgagee, that if the gross rental then fetched by the mortgaged property became deficient afterwards the mortgagor would pay the deficit, that if the revenue assessed on the property was enhanced the mortgagor would pay the extra revenue, that if by any efforts of the mortgagee the profits derived from the mortgaged property increased the advantage of that increase would go to the mortgagee, that the mortgagor would have no right to claim surplus profits on that account and that the mortgagor would be entitled to redeem the property after the lapse of the fixed period on payment of the principal money secured by the mortgage and such deficient profits or extra revenue as might be recoverable under the above conditions:

Held, that in a suit for redemption of the above mortgage the mortgagor was entitled to claim an account of the profits, derived by the mortgagee from the mortgaged property although no provision was made in the deed to cover a case where the profits might increase without any special efforts on the part of the mortgagee. [p. 694, col. 1.]

Appeal from the decree of the Subordinate Judge, Partabgarh, dated the 7th March 1919, modifying that of the Munsif, Kunda, dated the 8th May 1918.

Mr. *Mumtaz Husain* and Babu *Daya Kishan Seth*, for the Appellants.

The Hon'ble Syed *Wazir Hasan*, Syed *Ali Mohammad* and Syed *Mohammad Sibtain*, for the Respondent.

JUDGMENT.—The suit which has given rise to this appeal was brought by the plaintiff for the redemption of a mortgage effected by his father, Gayadin Lal, in favour of Parsotam Das, the predecessor-in-title of the defendants, on the 1st May 1880. The amount secured by the mortgage was Rs. 895 and among other conditions the mortgage-deed provided that the net profits of the mortgaged property which were then estimated at Rs. 134-1-0 per year shall go towards the payment of interest due to the mortgagee at Rs. 1-4-0 per cent. per mensem, that if the gross rental then fetched by the mortgaged property became deficient afterwards the mortgagor would pay the deficit, that if the revenue assessed on the property was enhanced, the mortgagor would pay the extra revenue, and that the mortgagor would be entitled to redeem the property after the lapse of ten years in the month of Jeth on payment of the principal money secured by the mortgage and such deficient profits or extra revenue as might be recoverable under the above conditions. The mortgage deed also contained a covenant that if by any efforts of the mortgagee, such as the construction of wells, ponds and the like, the profits derivable from the mortgaged property increased, the advantage of that increase would go to the mortgagee and that the mortgagor would have no right to claim surplus profits on that account.

The first point for consideration in this appeal is whether in viw of the terms above specified the mortgagor is entitled to claim an account of the profits derived by the mortgagee from the mortgaged property. If the net profits estimated at the time of the

mortgage be taken into consideration, it would seem that the mortgagee was entitled on redemption to the principal money secured by the mortgage and to keep any extra profits which he might have derived by virtue of improvements made by him or efforts made to enhance the rental. But if the rate of interest provided for by the deed of mortgage be taken into consideration it is obvious that the mortgagor had limited the extent of the benefit which he was to receive. The interest stipulated was the measure of the recompense which he was to receive for the advancement of the loan and if any profits were derived in excess of the interest stipulated for, the mortgagee could not claim the same. The view taken by the Court of first instance was that the mortgagee was entitled to the principal money secured by the mortgage and that the plaintiff could not claim an account of the profits from the mortgagee; but the lower Appellate Court adopted a different view. The latter construction appears to be more equitable and consistent with the intention of the parties so far as it can be gathered from the document in question. The language is far from clear; but it seems that if the rate of interest which the mortgagee was to receive was fixed and certain, any extra profits which the mortgagee might receive after paying the interest stipulated for would not be his except in the circumstances specified in the deed. As pointed out in *Rajah Amir Hasan Khan* v. *Mukhdoom Singh* (1), it would require very clear words to induce a Court to put upon a document such construction as would entitle the mortgagee to claim the interest and such portion of the usufruct as might be in excess of it. The mortgagor did not then anticipate that in the natural course of things the profits of the mortgaged property would exceed the estimate he had then arrived at. He made a provision for such increase as might take place in consequence of any efforts made by the mortgagee to improve the property and allowed the mortgagee to appropriate the benefits resulting from those improvements. No provision was, however, made to cover a case where the profits might increase without any special efforts on the part of the mortgagee. The lower Appellate Court was, therefore, justified in allowing accounts to be taken of the profits realised by the mortgagee from the mortgaged property.

The mortgagee claimed a certain amount due on a deed of further charge executed by Gayadin Lal on the 4th June 1889. The Courts below disallowed the amount on the ground that no legal necessity therefor was established. The deed of further charge purports to have been executed to pay two prior deeds of a similar nature; but it is not necessary to consider whether the debts, for the payment of which that deed was in the main executed, were antecedent debts, because the accounts accepted by the lower Appellate Court show that the profits derived from the mortgaged property were such as to satisfy the money due on the deed of further charge also. The amount claimed by the defendants in this appeal on account of the deed of further charge is only Rs. 3,524 exclusive of the principal money claimed on account of the previous possessory mortgage. The profits derived from the mortgaged property amount, according to the above account, to Rs. 6,198-0-3 up to 1320 Fasli.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) Rafique & Jackson's P. C. No. 31.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 937 OF 1917.

June 11, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Duval.

MADHUSUDAN KOER—PLAINTIFF—APPELLANT

versus

BADRIDAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract, formation of - Documents constituting contract—Breach of contract—Damages, measure of.

A, a dealer in a certain class of goods, used to obtain his supplies from firm *B*. On July 21st he wrote to *B* stating his requirements and asking the firm to write *sowda* or contract. On July [illegible] firm wrote giving their selling rates from [illegible] to November. On July 26th *A*. wrote to the firm: "Please write *sowda* for one wagon for [illegible]

MADHUSUDAN KOER v. BADRIDAS.

July in respect of flour," etc., he then set out the rates and concluded thus, "Please write *sowda* for four wagons. On arrival of the goods ordered I shall send for one wagon of July *sowda*. Further I shall make the *sowda* for the months of October and November *pucca* hereafter. Please send a reply to this letter." He also on the 1st and 5th August made remittances to *B.* which the latter accepted. On July 29th *B.* despatched a letter, dated July 28th, to *A.* repeating the rates quoted in his letter of July 24th, and on the same day sent him a telegram quoting different rates, to which *A.* objected:

Held, that there was a completed contract between the parties, that after the firm *B.* had sent in its quotation, and *A.* had made the remittance and given the order, there was an acceptance of the offer which constituted a complete contract, and that the rate of damages was the difference between the price prevailing in *A*'s city on the day of delivery and the contract rate *plus* the cost of freight and bags [p. 995, col. 2.]

Appeal against the decree of the District Judge, Rungpur, dated the 10th April 1917, affirming that of the Subordinate Judge, Rungpur, dated the 29th February 1916.

Babus *Sarat Chunder Roy Chowdhury* and *Rishindra Nath Sarkar*, for the Appellant.

Babus *Baidya Nath Dutt* and *Bhupendra Kumar Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for damages for breach of a contract.

The plaintiff who is a dealer in flour and other goods at Rungpur used to get his goods from the defendant's firm at Allahabad.

The questions which arise in this case are first whether there was a complete contract between the parties; and secondly, if so what is the principle on which the plaintiff should be entitled to damages.

The Courts below are of opinion that there was no complete contract.

Now, the question whether there was such a contract or not, is to be decided upon a construction of certain letters which passed between the parties.

The first letter is dated the 21st July 1914 written by the plaintiff to the defendant. In this letter the plaintiff stated as follows:—'Within 5 or 7 days in July I shall send an order for one wagon of goods. Please write *swoda* in respect thereof." It was further stated that the plaintiff would send for 2 wagons for delivery in August, 2 wagons in September, 2 wagons in October and 2 in November and that these wagons would be sent for (one at a time) at an interval of 15 days. The plaintiff asked the defendants to quote rates. On the 24th July the defendants sent a reply in which they gave the present rates *i.e.*, for July and they stated that in August and September the rate would be increased by 2 annas in the maund and in October and November the increase would be at the rate of 4 annas per maund over the July rate.

It appears that on the 24th July the plaintiff had sent a telegram ordering delivery of one wagon of goods on a former contract and that was despatched by the defendants. On the 26th July 1914 the plaintiff wrote as follows:—"The goods ordered for might have been sent by you; please write *swoda* for one wagon for the month of July in respect of flour etc." Then followed the rates of the goods as quoted in the defendant's letter dated the 24th July. Then the letter proceeds as follows:—"Please write *swoda* for four wagons in respect thereof. On arrial of the goods ordered, I shall send for one wagon of July *swoda*. Further I shall make the *swoda* for the months of October and November *pucca* hereafter. Please send a reply to this letter." This is the document upon which the suit is based, as completing the contract for delivery of one more wagon in July and two wagons in August and September.

The translation given of the letters which were in Hindi or Mahajani character is taken from the translation supplied to us on behalf of the appellant and which is different from the translation made by the Court translator of the appellate side. The translation made by a senior translator on the original side of this Court agrees with the translation made by the appellant. We have also been supplied with copies of the original letters in the Bengali character.

The main point to be considered in connection with the construction of the letters is whether the words * * (*sowda likhengeii*) refer to the writer of the letter or to the addressee, *i.e.*, do they men "I will write *sowda*" or "you will please write *sowda*."

The Courts below have apparently taken the view that they mean the former show-

ing that the contract was not yet complete. But it appears from Exhibit 2 that in the last line of the letter, namely *chithika jabab likhengeji* the words "*likhenge ;i*" cannot possibly refer to the writer of the letter: they must have reference to the person addressed namely the defendant : and if that is so, the same meaning should be attached to the words appearing in the earlier part of the document *viz.*, *gari* and *sowda likhengeji*. We think that the words *sowda likhengeji* must mean that the defendant was to enter up the *sowda* (contract).

Then the learned District Judge lays much stress on the fact that the words used in the document are used in the future tense and that is also relied upon by the learned Pleader for the respondent. But the future tense used is in connection with the contract for October and November for which, it is expressly stated in the letter, contract would be made hereafter : and that is distinguished from the *sowda* (contract) for July and August with respect to which the plaintiff wrote to the defendant to "write *sowda* or contract." That this is the correct construction of the document, also appears from the fact that the plaintiff made a remittance of Rs. 850 to the defendant firm at Allahabad on the 1st August and also sent Rs. 1,000 on the 5th August and orders were sent along with the remittance giving details of the goods to be supplied under the terms of the contract.

It appears that on the 29th July the defendants sent a telegram to the plaintiff in which they gave different rates from what were quoted in their letter dated 24th July. On the next day, 30th July, the plaintiff wrote a letter to the defendants expressing surprise at the different rates given in their telegram. It was further stated in that letter that the plaintiff had accepted the proposal of the defendants and sent orders for 6 wagons of goods of which the defendants had despatched only one. The letter went on to say, "The rest *i. e.*, 1 for July and four for August and September still remain undespatched. After entering into contract with you, I have sold the goods here to my customers in advance at the old rate mentioned in your letter. So you see I will be put in a very false position and incur severe loss if I be driven to accept the rate mentioned in your telegram. I hope you will be pleased to rectify your mistake and despatch the goods at the former rate mentioned in your letter of 1st Sravan Sudi Sambat 1971."

Now, before the telegram of the 29th July was sent from Allahabad, a letter dated 28th July had been despatched on the 29th by the defendants to the plaintiff in which the same rates as were quoted on the 24th July, were given : and up to that time there was no repudiation of the original contract. It was only in the telegram so despatched that the defendants appear to have resiled from the original contract.

The defendants did not return the money until after the institution of the suit which was instituted on the 14th September 1914, Even if there was no complete contract contained in Exhibit 2, it seems to us that after the defendant had sent in his quotation and the plaintiff made the remittance and gave the order, there was acceptance of the offer which constituted a complete contract.

The plaintiff asked the Court to call upon the defendants to produce the letters and the Court made an order to that effect. But the defendants did not produce the letters. It does not appear whether the defendants were actually served with notice to produce them. However, that may be, the fact remains that in accordance with what was written in Exhibit 2, the plaintiff made the remittance and gave orders for the goods to be supplied.

We are accordingly of opinion that there was a complete contract upon these documents.

The next question is as to the damages.

The plaintiff has stated his claim for damages in two schedules attached to the plaint. In the first, he gave the difference between the market rate at Allahabad and the contract rate at Allahabad and in the second schedule he gave the market rate at Allahabad and the market rate at Rungpur and claimed the balance after allowing for costs of freight and bags. The learned Subordinate Judge was of opinion that the principle on which the damages were claimed was erroneous because in his opinion the damage in the second schedule was too remote and should not

be allowed. The learned District Judge was also of opinion that the plaintiff in claiming damages at the rate prevailing at Allahabad had claimed on an erroneous principle. He apparently overlooked the fact that in the second schedule the plaintiff had also claimed the difference between the contract rate and the prevailing rate on the day of delivery at Rungpur.

Our attention has been drawn to a passage in the judgment of the learned Judge where he says "There is no reliable evidence to show at what rates the goods were available at Rungpur the place of delivery," Before taking up the question of damages, the learned Judge in another portion of his judgment says "In view of the finding recorded above, it is hardly necessary to decide whether the plaintiff suffered any loss on account of his not having received the goods from the defendants."

It is clear, therefore, that he did not properly apply his mind to the question of damages and in the next place it appears from his judgment that he entirely overlooked the fact that the plaintiff had claimed damages at the Rungpur rate. We do not think that he meant to arrive at any definite finding on the evidence on the record which we unde stand is entirely one-sided.

We think that the rate of damages should be the difference between the price prevailing at Rungpur on the day of delivery and the contract rate *plus* the cost of freight and bags.

It these circumstances we think that the case should go back to the lower Appellate Court in order that the question of damages may be gone into and the appeal disposed of according to law.

Costs will abide the result.

Case remanded,

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 90 OF 1919.

February 10, 1920.

Present:—Pandit Kanhaiya Lal, A. J. C.

TIKA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAM KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Inheritance—Jadubansi Ahirs *of village Dharam Khera, District Kheri—Collaterals preferred to daughters*—Wajib-ul-arz, *entry in, construction of.*

By virtue of a tribal and family custom among the Jadubansi Ahirs of village Dharam Khera, in the District of Kheri, collaterals are, in matters of inheritance, entitled to preference over daughters and their issue. [p. 697, col. 1.]

Where a *wajib-ul-arz*, purporting to have been dictated or agreed to by the ancestor of the family under consideration, recorded that the custom observed by the family relating to inheritance was that, if a person died without leaving a son, his widow was entitled to remain in possession of his estate for life without any power of transfer, and that, if there was no widow the collaterals would succeed and in their default daughters and their sons would succeed to the inheritance:

Held, that the *wajib-ul-arz* established that there was a custom in the family by virtue of which daughters and their issue were postponed in favour of collaterals where they existed. [p. 697, col. 1.]

Appeal from the decree of the Subordinate Judge, Kheri, dated 30th January 1919, upholding that of the Munsif, Kheri, dated the 5th April 1918.

Babu *Basudeo Lal*, for the Appellants.

Mr. *S. N. Sinha*, for the Respondents.

JUDGMENT.—The dispute in this case relates to certain property which belonged to Kesri, who died leaving a widow, *Musammat* Ram Kuar, a daughter *Musammat* Kailasa, and a grand-son by a predeceased daughter named Balakram. He also left two brothers, Tika and Kallu, who are the plaintiffs.

On the 19th July 1917 *Musammat* Ram Kuar made a gift of certain plots of land situated in the village Dharam Khera, which formed part of the estate inherited by her from her husband, in favour of Balakram. On the same day she executed another deed of gift by which she gave a 21/2 *biswansis* share in the village Dharam Khera, Patti Mahanand, to her daughter *Musammat* Kailasa It is not now disputed that the plaintiffs lived separately from Kesri. Their sole conten-

tion is that by virtue of a tribal and family custom daughters and their issues were excluded from inheritance in the presence of collaterals and the deeds of gift aforesaid could not, therefore, affect their reversionary rights. The Courts below found against them and dismissed the claim.

The plaintiffs produced in support of the custom set up by them a copy of the *wajib-ul-arz* of the village Dharam Khera in which Kesri resided and in which the disputed properties are situated.

That *wajib-ul-arz* records that the custom observed by the families of the Zamindars of the village relating to inheritance was that if a co-sharer died without leaving a son his widow was entitled to remain in possession of his estate for life without any power of transfer; if there was no widow, the collaterals would succeed and in their default daughters and their sons would succeed to the inheritance. The *wajib-ul-arz* purports to have been dictated or agreed to by the co-sharers of the village, one of whom was Khusal, the father of Kesri, and the present plaintiffs. It purports to have been signed by Hulas Rai, the Patwari, and Bihari, the Lamberdar. The village belonged entirely to Jadubansi Ahirs; and considering the terms of the *wajib-ul-arz*, there can be no doubt that there was a custom among them by virtue of which daughters and their issue were postponed in favour of collaterals where they existed. Some oral evidence has been produced to show that on certain occasions the custom had been observed. The Court of first instance adversely criticised that evidence; but the lower Appellate Court does not refer to it. The fact, however, remains that the *wajib-ul-arz*, which was dictated by Jadubansi Ahirs, including the father of Kesri and the plaintiffs, recorded what was the tribal custom observed by the families of Jadubansi Ahirs, who were Zamindars. By virtue of that custom the collaterals were entitled to preference over daughters and their issue. As observed in *Suraj Bakhsh* v. *Thakurain Chhab Kuar* (1) a *wajib ul-arz* is properly admissible to prove a custom set out therein and the entries made therein where it appears that those entries indicate the existence of a well-established custom rather than connote the views of individuals as to the practice which they wish to see prevailing in the village or tribe. Where the custom is startlingly at variance with the law, a Court is entitled to look for substantial corroborations, but a custom excluding daughters and their issue from inheritance or postponing them in favour of collaterals is by no means uncommon. The decision in *Bandi Bibi* v. *Musharraf* (2) dose not apply because what was set up therein was purely a family custom and there was nothing to show that the persons who dictated the *wajib ul arz* were persons of the same family.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed for a declaration that the deeds of gift executed by *Musammat* Ram Kuar in favour of *Musammat* Kailasa and Balakram on the 19th July 1917 would not affect the reversionary rights of the plaintiffs. The plaintiffs will in the circumstances get their costs here and hitherto from the contesting defendants respondents.

Appeal allowed.

(1) 26 Ind. Cas. 98; 1 O. L. J. 532.

(2) 42 Ind. Cas. 199; 4 O. L. J. 509.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 887 AND 883 OF 1918.

May 11, 1920.

Present:—Mr. Justice Coutts and Mr. Justice Sultan Ahmed.

RAMA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JANAK SINGH AND OTHERS—PRINCIPAL DEFENDANTS

BAIJ NATH SINGH—*Pro forma* DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Permission to withdraw suit with liberty to bring fresh suit—Jurisdiction, want of, effect of—Res judicata.

A Court has no jurisdiction to permit a suit to be withdrawn with liberty to bring a fresh suit except under Order XXIII, rule 1, Civil Procedure Code. [p. 698, col. 2.]

RAMA SINGH v. JANAK SINGH.

Where an Appellate Court allows a suit to be withdrawn without jurisdiction, the decision of the trial Court operates as *res judicata*. [p. 699, col. 1.]

Appeals from a decision of the District Judge, Patna, dated 22nd March 1918.

Messrs. *S. K. Mitter* and *Kamleshwari Prosad*, for the Appellant.

Messrs. *Fakhruddin*, *L. N. Singh*, *Krishna Ballabh Sahay*, *Siveshwar Dayal* and *Ramgopal Singh Chaudhry*, for the Respondents.

JUDGMENT.

SULTAN AHMED, J.—This appeal arises out of two suits which were instituted by the plaintiffs-appellants for declaration of their title and confirmation or in the alternative recovery of possession of certain plots of land. It appears that similar suits had been instituted in 1914 by the same plaintiffs against the same defendants, for a similar declaration and consequential relief with respect to the same subject-matter. These suits were dismissed by the Munsif after contest but on appeal the Subordinate Judge gave permission to the plaintiffs to withdraw the suits with liberty to bring fresh suits on the same cause of action. Accordingly, the plaintiffs instituted the suits out of which this appeal arises. The Munsif held that the order of the Subordinate Judge in the previous suits was passed without jurisdiction and, therefore, the decision of the Munsif in the previous suits was *res judicata*. An appeal having been preferred against the decision of the Munsif the learned District Judge also held that the decision of the Munsif in the previous suits was *res judicata*. The learned District Judge came to this conclusion, relying on the case of *Kali Prasanna Sil* v. *Panchanan Nandi* (1). This second appeal has been filed against the judgment and decree of the learned District Judge.

The first question that arises for decision is what is the effect of the order of the Subordinate Judge granting permission in the previous suits to bring fresh suits on the same cause of action? It is contended by the learned Vakil appearing on behalf of the appellants that though the order of the Subordinate Judge giving permission to the plaintiffs to withdraw the suits with liberty to bring fresh suits was not strictly in compliance with the provisions of Order XXIII, rules 1, Civil Procedure Code, yet it was not an order without jurisdiction. The learned Subordinate Judge, it is urged, had jurisdiction to hear the appeal and while hearing the appeal, passed an erroneous order under Order XXIII, rule 1. On the other hand it is contended on behalf of the respondent that the order of the learned Subordinate Judge was void and a mere nullity. We have, therefore, to decide whether that order was without jurisdiction or whether simply an error of law had been committed by the Subordinate Judge in the exercise of jurisdiction. In my opinion this is clearly a case where the Subordinate Judge had no jurisdiction to make the order. In the case of *Nusserwanjee Pestonjee* v. *Meer Mynooddeen Khan* (2) the Judicial Committee of the Privy Council laid down as follows:—"The present question turns upon this principle, that wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament), and such jurisdiction is only given upon certain specified terms contained in the Regulation itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise." In the case of *Hira Lal Mitra* v. *Uday Chandra Dey* (3) it was laid down following the case of *Robert Watson & Co.* v. *Collector of Zillah Rajshahye* (4) that "Courts in India have no general power of dismissing a suit with liberty to the plaintiff to bring a fresh suit on the same matter. The only power they have in this respect is that given by Order XXIII, rule 1, sub rule (2), Civil Procedure Code." Applying these principles to the facts of the present case, the jurisdiction of the Subordinate Judge to grant the order could only arise if the conditions laid down in Order XXIII, rule 1, were fulfilled. It is conceded that the terms of Order XXIII, rule 1, were not complied with in this case. The result is that the decision of the Subordi-

(1) 33 Ind. Cas. 670; 20 C. W. N. 1000; 23 C. L. J. 489; 44 C. 967.

(2) 6 M. I. A. 134; 19 E. R. 50.

(3) 14 Ind. Cas. 33; 16 C. W. N. 1027; 16 C. L. J. 103.

(4) 13 M. I. A. 160; 12 W. R. P. C. 43; 3 B. L. R. P. C. 48; 2 Suth P. C. J. 283; 2 Sar. P. C. J. 500; 20 E. R. 511.

nate Judge was absolutely without jurisdiction and was, therefore, void and a nullity. The decision in the case of *Kali Prasanna Sil* v. *Panchanan Nandi* (1) which is on all fours with the present case is based upon the view that I have laid down above, and, as I have shown, correctly lays down the law. In the case of *Satyabadi Gountia* v. *Bediadhar Bar Panda* (5) which is also on all fours with the present case, it was laid down that: "The order of the Appellate Court granting leave to withdraw amounted to a decision that the evidence on the record was not sufficient to support the plaintiff's case, and, therefore, a subsequent suit between the same parties, in which the same matters were substantially in issue, was barred by the rule of *res judicata*." So, whatever view may be taken, whether the decision of the Subordinate Judge was without jurisdiction or amounted to a decision that the evidence on the record was not sufficient to support the plaintiff's case, it must be held that the present suits would be barred by the doctrine of *res judicata*. The difficulty suggested, that the Munsif could not treat a decision in the same case between the same parties of another Court of co ordinate or superior jurisdiction as a decision without jurisdiction and then proceed to ignore it, is not in my opinion real or substantial. If, as I have held, the order of the Subordinate Judge was without jurisdiction, and not erroneous in the exercise of his jurisdiction, and so was void and a nullity, it is quite competent for any Court, whether exercising higher or lower or co-ordinate jurisdiction to treat that order as void and a mere nullity. There is no warrant for suggesting that a Court when determining the plea of *res judicata* is not entitled to consider the question of the competency of the Court which passed the previous decree, as "in order that a judgment may be conclusive between the parties, the essential pre requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of section 11 of the Code of Civil Procedure", see *Krishna Kishore De* v. *Amar Nath Khettry* (6). The result is that in my view this case is concluded not only by the decision in the case of *Kali Prasanna Sil* v. *Panchanan Nandi* (1) but is also fully covered by the decision of this Court in the case of *Satyabadi Gountia* v. *Bediadhar Bar Panda* (5). This appeal is, therefore, dismissed with costs.

COUTTS, J.—I agree. I accept the view of the law as laid down in *Kali Prasanna Sil* v. *Panchanan Nandi* (1).

Appeals dismissed.

(5) 46 Ind. Cas. 392; 3 P. L. J. 404.
(6) 56 Ind. Cas. 532; 31 C. L. J. 272; 24 C. W. N. 633.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 228 OF 1919.
February 25, 920.

Present:—Pandit Kanhaiya Lal, A. J. C.

HAFIZUDDIN—DEFENDANT—APPELLANT
versus
MUBARAK ALI—PLAINTIFF—RESPONDENT.

Wajib-ul-arz, *entry in, construction of*—*Custom*—*Widow, childless*—*Estate taken by widow, nature of.*

A *wajib-ul-arz* purporting to record a custom prevailing in the family of the proprietors of a particular village contained an express direction that a childless widow can hold the property of her husband for her life to the exclusion of the heirs of her husband who get it after her death. On a question arising as to whether the widow had powers of alienation:

Held, that the widow took a life-estate merely and consequently had no power of alienation. [p. 700, col. 1.]

Appeal from the decree of the Third Additional District Judge, Lucknow, dated the 9th June 1919, upholding that of the Subordinate Judge, Bara Banki, dated the 30th January 1919.

The Hon'ble Syed *Wazir Hasan* and Syed *Ali Mohammad*, for the Appellant.

Mr. *Niamatullah*, for the Respondent.

JUDGMENT.—The dispute in this case relates to the property of Mansur Ali, who died about 20 years ago, leaving a widow, *Musammat* Shauran. On the 3rd June 1918 *Musammat* Shauran mortgaged the said property with possession in favour of the defendant-appellant. The plaintiff-respondent is the brother of Mansur Ali and his allegation is that according to the custom obtaining in the family to

which Mansur Ali belonged the widow of a childless person succeeded to the estate of her husband for life without any power of alienation and that on her death the estate reverted to the heirs of her husband. The Courts below found in favour of the plaintiff respondent and decreed the claim They held that the plaintiff respondent would be entitled to succeed to the property of Mansur Ali on the death of *Musammat* Shauran and that the mortgage effected by the latter in favour of the defendant-appellant was not binding on the plaintiff-respondent.

The only question which has been pressed for consideration in this appeal is whether the *wajib-ul-arz* has been correctly construed and bears out the custom set up by the plaintiff respondent. The *wajib-ul-arz* purports to record a custom prevailing in the family of the proprietors of the village Hunhuna, in which Mansur Ali owned the disputed share. It was verified among other persons by Imam Bakhsh, the father of Mansur Ali and the plaintiff-respondent. It states:—"The custom with regard to the distribution of inheritance in the family is that if a co sharer has two wives by marriage belonging to his caste and one of the wives has a son and the other wife has many sons the division of shares takes place by halves. If one wife has issue and the other is childless, the wife who has issue will get the share in preference to the wife who has no issue. If joint, the latter will get maintenance. But if she separates herself, so much *sir* land will be set apart for her with power of alienation as may be sufficient for her maintenance, regard being had to the extent of the share (left by the deceased). If any co sharer, who has no issue, adopts to himself any male relation of his, other than from among the relations of his wife, the person adopted shall be in possession of his share in his place after his death. A widow who has no issue remains in possession over the share of her husband after his death for her life. The heirs belonging to the family of her husband cannot get possession over his share. After her death that share passes of course to the heirs belonging to the family of her husband."

The only condition in which a childless widow is allowed an alienable interest is thus where her husband lived jointly with the other members of his family and the widow decides to separate herself after the death of her husband and accepts some *sir* land with alienable rights in full settlement of her claim to maintenance. After describing how the division should take place where a person leaves some children by a wife of a respectable caste and others by another wife of a low caste, the *wajib-ul-arz* goes on to say: "If there are three co-sharers, who are own brothers, born of the same mother, owning equal shares, and out of them one brother separates and the other two remain joint and out of those two one dies without issue and without leaving any widow, that share would be divided among the remaining two brothers in equal shares regardless of the fact that any of them was joint or separate. If the deceased brother leaves a widow surviving him, then that widow will remain in possession without power of alienation for her life. After her that share will be divided in the manner aforesaid." Relying on the latter clause, the learned Counsel for the defendant-appellant urges that the power of alienation is taken away only where a person who was living jointly with his brother leaves a widow behind him. The *wajib ul-arz*, however, contains an express direction that a childless widow can hold the property of her husband for her life to the exclusion of the heirs of her husband, who get it after her death. It does not expressly say that she shall have no power of alienation. But reading the *wajib ul-arz* as a whole there can be no room for doubt that the only circumstance in which she can get an absolute estate is where she is entitled solely to maintenance and accepts a composition in lieu of it.

The Court below was not much impressed with the oral evidence adduced in support of the custom, but it observed that though the evidence was of a flimsy nature so much was clear beyond all doubt from that evidence that in none of the instances cited, the properties which the widows inherited from their husbands passed to the heirs of those widows after their deaths. The estate reverted in each instance to the heirs of their husbands. It pointed out that if the

widows had actually taken the entire estate left by their husbands as full owners, the estate on their deaths would have passed to their heirs and not to the heirs of their husbands and treated that fact as affording a strong piece of evidence corroborating the custom set up and recorded in the *wajib-ul arz* giving childless widows only a life estate.

No question of adverse possession arises. The question of legal necessity was found against the defendant-appellant by the Court of first instance and the propriety of that finding was not challenged in the lower Appellate Court.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 430 OF 1916.

April 29, 1920.

Present:—Mr. Chevis, Acting Chief Justice, and Mr. Justice Martineau.

ZIA-UL HAQ—DEFENDANT—APPELLANT

versus

MUHAMMAD IBRAHIM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2, conditions of applicability of—Identity of causes of action—Plaintiff, whether bound, to sue for relief—Joint property—Partition, right to sue for, nature of.

The cardinal condition of the applicability of Order II, rule 2, Civil Procedure Code, is that the cause of action in both cases shall be identical. Moreover, it is essential that the plaintiff should have been bound to sue in the earlier case for the relief for which he prays in the subsequent suit. [p. 703, col. 1.]

The right of an owner in joint property to sue for partition at any time so long as the property shall remain undivided is a continually recurring right and once the immoveable property in suit has been declared to be common property the plaintiff has a right to come in at any time and ask for partition. [p. 703, col. 2.]

On the 17th February 1912 plaintiff sued defendant for rendition of account and dissolution of partnership alleging a partnership of long standing and purchase of certain immoveable property out of the profits of the partnership The suit was valued at Rs 130 only and on the defendant's objection as to valuation the plaintiff's Pleader stated that the suit was not in respect of immoveable property but only in respect of the profits arising out of it. The matter was referred to arbitration and the award declared the property to be partnership property and the plaintiff to be entitled to one-half share in it. A decree was eventually passed in accordance with this award.

On the 11th June 1914 the plaintiff instituted the present suit for rendition of accounts of the property decreed in the former suit and for its partition The Court gave the plaintiff a decree for possession of one-half of the property in suit and directed that accounts be taken of the mesne profits The defendant appealed to the High Court and contended that the suit was barred by Order II, rule 2, Civil Procedure Code:

Held, (1) that though in the first case the plaintiff was bound to sue for partition of the immoveable property, he was not bound to sue for its partition by metes and bounds: [p. 703, col. 1.]

(2) that the award and the decree passed in accordance therewith did in fact deal with the right of the parties in the immoveable property by declaring it as their property in common tenancy in equal shares; [p. 703, col. 1.]

(3) that the present suit was not one between partners for dissolution of partnership and for rendition of partnership accounts, but was one between tenants-in-common for mesne profits and partition of the common property; [p. 703, col. 2.]

(4) that under the circumstances the first suit was no bar to the present suit because there was no identity of causes of action in the two suits. [p. 703, col. 2.]

First appeal from the decree of the Subordinate Judge, 1st Class, Delhi, dated the 23rd December 1915.

This appeal first came on for hearing before Chevis, Acting Chief Justice, and LeRossignol, J., on 1st March 1920.

ORDER.

CHEVIS, ACTING, C. J. AND LEROSSIGNOL, J.—On the 17th of February 1912 the plaintiff in this case brought a suit against the defendant in this case for rendition of account and dissolution of partnership. In that plaint he recited a partnership of long standing, the opening of a shop dealing in various articles of merchandise and its closure some fifteen days before the suit. He asserted that there had been no rendition of account or dissolution of partnership and that immoveable property had been purchased out of the profits of the partnership and he sued as well for an account of the income from that immoveable property and for its division. The reliefs for which he prayed in detail were that the partnership should be dissolved, that the account should be adjusted of the partnership business including the income from the immoveable property

belonging to the partnership, and finally that a Receiver should be appointed. The suit was valued at only Rs. 130 and the defendant's first objection was that as the immoveable property alleged by the plaintiff to belong to the partnership was worth something between Rs. 25,000 and Rs, 45,000 the suit was undervalued. This objection elicited from the plaintiff's Pleader the clear statement that the suit was not in respect of that immoveable property but solely in respect of the profits derived from it and Court-fee was consequently not payable on the capital value. To this the defendant's Pleader retorted that the suit did not lie for a partial rendition of account but must include the whole of the property of the partnership of which partition should be demanded. Upon these statements certain preliminary and technical issues were framed including one whether the plaintiff had sued for only a part of the partnership property. But before parties went to proof upon these issues the matter was referred by them to arbitration and the arbitrator, whose award is printed at page 39 of the paper-book, gave the following award :— That the parties were partners in equal shares; that the property entered in a list filed by the plaintiff had been purchased out of the profits of the shops and, therefore, was partnership property ; that as he had been entrusted to decide only the dispute regarding the account and had not been authorised to make a partition, he made no award regarding partition but advised the plaintiff to sue formally therefor ; and finally he found that plaintiff should be given a decree declaratory of his ownership in one-half share of the immoveable property and that he should pay Rs. 327 to the defendant. Upon that award, after objections raised and decided, a decree issued declaring that the plaintiff is entitled to half the property in the list filed by him and is to pay Rs. 327 to the defendant. This decree is dated 28th February 1913.

On the 11th of June 1914 the present suit was instituted by plaintiff and contained the following recitals :—

That a previous suit for rendition of account and dissolution of partnership had been referred to arbitration and that the District Judge had passed a decree in accordance with the award; that the immoveable property now in suit was owned by the plaintiff and the defendant in equal shares but the defendant alone was in possession and refused to render to the plaintiff any account of the income thereof; and he, therefore, prayed for rendition of account of the said property from 17th February 1912 up to date and a decree be passed for any sum found due by the defendant to the plaintiff ; also that the property should be partitioned. The first Court has given the plaintiff a decree for possession of one half of the property in suit and has directed that the accounts be taken of *mesne* profits from the 17th of February 1912 to the date of partition.

Against that decree the defendant has instituted this appeal and the first objection raised by him is that the present suit by the plaintiff is barred by Order II, rule 2, Civil Procedure Code, inasmuch as, though urged by the defendant in the earlier suit to include in that claim a prayer for partition of the immoveable property alleged to be the partnership property, he persistently refused to do so and clearly asserted through his Pleader that the suit was merely for account of the income and expenditure of the immoveable property and of the shop but did not include a prayer for partition of the corpus.

Counsel for the appellant has contended that a suit contemplating a dissolution of partnership with the retention of the partnership property as joint property did not lie and he has cited several cases, *e g*, *Phula* v. *Shibdayal* (1), *Nawab Khan* v. *Sheikh Ghulam Ahmed* (2) and *Umar Baksh* v. *Faizulla* (3), which lay down that a suit between partners for a specific sum out of the partnership property without a prayer for dissolution of the partnership and rendition of account does not lie, but these decisions have little bearing on this case, for admittedly and clearly the first suit did include a prayer for dissolution of partnership. For the respondent it has been contended that the present suit is based on the decree issued in the former case, that the plaintiff was declared the

(1) 34 P. R. 1873.
(2) 7 P. R. 1875.
(3) 13 P. R. 1879.

owner of the property now sued for by that decree and that the first Court was not bound to partition the partnership property by metes and bounds. He also contended that the plaint in the former suit asked for dissolution of partnership, for rendition of accounts, and for the appointment of a Receiver; in other words, it prayed for the full relief that the Court could give. He contended that the Court which tried the former suit did in fact distribute the partnership property by declaring it to be the property of the parties in equal shares and that the decree really granted the plaintiff and the defendant a new status in respect of the quondam partnership property. So that it was *res judicata* that the property now belonged to the parties jointly in equal shares.

In our opinion, the appellant's contention that the earlier suit is in bar of the present suit cannot succeed. The cardinal condition of the applicability of Order II, rule 2, Civil Procedure Code, is that the cause of action in both cases shall be identical. Moreover it is essential that the plaintiff should have been bound to sue in the earlier case for the relief for which he prays in the subsequent case. Now though we have no doubt that in the first case the plaintiff was bound to sue for the partition of the immoveable property, we see no reason to hold that he was bound to sue for its partition by metes and bounds and though through his Counsel he refused to bring the partition of the immoveable property within his suit, the arbitrator's award did in fact deal with the right of the parties in the immoveable property by declaring that it should be in future regarded as their property in common tenancy in equal shares and the decree issued by the first Court was in accordance with that award. From that decree which of course renders the matters of which it disposes *res judicata* between the parties it follows that the immoveable property, which up to the date of that decree was partnership property in which, it could not be predicated until accounts had been rendered, what shares would fall to either party, became the common property of the parties in equal shares, and the present suit is based upon the position that at the time of the suit the immoveable property had ceased to be partnership property in which the rights of the parties severally were still unascertained and was the common property of the parties in equal shares. The suit indeed is not one between partners for dissolution of the partnership and for rendition of the partnership accounts but is one between tenants-in-common for mesne profits and partition of the common property.

Now, the right of an owner in joint property to sue for partition at any time so long as the property shall remain undivided is well established. Such a right is a continually recurring right, *cf.*, *Bisheshar Das* v. *Ram Prasad* (4) and *Mansaram Chakravarti* v. *Ganesh Chakravarti* (5) and once the immoveable property in suit had been declared to be common property, the plaintiff had a right to come in at any time and ask for partition. We are not concerned with the question whether the decree in the first suit was in excess of the prayer in the plaint, for we are not competent to go behind that decree nor, inasmuch as the decree so far as the plaintiff's rights were concerned was purely declaratory, can we see any force in the present appellant's contention that the plaintiff could have executed it.

For the foregoing reasons we hold that the first suit is no bar to the present suit because there is no identity of causes of action in the two suits.

As we have had time to hear parties' Counsel only on this plea of bar and as this Bench will not be sitting next week, we direct that another date be given for the disposal of the remaining grounds of appeal.

Mr. *Dev Raj Sawhney*, for the Appellant.

Mr. *Mukand Lal Puri* and Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The order of this Court, dated the 1st of March 1920 should be read as part of this judgment. The facts of the case are stated in the above order and need not be repeated. By the the above order it has been decided that the present suit is not barred under the provisions of Order II, rule 2. Counsel for the appellant has now addressed us upon the merits of the case.

(4) 28 A. 627; 3 A. L. J. 379; A. W. N. (1906) 142.
(5) 16 Ind. Cas. 383 17 C. W. N. 521.

His arguments have been confined to three points only :—

(1) That list P. W. 1 or list A, is not a true copy of the list which was filed by the plaintiff before the arbitrator in the previous case;

(2) That ten shops and house in the Saddar Bazar which plaintiff claims as his sole property are also part of the joint property of the parties and should be brought into hotchpot;

(3) That the plaintiff having based his claim upon a false list of the property, (*i. e.*, the list filed with the plaint), the suit should be dismissed *in toto*.

The first question for consideration is, what is the property of which a list was given to the arbitrator in the former case. The decree in the former case followed the award and declared the plaintiff the owner of one-half of that property. The previous case was decided on the 28th of February 1913. It is admitted on both sides that a list was given by the plaintiff to the arbitrator and formed part of the record of the suit. It is also admitted by both sides that soon afterwards this list was abstracted from the file and a substituted list P.-1 was put in its place. List P-1 is printed on page 6 of the paper-book. Neither side contends that this list is genuine. Maulvi Abdur Rahman, Pleader for the plaintiff, somehow obtained information that a document had been substituted for the genuine one and made a complaint to Mr. Gordon, Assistant Commissioner, who made an enquiry into the case. This enquiry led to nothing and the Additional District Magistrate ordered the papers to be filed, saying that there seemed to be no possibility of getting at the bottom of the matter. The plaintiff then lodged a criminal complaint against the defendant accusing him of having substituted a forged list. That complaint was enquired into by Mr. Connolly, the Additional District Magistrate, but was finally dismissed without process issuing to the defendant. In the enquiry before Mr. Gordon, Moulvi Abdur Rahman filed a list as a draft from which the list put in before the arbitrator was said to have been drawn up. This list is called list A and is to be found on page 8 of the paper-book. During the trial of the present suit a list P. W. 1 was put into Court by Fazl-i-Azim who had been called as a witness for the plaintiff. Fazal i-Azim, however, has not given evidence in this case. So we have not got his version of how the list came into his possession, but on behalf of the plaintiff it is alleged that the defendant applied for a copy and afterwards made it over to Fazl-i-Azim as he wanted to raise money on the property. List P. W. 1 and list A agree and the plaintiff relies on them and throws over the list filed with the plaint which covers one or two houses not mentioned in the other lists.

On behalf of the defendant-appellant, it is urged that list A and list P. W. 1 are both forgeries, that the original list was abstracted from the record of the former case by the plaintiff and further that the plaintiff has caused the Bahis of the defendant, which would have disproved the plaintiff's claim, to be stolen. These are grave accusations and there must be good grounds forthcoming before we can hold that there is any truth in them. The principal witness as regards the list A is Maulvi Abdur Rahman, Pleader, whose evidence is to be found on page 89. He deposes that as far as he remembers the list put in before the arbitrator was copied from the draft list A. The words "as far as I remember" are not to be found on the vernacular record, but we have no doubt that the witness said these words. Then there is the evidence of Asaf Ali, Mr. Abdur Rahman's *moharrir*, who says that he made a fair copy of the draft. As regards the other list P. W. 1 we have the evidence of Syed Jaffar Hussain, copying agent (page 89) that Zia-ul-Haq, the defendant, applied for a copy on the 3rd of January 1913 and that P. W. 1 is the copy which was delivered to him; also the evidence of Abdul Shakur (pages 85-86) who swears that the copy P. W. 1 is in his handwriting. There is as far as we can see no particular reason to distrust the evidence of any of these witnesses. There is plenty of evidence including the evidence of Mr. Khushi Diyal, who was the Pleader for the defendant in the former case, to prove that the list of the property given to the arbitrator was a list of properties regarding which the defendant produced sale-deeds before the arbitrator, all the sale deeds being in favour of the defendant except one which was in favour of himself and his brothers jointly. On this point the evidence of the arbitrator Mian Abdul Samad

(page 87) may also be referred to. The plaintiff in the present case produced several witnesses with respect to the copies of sale deeds produced by him, *e. g.*, Bishen Sarup (page 88), Muhammad Hussan, (page 88), Inam Ullah (page 88), Muhammad Khalil, (page 91), Abdul Hamid (page 87) and Muhammad Ishaq (page 88). These witnesses depose that they appeared before the arbitrator, and the sale deeds with regard to which they give evidence relate to the properties in Exhibit P. W. 1. This seems to us corroboration of the genuineness of P. W. 1. The defendant was called to produce documents and obviously he should have produced the original sale-deeds. As he did not do so, the plaintiff was allowed to put in copies. The only explanation which has been given us of the non-production of the original sale deeds by the defendant is that the defendant produced the originals at the end of the case, and was then told by the Court that they were not required as copies had already been admitted. We have not been referred to anything on the record in support of this explanation, but even if the explanation be true, it must be regarded as a very lame and unsatisfactory one. Which party should be held responsible for the abstraction of the original list from the record of the former suit is a difficult question. The plaintiff could only gain by the abstraction by falsely pleading that certain properties not really entered in that list were entered. The defendant, on the other hand, might hope that if the list was not forthcoming the plaintiff would be unable to make any use of the declaratory decree which had been granted to him. The defendant in the present case has neither produced the account books nor the originals of the sale deeds, though admittedly both were in his possession. As regards the account books, we see that the defendant reported at the Thana on the 13th of August 1913 that his books had been stolen. Apart from this report there is no evidence to this effect. The lame explanation given for the non-production of the sale-deeds has already been referred to. On behalf of the plaintiff, it is urged that Exhibits P. A. and P. W. 1 cannot be forgeries, for if they had been forged before the institution of this suit, the list put in with the plaint would have tallied with them, whereas if they had been forged after the institution of the present suit, they would have been made to tally with the list put in with the plaint. The argument in reply is that the list put in with the plaint was put in at a time when the plaintiff had forgotten that a list had been put in by his Pleader in Mr. Gordon's Court and since it was found too difficult to abstract the list A from the file of the proceedings before Mr. Gordon and substitute a false list it was determined to throw over the list filed with the plaint and to stick to the list put in before Mr. Gordon; and so list P. W. 1 was forged to back up list A. But if the plaintiff were such a man as to abstract the original list and substitute a forged list therefor and also to forge the document P. W. 1 and also to cause the defendant's house to be broken into and his Bahis to be stolen, we doubt if he would have hesitated to attempt to substitute another list for list A. Again turning to list P 1, which both sides now admit to be a forgery, we find that it includes certain shops which plaintiff claims to be his separate property. These shops the defendant now urges are part of the joint property purchased out of the income of their shop. So far as we can see, the plaintiff has never at any time had any idea of admitting that the defendant has any share in the shops. So if the plaintiff had wished to substitute a list for the original list which was on the file of the former case, we do not think at all likely that he would have included these shops in the forged list. Having considered all the evidence in the case we can only give it as our opinion that the probabilities are that the original list was abstracted by or on behalf of the defendant. We agree with the lower Court in holding that list P A is the rough draft from which the original list was prepared and that P. W. 1 is the true copy of that list.

The next point for consideration is the shops standing on Nazul land which the defendant claims are part of the joint property and should be included in the partition. These shops were originally Kacha but were rebuilt in Pucca form a few years ago. The defendant's contention is that they were re-built out of the income of the joint shop and are joint property. The defendant has produced various witnesses, masons, labourers and carpenters, etc., who profess to have been

concerned in the rebuilding of the shops and who say that the plaintiff superintended the building and that wages were paid by the defendant at the cloth shop. Several of these men are common labourers earning only a few annas a day. The evidence is purely oral and we can regard it of no value. Ranjit Singh, collector of rents of Nazul land, deposes that the plots of Nazul land in question are in the name of the plaintiff or his relations as tenants and that the rent is still shown as realised from the plaintiff though he says he has sometimes realised rent from the shop of the parties in the Chandni Chauk. He may no doubt have received rent from the plaintiff at the shop, but if the defendant had been a joint owner in the shops, the best proof would have been some documentary evidence, such as receipts for rent paid granted in the name of both the parties. It is to be noted that in various mortgage deeds the plaintiff has described these shops as his own property, though other properties have been described by him in the deeds as belonging to himself and the defendant in equal half shares. Our attention has been called to the statement of the plaintiff recorded on page 98 of the paper-book. There he speaks of the shops as belonging to his brother and his nephews and not to himself, and says that he mortgaged the shops with their permission and with their signature. There the plaintiff clearly seems to have been lying, for the shops undoubtedly belonged to his father and were re-built by the plaintiff and were mortgaged by him as his own. In cross examination on the same page there is a peculiar statement which runs thus:—

"Property was purchased jointly but separately from the joint shops."

What this means it is hard to say. But though it follows examination-in chief relating to the shops in the Saddar Bazar, it can scarcely relate to these shops, as that property was certainly not purchased from any one but was merely re built. We hold that the shops in the Saddar Bazar belong to plaintiff and not to the parties jointly.

In the list filed with the plaint the plaintiff has certainly included certain properties which are not to be found in list A or list P. W. 1, and holding as we have held that list A and list P. W. 1 are correct lists of the property covered by the award in the former case, it follows that the list filed with the plaint goes beyond the award. On behalf of the defendant it is urged that the plaint was drawn up by Mr. Abdur Rahman who must have remembered that he had filed list A in Mr. Gordon's Court; but it seems probable enough that Mr. Abdur Rahman when drawing up the plaint was content to refer to mortgage-deeds produced by his client and copied down in the list properties mentioned in the various deeds without the thought occurring to him that it would be better first to refer to the list which he had filed in Mr. Gordon's Court for purposes of comparison and verification.

Lastly it is urged that the plaintiff having put in a forged list with his plaint the whole suit should be dismissed. We are unable to accede to this contention. In the first place it was not clearly proved that the plaintiff deliberately put in a false list although it certainly does appear that that list contains certain properties not mentioned before the arbitrator, for at the time of filing the plaint the plaintiff had not a copy of that list with him. Unless it is proved that the plaintiff deliberately put in a false list, we certainly cannot hold that the suit should be dismissed *in toto*. We consider that the plaintiff is entitled to a decree for his share in so much of the property now in suit as is proved to have been covered by the declaratory decree in the former suit.

In conclusion we note that the sale-deed relating to one of the houses decreed stands in the name not of defendant only but in the names of defendant and his brothers. His brothers are not parties to the present suit and the present decree is not binding on them, and we can only remark that as between the plaintiff and the defendant we cannot go behind the declaratory decree in the former suit which declared plaintiff to be the half owner.

The appeal is dismissed with costs.

Appeal dismissed.

TAHAWWAR HUSAIN *v.* LACHHMAN DAS.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 45 OF 1918.

February 23, 1920.

Present :—Mr. Lindsay, J. C.

Saiyed TAHAWWAR HUSAIN—PLAINTIFF —APPELLANT

versus

Lala LACHHMAN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust, private—Plaintiff having no interest in trust property—Suit questioning acts of trustees, whether maintainable.

Unlike a public trust, the acts of a trustee of a private trust cannot be impeached in a suit by a person who has no interest relating to the property of the trust. [p. 708, col. 2.]

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 31st January 1918.

Syed *Ali Mohammad* holding brief of The Hon'ble Syed *Wazir Hasan*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for Respondents Nos. 1 and 2.

JUDGMENT.—This is an appeal against the decision of the Subordinate Judge of Lucknow dismissing the suit of the plaintiff.

The suit was one for a declaration that certain property, namely, an 8-annas share in a village called Faiz-ullah-Ganj, which had been mortgaged to the first and second defendants by the third defendant under two deeds of mortgage, dated respectively the 23rd of August 1913 and the 5th of March 1915, was Wakf property and, therefore, not capable of being mortgaged. Further it was asked that a declaration should be made that a decree dated the 14th of April 1917, which had been passed in favour of the defendants Nos. 1 and 2 in a suit brought by them to enforce their mortgage should be declared to be ineffectual as against the property on the ground that the third defendant, who made the mortgage, was merely a trustee and manager of the property which, as already said, was alleged to be Wakf property.

The Court below has dismissed the suit on the ground that the plaintiff has no *locus standi* to maintain it; and the question which I have to decide here is whether or not this decision of the Court below is correct.

In order to ascertain the nature of the suit I shall refer to the allegations contained in the plaint setting out certain facts upon which the plaintiff bases his right to sue. It is said that in the year 1292 Hijri a lady named Haidri Khanam executed a Will by which she appointed one Rehan-ud-daula as executor and trustee to take her property for the purpose of applying it to certain trusts specified in the Will. This lady died in the year 1875 and according to the plaint Rehan-ud daula otherwise known as Shuja Husain, got possession of the lady's property. It may be mentioned here that Rehan-ud-daula was the father of the third defendant Safdar Husain and the grandfather of the plaintiff Tahawwar Husain. After the lady's death it is alleged that certain money was received by Rehan-ud daula on account of the redemption of a mortgage affecting two villages Itwa and Bazidpur which had been mortgaged to Haidri Khanam. In the fourth paragraph of the plaint it was stated that the money so received in the course of redemption was applied by Rehan-ud daula in the purchase of a village called Faiz ullah Ganj. It is said that during his lifetime Rehan-ud-daula applied the income arising from this village to the discharge of the trust purposes indicated in the Will of the lady.

Rehan-ud-daula died on the 28th of October 1897. He left a Will executed on the 25th of January 1897. The Will of Rehan-ud daula is on the record and begins with a recital concerning the property which had been left by the lady Haidri Khanam including the mortgagee rights over the villages of Itwa and Bazidpur. The testator went on to describe how the mortgage affecting these two villages had come to be redeemed and how a sum of Rs. 8,000 had been left in his hands which he had applied in the purchase of the village Faiz ullah Ganj. He declared that the income of this property was in future to be applied as it hitherto had been applied, for the purpose of discharging the trusts created by the Will of *Musammat* Haidri Khanam. In the Will it is recited that his two sons Dilar Husain and Safdar Husain were still minors and for this reason Rehan-ud-daula appointed two persons Mehdi Ali Khan and Saiyed Asad

uz zaman as his executors to carry out all the trusts referred to in the Will of Haidri Khanam. He further declared in this document that the property was not susceptible of sale or mortgage. He then went on to provide that the two executors named by him should have power to hand over their office as trustees or Mutwallis of the property to his two minor sons after they had attained full age. A further power was given to the executors to appoint as trustee some person other than the sons, should a case of necessity arise. The executors were directed to apply the income of the property for the purposes of the trusts above mentioned. It is proved that after the death of Rehan-ud-daula Mehdi Ali Khan, one of the executors named in the Will, obtained Probate of the Will on the 4th March 1898. In the 7th paragraph of the plaint it was stated that after Saiyed Diler Husain, the father of the present plaintiff, reached the age of majority Mehdi Ali Khan, in accordance with the provisions of the Will, made over the trust property to him as one of the executors and it is said that Diler Husain remained the manager of the property and continued to administer it up till the time of his death. In the eighth paragraph of the plaint it is stated that on the death of Diler Husain on the 13th of May 1913 the plaintiff was left as his heir and representative and that by reason of his minority at the time the third defendant Safdar Husain "remained" manager and in possession of the property. In the ninth paragragh of the plaint it was alleged that Safdar Husain was a person of immoral and extravagant character and that the debts incurred by him under the mortgages referred to in the plaint had been incurred for immoral purposes. The tenth paragraph of the plaint recites that Safdar Husain was merely a trustee or executor of the property and in that capacity had no power to make any alienation of it. Consequently it was pleaded that the mortgages in favour of the first and second defendants were made without any legal necessity.

The question that at once arises for consideration after a perusal of these statements in the plaint is what interest does the plaintiff claim in the property in dispute which enables him to maintain a suit for the declarations which he asks for. The allegations in paragraphs 7 and 8 of the plaint seem to suggest that the present plaintiff stands in the position of a trustee. That suggestion, however, is clearly untenable in view of the provisions of the Will executed by Rehan ud-daula. It is clear that the intention of Rehan ud-daula was that as soon as his minor sons attained full age the trusteeship of the property was to be handed over to them by the executors whom he appointed. There is nothing in the Will of Rehan ud-daula to indicate that on the death of one of his sons the legal representatives of the deceased son were to be joined as co-trustees with the surviving son. In short all that we find is a provision that the trusteeship of this property alleged to be Wakf property was to descend upon Rehan-ud-daula's two sons. That being the case and there being no provison to the contrary in the Will it necessarily follows that the trusteeship devolved upon Diler Hussain and his brother Safdar Hussain as joint tenants and that when Diler Hussain died his brother Safdar Hussain became the sole trustee. It is not possible for the plaintiff to argue that because he is the heir of his father Diler Husain he is a co trustee of the property now in dispute. It is impossible, therefore, for the plaintiff to maintain this suit in the character of a co-trustee. What other position then is open to the plaintiff or what other interest can he allege in the property with which we are concerned? The only possible interest he could allege in this property is a personal interest but that position is not open to him in view of his own admission that the property is Wakf property and was not the personal property of his grandfather Rehan-ud daula. Indeed that fact is sufficiently indicated in the recitals contained in Rehan-ud-daula's Will. The plaintiff, therefore, has no personal interest in the property.

It is further to be observed that the Wakf alleged in this case constitutes a private and not a public trust. That is perfectly clear from the language of the Will left by Haidri Khanam and also by the language of the Will of Rehan-ud-daula. In the case of a public trust

indeed any person who is interested in seeing that the purposes of the trust are carried out may bring a suit in the form provided for that purpose by the Code of Civil Procedure. That course, however, is not open to the plaintiff here for the reason already given, namely, that the trust is a private and not a public trust. In these circumstances I must hold that the decision of the learned Subordinate Judge is correct. I can find no interest of the plaintiff relating to the property in dispute which would enable him to maintain this suit for a declaration. I hold that the decision of the Court below must be affirmed and the appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2226 OF 1917.

March 20, 1920.

Present:—Mr. Justice Shadi Lal and Mr. Justice Martineau.

UBEROI LIMITED AND GANDA SINGH OF DELHI—PLAINTIFFS—APPELLANTS

versus

THE PROPRIETOR OF THE BUSINESS OF UBEROI AND COMPANY KASHMIRI GATE, DELHI, BELIEVED TO BE KIRPAL SINGH—DEFENDANT—RESPONDENT.

Trade mark—General rule of law—Defendant, whether can be restrained from carrying on business in his own name—Injunction.

No one may use a name in such a way as to be calculated to lead the public to believe that the business carried on by him is the business of some other person with whom the name has come to be associated. [p. 711, col. 1.]

The Court ought not to restrain a man from carrying on business in his own name simply because there are other people who are doing the same and who will be injured by what he is doing. It must appear that the person who is carrying on the business in his own name is doing it in such a way as to pass off his goods as the goods of some body else. [p. 712, col. 1.]

Where, therefore, the defendant was carrying on business in his own name which also happened to be the name of the plaintiff:

Held, that the defendant could not be restrained from using his own name. [p. 712, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, 1st Class, Delhi, dated the 30th May 1917, decreeing the claim in part.

Messrs. *Bevan-Petman, Carden Noad* and *Ram Lal*, for the Appellants.

Messrs. *Nanak Chand Pandit, Gokal Chand Narang* and Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The dispute in this case relates to the use of certain trade names and trade marks. The suit was brought by "Uberoi, Limited" and Ganda Singh, against Jhanda Singh and his sons Ikbal Singh and Kirpal Singh, as being the proprietors of the firm Uberoi and Company, but at the time of arguments the plaintiffs withdrew their case against Jhanda Singh and Ikbal Singh, and proceeded only against Kirpal Singh.

The plaintiffs carry on the business of manufacturing and selling sporting goods. The business was originally started by Ganda Singh at Sialkot in 1888 under the name of "Ganda Singh, Uberoi and Sons," Uberoi being the name of his caste or sub-caste. In 1892 he took into partnership his younger brother Jhanda Singh, and they carried on business together under the name of 'Ganda Singh, Uberoi and Company," till 1899 when they dissolved partnership.

After the dissolution Ganda Singh carried on business under the name of "Ganda Singh, Uberoi and Company", also known as the Punjab Sports Works, till 1913, when the name was changed to "Uberoi" and the business was converted in the same or the following year into a limited liability company under the name of "Uberoi Limited". In December 1916 the plaintiffs opened a branch in Delhi.

Jhanda Singh after the dissolution in 1899 carried on a separate business in Sialkot under the name of "Jhanda Singh Uberoi and Sons," calling his works "The Victoria Works" and later "The Victoria Steam Works." In 1913 he started a business in Delhi, first under the name of "Jhanda Singh, Uberoi and Sons" and then under that of "Uberoi and Sons." He carried on the Delhi branch till the 23rd March 1916, when the goods of the shop were purchased for Rs. 3,000 by his younger

son Kirpal Singh, who has from that time been carrying on business in Delhi under the name of "Uberoi and Company". Jhanda Singh sold the building at Sialkot in which he had his workshop in 1916 but he rented another building there, as stated by the plaintiff's secretary Beli Ram, and he says his business has never stopped. On the 6th February 1917, he executed an agreement (page 264 of the paper-book) as proprietor of Uberoi and Sons, Sialkot, appointing Uberoi and Company his agents to sell Uberoi and Sons' goods at Delhi.

Jhanda Singh's elder son Ikbal Singh went to England for a few years, and on his return in 1915 started a business in Madras under the name of "Uberoi and Company." In a suit brought against him by the plaintiffs in the High Court of Madras for an injunction a consent decree was passed on the 11th of January 1917, which provided that Ikbal Singh should not trade except under the style of "Ikbal Singh, Uberoi and Company," and should not use the word "Uberoi" in connection with his trade or goods, except in the collocation "Ikbal Singh, Uberoi and Company".

In their plaint in the present case, which was instituted on the 20th March 1917, the plaintiffs asked for a permament injunction restraining the defendants from carrying on business under the name and style of "Uberoi and Company," "Uberoi," "Uberoi and Sons", and "Uberoi" in conjunction with any other word or words, and from stamping or marking their goods, or selling goods stamped or marked, with the word "Uberoi" as illustrated in the document A attached to the plaint or in any way. They also complained that the defendants had applied to certain goods which they had for sale the word "Goto" in order to deceive the public into the belief that they were purchasing plaintiff's goods marked "Togo". They asked for an injunction to restrain the defendants from so marking their goods or from selling goods so marked. They asked further for an account of the sales and profits of the business carried on in Delhi under any of the names mentioned above and for damages and also for an injunction restraining the defendants from receiving any letters, money orders, parcels, and cheques addressed to, or in the name of or for the benefit of "Uberoi and Company," "Uberoi and Sons," "Uberoi" or "Uberoi" with any other word or words appended thereto.

The Subordinate Judge has granted an injunction only to restrain the defendant Kirpal Singh from stamping or marking his goods, or selling any goods stamped or marked with the word "Goto"; in other respects he has dismissed the suit, finding that the defendant Kirpal Singh was entitled to use the name "Uberoi" as much as the plaintiffs. The latter have appealed to this Court.

The plaintiffs stated in their plaint that they believed that the businesses at Madras and Delhi really belonged to Jhanda Singh and were being carried on by his sons under the name of "Uberoi and Company" for his benefit and that of the family. If this were so, Jhanda Singh would be breaking the terms of the agreement (page 17 of the paper book) that he made with Ganda Singh on the 5th August 1899, when they dissolved partnership in which he undertook that he would have no concern with correspondence and orders for goods addressed to "Uberoi and Company" and would not sell goods bearing that name. But as the plaintiffs have chosen to withdraw the case against Jhanda Singh, the agreement between Jhanda Singh and Ganda Singh becomes immaterial, and the case must proceed on the assumption that the Delhi business belongs to Kirpal Singh alone.

Mr. Petman who appears on behalf of the plaintiffs admits that it is too late for them to object to Kirpal Singh's using the name "Uberoi and Sons", as that name had been used by Jhanda Singh for some years before Kirpal Singh started business, but he contends that Kirpal Singh is not entitled to trade under the name "Uberoi and Company" or under the name "Uberoi" alone unaccompanied by other words which would serve to distinguish Kirpal Singh's firm from that of the plaintiffs.

We have been referred to a number of authorities which are discussed in Sebastian's and Kerly's Works on the Law of Trade marks, and also to Volume XXVII of Halsbury's Laws of England at pages 751 and 777, *Oriental Government Security Life Assurance Co. Ltd.* v. *Oriental*

Assurance Co. Ltd. (1), *Mahomed Esuf* v. *Rajaratnam Pillai* (2) and a case of the *Gurkha Association Simla* v. *Muhammad Umar* (3) decided by this Court and reported in Volume I of the Lahore Law Journal.

The law on the subject is clear, and it is this, that no one may use a name in such a way as to be calculated to lead the public to believe that the business carried on by him is the business of some other person with whom the name has come to be associated.

It is unnecessary to mention the various cases decided by the Courts in England which have been cited before us, but we may quote the following passage from the judgment of Lord Herschell in the case of *Reddaway* v. *Banham* (4) which is given at page 565 of Kerly's Law of Trade-marks, Fourth Edition:—

"The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of *A*. when he was really getting the goods of *B*. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff." The questions put to the Jury in the same case, which are quoted in the foot-note on page 569 of Kerly's book, are also instructive.

The main question in the present case is whether the names "Uberoi and Company", and "Uberoi" have become so identified with the plaintiffs' firm that the use of those names by the defendant Kirpal Singh would mislead the public.

It is not denied that the term "Uberoi" has been used by the plaintiffs and there also appears to be no doubt that they used frequently to be addressed as "Uberoi and Company" notwithstanding that they did not adopt this as a trade name. They have produced a number of letters addressed to "Uberoi and Company" dating from 1899 to 1905 and from 1913 to 1916, and the lower Court is wrong in thinking that it is not shown for which of the parties the letters were intended, for many of the letters are shown to have been intended for the plaintiffs, either by the fact that they related to orders for certain goods of which the plaintiffs alone were the manufacturers or by mention being made of the Punjab Sports Works in the address. But there are also a large number of letters produced by the other side showing that Jhanda Singh used to be similarly addressed. Exhibits D-129 to D-163 are letters and post cards addressed to "Uberoi and Company" and Exhibits D 83 to D-128 are letters, post cards and telegrams addressed to "Uberoi". They bear dates from the beginning of 1914 to the end of 1915 and were addressed to Delhi so that they were evidently intended for Jhanda Singh as it was not till December 1916 that the plaintiffs opened their branch in Delhi. It is also not denied that Jhanda Singh gave the name "Uberoi" to many of his goods in his catalogues. It is true that the envelopes of the letters in which the firm was styled "Uberoi" or "Messrs. Uberoi" are not produced, and it may be said that a customer may have addressed the firm briefly as "Messrs. Uberoi" in his letter, but may have given the fuller name, "Uberoi and Sons" or "Uberoi and Company" on the envelope. There are, however, as has been mentioned, some post-cards also in which the firm is addressed as "Uberoi", or "Messrs. Uberoi" and the probability is that customers in addressing the firm would not be particular whether or not they added the words "Uberoi and Sons" or "Uberoi and Company." It is only the word "Uberoi" which would have attracted attention.

It appears to us, therefore, that it was not exclusively the plaintiffs' firm that was known to the public as "Uberoi" and "Uberoi and Company" but that Jhanda Singh was also known under those names. It is no doubt stated at page 544 of Kerly's Law of Trade-marks that the name taken

(1) 21 Ind. Cas. 258; 40 C. 570.
(2) 5 Ind. Cas. 712; 33 M. 402; 7 M. L. T. 55.
(3) 51 Ind. Cas. 905.
(4) (1896) A. C. 199; 65 L. J. Q. B. 381; 74 L. T. 289; 44 W. R. 638.

or copied by the defendant need not be that under which the plaintiff alone and no other person is properly trading, a statement which appears to be based on the case of *Dent* v. *Turpin* (5) in which it was held that each of two firms carrying on business separately as watchmakers under the name Dent might sue a third person, who had set up a similar business under the same name, for an injunction. But when it is conceded that the plaintiffs are not entitled to restrain Kirpal Singh from using the name "Uberoi and Sons" on account of that name having been in use by Jhanda Singh, their claim to restrain him from using the names "Uberoi and Company" and "Uberoi" must be similarly defeated by proof that Jhanda Singh also has been known to the public under those names.

Furthermore, as "Uberoi" is Kirpal Singh's own caste name just as much as it is the plaintiffs', the latter must make out a strong case before they can be given an injunction to restrain Kirpal Singh from using that name either alone or in conjunction with "and Co." In *Jamieson & Co.* v. *Jamieson* (6) referred to on page 597 of Kerly's Law of Trade-marks, Lord Lindley, M. R. said:—

"When we are asked to restrain a man from carrying on business in his own name we must take very great care what we are about. The principle applicable to the case, I take, is this: the Court ought not to restrain a man from carrying on business in his own name simply because there are other people who are doing the same and who will be injured by what he is doing. It would be intolerable if the Court were to interfere, and to prevent people from carrying on business in their own names in rivalry to others of the same name. There must be something far more than that, *viz.*, (there must be), that the person who is carrying on business in his own name is doing it in such a way as to pass off his goods as the goods of somebody else."

Confusion has no doubt arisen in consequence of the plaintiffs and Jhanda Singh having both been addressed by customers as "Uberoi and Company" and "Uberoi" and it has increased since Kirpal Singh set up his business in Delhi under the style of "Uberoi and Company." The correspondence on the record shows that persons have sent orders to the firm of 'Uberoi and Company" at Delhi under the impression that it was a branch of the plaintiff's firm at Sialkot (see the letters on pages 113, 114, 123-126, 129 131, 133 136 and 154 of the paper book), and on the other hand it appears that some of the letters meant for Jhanda Singh's firm were received by the plaintiffs (see Exhibit P 75 on page 51 of the paper-book and Beli Ram's statement on page 234). But the mere existence of such confusion, which was inevitable, is no reason for granting an injunction, and it must be remembered that the plaintiffs are in great measure to blame for it by having dropped the distinctive name "Ganda Singh" in 1913.

Turton v. *Turton* (7) which is mentioned at pages 603 and 604 of Kerly's work, was a case in which the plaintiffs, Thomas Turton and Sons, Limited, complained of the use of the name John Turton and Sons by the defendants, who had previously styled themselves John Turton and Company. It was decided by the Court of Appeal that, notwithstanding the possibility of mistakes between the two firms being made by careless people, the defendants were justified in adopting the name complained of, and in continuing its use after the possibility of mistake had been brought to their knowledge. Also in the case of *Jamieson & Co.* v. *Jamieson* (6), referred to above, it was decided that the defendant was not bound to use extra precautions to avoid confusion between his goods and those of other persons in the trade, if such confusion arose solely from the similarity of his own name with theirs, and from the use of features common to the trade.

No fraud is, in our opinion, shown to have been intended by Kirpal Singh in adopting the name "Uberoi and Company", and we think he cannot be restrained from using that name, taking into consideration that "Uberoi" is his own caste name, that the plaintiffs have never traded

(5) (1861) 2 J. & H. 139; 30 L. J. Ch. 495; 7 Jur. (N. S.) 673; 4 L. T. 637; 9 W. R. 548; 70 E. R. 1003; 134 R. R. 166.

(6) (1908) L. R. P. C. 169; 14 T. L. R. 160.

(7) (1889) 42 Ch. D. 128; 58 L. J. Ch 677; 61 L. T. 571; 38 W. R. 22; 54 J. P. 151.

under the name "Uberoi and Company," and that that name was applied by the public to Kirpal Singh's father Jhanda Singh just as much as to the plaintiffs.

But although Kirpal Singh was entitled to use the name "Uberoi and Company" he has been guilty of certain misrepreeentations which require to be noticed He wrote on the 3rd July 1916, to the Post Master, Delhi, describing himself as a limited liability concern and asking that "Uberoi and Company Limited," "Uberoi and Sons Limited," "Uberoi Limited," etc., might be added to his addresses already registered (page 2 of the supplementary paper-book). That letter, however, was written before the plaintiffs opened their branch in Delhi, and there has been no attempt by Kirpal Singh to trade under the name of "Uberoi Limited." He has advertised his firm as being the founders of the sports industry in India and as being large manufacturers with extensive experience (pages 137 and 143 of the paper-book), a description which certainly did not apply to himself, though it might have been applicable to Jhanda Singh. We do not attach much importance to this, but a more serious matter is his using the word "Sialkot" in conjunction with "Uberoi and Company." He has put the name "Uberoi and Company Sialkot" on his signboard, the word "Delhi" being added in small letters (see photograph, Exhibit P.262). He has described himself as "Uberoi and Company Sialkot" in a letter written to a customer on the 4th January 1917 (page 131 of the paper-book). Besides this, at the foot of the cover of his catalogue (Exhibit P.202), which is nothing but the catalogue of the Madras firm "Uberoi and Company" with the address Kashmiri Gate Delhi pasted on the cover and hiding the Madras address, there is a note in which reference is made to "our works at Sialkot." Admittedly Kirpal Singh has no shop or works at Sialkot, and the object of these acts of deception can hardly have been any other than that of causing people to believe that his firm is a branch of the plaintiff's firm. At any rate such misrepresentations were calculated to induce that belief. While he cannot be prevented from styling himself "Uberoi and Company" he has no right to use that name in connection with the word "Sialkot" so as to mislead the public.

Further he has gone to the length of using the plaintiffs' trade-mark shown in Exhibit A attached to the plaint, which consists of the word "Uberoi" written in a distinctive manner, and which was registered on the 27th April 1915, (page 93 of the paper book). He has used this mark, for instance, on the Uberoi Special Tennis Racket which is sold by him, and also on his shop, as seen in the photograph page 261. The plaintiffs are certainly entitled to restrain him from using their trade mark, which is nothing less than a fraud.

Mr Petman also lays stress on the fact that Kirpal Singh has been applying the name "Orient" to certain of his goods in the same way in which the plaintiffs have applied the name "Oriental" to theirs, but as to this it is sufficient to note that the plaintiffs have not asked for an injunction to restrain the defendants from using the name "Orient."

We hold that the claim to restrain Kirpal Singh from using the names "Uberoi" and "Uberoi and Company" must fail, but we accept the appeal and modify the decree of the lower Court so far as to direct that in addition to the injunction granted with regard to the use of the word "Goto" a further injunction be issued restraining Kirpal Singh, (1) from using the word "Sialkot" in conjunction with the name "Uberoi and Company" on his shop or elsewhere, to signify that he carries on business or manufactures goods at Sialkot, or from giving out that he carries on business or manufactures goods at Sialkot, so long as he does not in fact carry on business or manufacture goods at that place; and (2) from using the plaintiff's trade mark "Uberoi" as shown in Exhibit A attached to the plaint on his shop, or stamping or in any way marking his goods, or selling any goods stamped and marked, with the word "Uberoi" as illustrated in Exhibit A.

We direct that the plaintiffs and Kirpal Singh shall bear their own costs in both Courts.

Appeal accepted;
Decree modified.

SECRETARY OF STATE FOR INDIA v. AFZAL HUSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 278 OF 1919.

February 5, 1920.

Present :—Mr. Lindsay, J. C.

SECRETARY OF STATE FOR INDIA FOR OUDH AND ROHILKHAND RAILWAY AND GREAT INDIAN PENINSULA RAILWAY THROUGH MANSUR ALI KHAN SPECIAL AGENT—DEFENDANTS NOS. 2 AND 1—APPELLANTS

versus

Saiyed AFZAL HUSAIN—PLAINTIFF —RESPONDENT.

Contract Act (IX of 1872), ss. 151, 152, 161—Railways Act (IX of 1890), ss. 72, 80—Bailee, liability of, extent of—Burden of proof—Goods consigned to two Railways—One Railway responsible for loss—Damages, whether can be recovered from both Railways.

The duty of a Railway Administration to which goods are delivered for carriage is that of a bailee as defined in sections 151, 152 and 161 of the Contract Act, and when a thing is injured or lost while in the charge of a Railway the question of the burden of proof must be dealt with on the footing that the Railway is a bailee and not an insurer, and the burden of proving that the Railway has exercised ordinary care must generally in the first instance be upon the Railway and it is for them to establish positively that they had discharged the statutory duty which is defined in section 72 of the Railways Act, read with sections 151 and 152 of the Contract Act. [p. 715, col. 2; p. 716, col 1.]

Although section 80 of the Railways Act gives a plaintiff an option to sue one of two Railway Administrations in cases where goods have been booked through, yet where the plaintiff sues both of them he is not entitled to a decree against that one of them which has satisfied the Court that it has taken all the care of his goods that was required of it by law. [p. 717, col. 1.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 16th June 1919, upholding that of the Munsif, Ram Sanehighat, dated the 19th October 1918.

The Hon'ble Syed *Wazir Hasan*, for O. & R Railway.

The Hon'ble Pandit *Gokaran Nath Misra* and Syed *Ali Muhammad*, for G. I. P. Railway.

Mr. *Muhammad Wasim*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiff respondent, Saiyed Afzal Husain, against the Secretary of State for India through the Agent of the Oudh and Rohilkhand Railway and against the Great Indian Peninsula Railway. The claim was for recovery of a sum of Rs. 1,649-10 0 on account of loss to the plaintiff's goods alleged to have taken place while they were in transit over the railway systems of the two defendants.

The claim has been decreed in both the Courts below against the defendants who now appeal. The defendants have been separately represented here in appeal and their cases must be dealt with separately.

The case being one of second appeal it will be expedient to set out at once the facts as found by the lower Appellate Court. It has been held to be proved that the plaintiff Saiyed Afzal Husain on the 12th of March 1917 delivered two boxes containing dyes to the G. I. P. Railway at Burhanpur for carriage to Safdarganj a station on the Oudh & Rohilkhand Railway. At the time the delivery was made a railway receipt was granted to the plaintiff in which the weight of the two boxes was described as being 3 maunds. These boxes arrived at Safdarganj between 11 and 12 on the night of the 13th of March 1917. It has been held to be proved that some time after the arrival of the goods at Safdarganj the larger of the two boxes was found to be in a damaged condition. It has also been found that when the two boxes came to be weighed at Safdarganj Station the same night or early the next morning there was a shortage in weight of 28½ seers. The plaintiff refused to take delivery of the goods. A report was made to the O. & R. Railway authorities and after an examination of the goods by one of the Railway Inspectors it was discovered that 47 tins of dye had been abstracted from the larger of the two boxes. It is the value of these 47 tins which the plaintiff has sought to recover in this suit. Both the Courts below have found that this larger box was not tampered with on the G. I. P. Railway system. They have held that the box was delivered on the O. & R. Railway at Lucknow in good condition. It has been further found that the damage to this box was done at Safdarganj Station after the arrival of the goods there. Both the Courts below have, therefore, found that there was no negligence on the part of the G. I. P. Railway. They have found that O. & R. Railway was guilty of negligence. Relying upon the language of section 80

of the Indian Railways Act (IX of 1890), the claim has been decreed by both Courts against both the Railways notwithstanding the finding in favour of the G. I. P. Railway.

These findings of fact have been criticized here in second appeal but after a careful examination of the evidence I hold that there is no ground upon which they can be attacked. There is on the record evidence upon which it was possible for both the Courts below to arrive at the findings they did. Ths case, therefore, must be discussed on the assumption that the findings of fact are correct.

For the O. & R. Railway the main argument has been that the Courts below have proceeded on wrong lines in dealing with the plaintiff's claim. It has been argued that it was the duty of the plaintiff to allege and prove affirmatively that the O. & R. Railway had been guilty of negligence. It is said that the Courts below wrongly threw the burden of proof upon the Railway Company and have wrongly decided that the Company was liable because it failed to prove want of negligence on its part.

As regards the question of pleading negligence there does not appear to me to be much substance in this argument. In the eighth paragraph of the plaint it was alleged that the plaintiff's property had been lost at some place between the Burhanpur and Safdarganj Stations and it was further alleged that in consequence of this loss both Railway Companies were liable in damages to the plaintiff. The plaintiff certainly did not in express terms allege that the loss of his property was due to negligence on the part of either Railway system but there can be no doubt that he asserted that by reason of the loss which had occurred both systems were liable to him. Further from the pleas which were set out in the written statements of defence of the two Railways it is plain that they both understood that a charge of negligence was being made. It was pleaded in both statements that the Railway Companies had taken all possible care of the goods bailed to them, such care as a man of ordinary prudence would in similar circumstances take of his own goods. These pleas are clearly answers to a definite charge of negligence on the part of the Railways.

As regards the question of the burden of proving the negligence a great deal of case-law has been cited to me at the time of the argument and the case upon which the lower Courts relied in particular, namely, *Hirji Khetsey and Company* v. *Bombay Baroda and Central India Railway Company* (1), has been criticized by the learned Counsel who appears to support the appeal of the O. & R. Railway.

It does not appear to me to be necessary to enter into any minute or detailed discussion of the authorities which have been cited at the Bar. The question of the incidence of the burden of proof can, in my opinion, be settled upon plain principles of law. In the first place I refer to section 72 of the Indian Railways Act which defines the responsibility of a Railway Administration for the loss, destruction or deterioration of goods delivered to the Administration to be carried by Railway. It is laid down definitely that the responsibility is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872. It must be taken, therefore, that the duty of a Railway Administration to which goods have been delivered for carriage is that of a bailee as defined in the sections just referred to. Section 151 of the Contract Act lays down that in all cases of bailment the bailee is bound to take such care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. Then section 152 lays down that in the absence of any special contract the bailee is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken the amount of care of it described in section 151. Section 161 is a special section which I need not refer to as it has no bearing on the facts of this case.

I next refer to the provisions of section 106 of the Indian Evidence Act which lays down that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him.

In the present case it has been proved that the plaintiff delivered the goods to

(1) 25 Ind. Cas. 241; 39 B. 191; 16 Bom. L. R. 467.

the G. I. P. Railway at Burhanpur on the 12th of March 1917. From the time of the delivery till the time the goods were deposited on the Railway platform at Safdarganj on the O. & R. Railway the plaintiff had admittedly no opportunity of seeing the goods. It is proved that at the time the two boxes were handed over at Burhanpur they were in good condition. It is further found that after their arrival at Safdargarj the larger of the two boxes was found to be damaged. These being the facts it is difficult to see how the plaintiff is in a position to allege and prove more than he did. The law does not compel parties to attempt the impossible and section 103 of the Indian Evidence Act is an illustration of this principle. Moreover, the rule embodied in this latter section has been incorporated in section 76 of the Indian Railways Act. That section provides that in a suit against the Railway Administration for compensation for loss, destruction or deterioration of animals or goods delivered to a Railway Administration for carriage by railway it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused. It may, therefore, be deduced from these principles of law that when a thing is injured or lost while in the charge of a bailee the burden of proving that he has exercised ordinary care must generally in the first instance be upon the bailee, the reason being that he has special knowledge of facts. I have no doubt, therefore, that the plaintiff having alleged and proved loss of his goods the burden of proof shifted on to the defendant Railways, and it was for them to establish positively that they had discharged the statutory duty which is defined in section 72 of the Railways Act read with sections 151 and 152 of the Indian Contract Act. I am satisfied, therefore, that the law relating to the burden of proof was not misapplied in the Courts below Both the Courts below have held that the O. & R. Railway failed to prove that it had taken such care of the plaintiff's goods as is demanded from a bailee. It has indeed been argued here that this finding is not justified by the evidence, but I cannot accept this contention. The principal evidence relating to what took place at the Safdarganj Railway Station where the goods were deposited in the statement of an Assistant Station Master, Lachhmi Narain. It would not, I think, be possible to argue successfully that the evidence of this man by any means established that all due care had been taken of the goods by the Railway authorities. According to what the Courts below have found the goods were left on the platform for some little time after they had been put out of the train. The Assistant Station Master went to collect the tickets and there is no definite evidence as to what took place between the time he was relieved of this latter duty and the time he saw the goods again. He makes a general statement that a watchman was on duty on the platform at the time the train arrived. The Courts below have drawn attention to the fact that the Khallasis who were said to have conveyed the two boxes from the spot where they had been deposited on the platform to the godown where they were afterwards examined have not been produced to give evidence. That is certainly a matter for severe comment; nor again was the watchman produced, the man who is said to have been on duty at the time and who in particular was responsible for looking after goods which had been unloaded from the train. There certainly is no direct and positive proof that the O. & R. Railway exercised the care which is demanded by the terms of section 151 of the Indian Contract Act and this being so, the Railway was certainly liable in damages to the plaintiff.

A plea is taken in the third ground of the memorandum of appeal to the effect that the Railway Company is neither a common carrier of goods nor of passengers and it is pleaded that the Courts below were wrong in taking the view that because there was a loss there must necessarily have been negligence.

It was nobody's case that the Railway Companies were common carriers, that is to say, insurers of goods delivered to them. The question of the burden of proof is undoubtedly to be dealt with on the footing that the railways are only bailees and not insurers. That matter, however, I have fully discussed and I have no doubt whatever that the burden of proof was properly laid. The appeal so far as the O. & R. Railway is concerned must fail.

I have next to deal with the case as argued for the G. I. P. Railway. In my opinion the Courts below were wrong in decreeing the claim against this Company. As I have already mentioned they have relied upon the terms of section 80 of the Indian Railways Act. Now that section merely lays down that when goods have been booked over the Railways of two or more Railway Administrations a suit for compensation for loss to the goods may be brought either against the Railway Administration to which the goods were delivered or against the administration on whose railway the loss occurred. But that section, while it gives an option to a plaintiff to sue one or other of two Railway Administrations in cases where goods have been booked through, cannot surely mean that in a case like the present, where the plaintiff has brought the suit against both Raliway Administrations he is entitled to a decree against that one of them which has satisfied the Court that it was in no way to blame for the loss accruing to the plaintiff. If one of the two Railways sued discharges the burden of proving that it has exercised all the care and caution which is demanded of a bailee it has established the complete performance of the statutory duty it owed to the plaintiff and the plaintiff is certainly not entitled to any relief. I was referred in the course of argument to a judgment of the Allahabad High Court reported in *Bengal and North Western Railway Company* v. *Haji Mutsaddi* (2). It would appear from the judgment in that case that the learned Judges were of opinion that under the terms of section 80 a decree could, in a suit framed like the present, be passed against two administrations even if one of them had succeeded in showing that it was not guilty of negligence. All I can say is that if that was a rule intended to be laid down by this judgment I am unable to follow it. I cannot see that there is either good sense or justice in saying that a plaintiff is entitled to hold a Railway Company liable to him for loss if it is proved that the company has taken all the care of the plaintiff's goods that was required of it by law. In my opinion there should have been no decree against the G. I. P. Railway in this case and to that extent the appeal must be allowed.

The result is that the appeal is allowed in part. It is ordered that the claim of the plaintiff as against the G. I. P. Railway be dismissed. The claim as against the O. & R. Railway is decreed with costs in all three Courts. As between the plaintiff and the G. I. P. Railway the parties will bear their own costs in the Court of first instance. The G. I. P. Railway will be entitled, as against the plaintiff, to costs both here and in the lower Appellate Court.

Appeal partly allowed.

(2) 7 Ind. Cas. 160; 7 A. L. J. 833.

PRIVY COUNCIL.

APPEAL FROM THE NAGPUR JUDICIAL COMMISSIONER'S COURT.

May 23, 1919.

Present:—Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

MADHO RAO—PLAINTIFF—APPELLANT

versus

GULAM MOHIUDDIN—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 98—Mortgage, anomalous—Sale, mortgagee, whether entitled to—Puisne incumbrancer, right of, to pay off prior incumbrance.

In considering the nature of a mortgage and the true conclusion to be drawn from its terms, what has to be considered is the intention of the parties to be gathered from the terms of the instrument of mortgage. If these show that the parties never contemplated a sale, the mortgagee has no right to a judicial sale. [p. 719, col. 2.]

In the case of a prior incumbrance, it is always open to a puisne incumbrancer to pay off the prior incumbrancer and the mortgagor, who has created both, has no interest or right to object. [p. 719, col. 2.]

Appeal from the decree of Mr. Batten, A. J. C. and Mr. Stanyon, A. J. C., Nagpur, in First Appeal No. 113 of 1914, dated the 19th July 1915, reversing the decree of the Additional District Judge, Nagpur, dated the 31st July 1914.

JUDGMENT.

LORD PHILLIMORE.—The suit to which this appeal relates was brought to enforce a mort-

gage, dated the 15th October, 1877. A village named Lonhara had just been purchased by the mortgagors and they desired to raise money to enable them to complete the purchase. They had bought one-half of the village free from incumbrances, but the other half was mortgaged to one Kewalram for Rs. 3,000, as was known to all parties. There was, moreover, a further incumbrance upon it in the shape of a second mortgage also to Kewalram for Rs. 900. This mortgage appears to have been concealed from the purchasers by their vendors.

The title to the village being in this state, the mortgage in suit took the following form. The arrangement made was that the mortgagee should receive, in addition to the sum advanced, a further sum equal to half the principal, which would take the place of interest, making Rs. 7,500 in all, and that this should be re-payable by six yearly instalments of Rs. 1,250, and that the mortgagee should enter at once into possession of the unincumbered half of the village; that as to the other half, on the expiry of the term of Kewalram's mortgage, the mortgagee might pay off the Rs. 3,000, add that sum to his security, and take possession of the other half of the village. In that event there were to be certain provisions as to the expenses of management and as to the allowance of a sum by way of maintenance to the mortgagors. These matters and certain other provisions as to interest were worked out in detail, but are not now material to be considered. Finally, there was a proviso that the mortgagors might at any time redeem the mortgage on payment of the principal sum due with interest at the rate of 1 per cent. per mensem.

Upon the execution of the mortgage the mortgagee entered into possession of half of the village and he has remained in possession ever since. He did not pay off Kewalram, but after many years the representatives of the mortgagors brought a suit against Kewalram's representatives and obtained a decree for redemption on payment of Rs. 3,900. In order to raise this money and certain other sums which they required the mortgagors made a fresh mortgage for Rs. 5,000 to one Tukaram and others.

On the 6th August 1910 the successor of the original mortgagee under the mortgage of the 16th October 1877 brought this suit, making the representatives of the mortgagors, and Tukaram and his co-parceners defendants. His claim was primarily to have the whole village brought to a judicial sale, and secondarily and in the alternative that he might be let into possession of the second half of the village. To this claim various answers were made, the most important being that upon the true taking of the accounts the mortgagee had paid himself all the money due to him, that the mortgage being an usufructuary one there was no right to enforce it by sale of the property and that the mortgagee had lost his opportunity of redeeming Kewalram and with it his right to enter into possession of the half of the village mortgaged to him.

The Additional District Judge, before whom the suit was tried, decided all points in favour of the mortgagee, finding that there was due to him for principal Rs. 7,500, and for interest since the date when the agreed sum should have been paid Rs. 20,794, while he had received in respect of his possession only Rs. 4,392, and giving him a primary decree for sale upon his paying into Court for the benefit of Tukaram and his co-parceners Rs. 6,027 and thus redeeming them. This decree is dated the 31st July 1914. On the 28th January 1915, the plaintiff, having made the payment as ordered, got a final decree as against Tukaram and his co-parceners for redemption of his half share of the village.

From the decree of the Additional District Judge, in so far as it affected the successors to the original mortgagors, an appeal was preferred to the Court of the Judicial Commissioner of the Central Provinces and was heard by Additional Judicial Commissioners, Batten and Stanyon. They by their decree, dated the 19th July 1915 allowed the appeal and dismissed the plaintiff's suit with costs.

When the case came before them they considered that the first point to be determined was whether the mortgage of 1877 was one which warranted an application for a judicial sale, and they came to the conclusion that it was not.

It is stated in their judgment that the case of the plaintiff was that the mortgage in question was a simple mortgage

usufructuary—in other words, a combination of a simple and an usufructuary mortgage—while the contention on behalf of the defendants was that it was a mere usufructuary mortgage; that in the opinion of the Judicial Commissioners it was neither one nor the other, but an agreement of a special kind, such as might well be made before the Transfer of Property Act, 1882, of the kind classed as an anomalous mortgage in section 98 of that Act; that this being so, what had to be considered was the intention of the parties as gathered from the terms of the instrument; that there had been no thought of sale and that, therefore, the plaintiff had no right to a judicial sale.

There are certain clauses in the mortgage which might be construed standing by themselves as importing a personal covenant by the mortgagors to pay the sum due, and it was upon these clauses that the Additional District Judge had placed reliance as indicating that the mortgage had the incidence of a simple mortgage; but in the opinion of the Court of Appeal these passages were not enough to warrant a decision that the parties contemplated a possible sale. On the other hand, as the Court of Appeal pointed out, the mortgage could not be an usufructuary one, or, at any rate, not an immediate usufructuary one in respect of the half village mortgaged to Kewalram, inasmuch as the mortgagee could not get possession of that half till his term had expired.

After giving every consideration to the argument urged by Counsel for the appellant plaintiff, their Lordships see no reason to differ from the conclusion at which the Court of Appeal arrived as to this part of the case. They agree in their view of the nature of the mortgage, and that the true conclusion to draw from its terms is that the parties never contemplated a sale.

There remains, however, the subordinate question of the alternative relief claimed by the plaintiff in respect of the half village mortgaged to Kewalram. Under the terms of the mortgage of 1877 it was provided that the mortgagee might, at the expiry of Kewalram's term, pay Rs. 3,000 and then get possession of his half village. The plaintiff called evidence to show that Rs. 3,000 had been tendered in due course, and that they were refused because there was the additional but hitherto unknown second mortgage for Rs. 900. The Additional District Judge, who saw the witness believed this evidence. The Judicial Commissioners in the Court of Appeal disbelieved it, and disbelieving it they held in substance that the mortgagee had lost his opportunity of redeeming Kewalram, that, as they put it, he had abandoned that part of the transaction which offered him a further investment on the half share in possession of Kewalram, in consequence of which the intended usufructuary mortgage of that share and all the arrangements for management of the whole village and the payment of an annuity to the mortgagor failed to mature. Or it might be, they said, that though owing to the existence of the mortgage for Rs. 900 the mortgagee was justified in not completing the contract, still he could not drop his part of it and hold the mortgagors liable to fulfil their part. Accordingly they refused to the plaintiff his alternative relief.

It appears to their Lordships unnecessary to determine whether the alleged tender was or was not made. It is obvious that if it had been made it would have been refused, because Kewalram was entitled to the additional Rs. 900.

On the discovery of this additional charge of Rs. 900 the mortgagee might no doubt have paid it off, as well as Rs. 3,000, a payment which it is somewhat quaint to describe as a "further investment," and added this sum as well as the Rs. 3,000 to his security. But he was under no obligation to do so; and till Kewalram was paid off in respect of both claims the mortgagee could not get possession of his half of the village. But at any time he could pay off these claims. They formed a prior incumbrance, and a puisne incumbrancer can always pay off a prior incumbrance, while the mortgagor, who has created both, has neither interest nor right to object. The proceedings in this case are somewhat complicated; but the devolution of title when examined is clear, and now that the plaintiff has redeemed Tukaram he has cleared that half of the village of prior incumbrances, and is entitled, under the terms of the mortgage of 1877, to have possession of the second half of the village, as he already is in possession of the first.

Their Lordships are, therefore, of opinion that this part of the plaintiff's claim should not have been dismissed, and their Lordships would propose to make an immediate order for giving the mortgagee possession, but for a further consideration. Owing to the view taken by the Judicial Commissioners in the Court of Appeal, it became unnecessary to go into one of the important questions in the suit, *i. e.*, whether the plaintiff and his predecessors in-title had not received enough while in possession of the half village to pay themselves off.

The Additional District Judge, as already stated, took the view that they had only received Rs. 4,392, but upon this the Judicial Commissioners observed that they did not believe for one moment that the ridiculous figure put forward by the plaintiffs from accounts never rendered or explained to the mortgagors represented anything like the income which they and their predecessors had actually realised in a possession of over 35 years; and, without putting it so strongly, their Lordships are of opinion that these accounts cannot be accepted without further investigation. They think that if the plaintiff desires the alternative relief he must submit to have the accounts properly taken in the Court of the Judicial Commiseioner. If upon the taking of these accounts it should appear that any money is still due to him then he ought to be given possession of the second half of the village. In taking these accounts he should be allowed the sum paid by him to redeem Tukaram with all proper costs appertaining thereto. In these circumstances there should be no costs of the appeal, or in the Courts below.

Their Lordships will, therefore, humbly recommend His Majesty that the decree of the Court of the Judicial Commissioner should be varied, and that the plaintiff on making application to that Court within three months should be allowed to have the accounts taken as between mortgagee in possession and mortgagor and that if, upon the taking of these accounts it appear that any sum remains due to him, he should have a decree putting him in possession of the second half of the village till the liquidation of the debt, and that otherwise the decree of the Court below should stand, and that the decree should be further varied in so far as it made the plaintiff pay the costs in the first Court and on appeal, and that any costs paid under this decree must be returned.

Decree varied.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 341 OF 1918.

February 12, 1920.

Present:—Mr. Lindsay, J. C.

JANKI SARAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

WIDOW OF MOHAMMAD SADIQ AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaration, suit for—Persons interested to deny title—Defendants acting in concert, though all do not deny plaintiff's title, effect of—Title established—Possession, presumption as to.

In a suit brought for the purpose of obtaining a declaration that the defendants were the plaintiff's *riaya* and for an injunction against certain of them restraining them from interfering with any rights of the plaintiff for the services of these *riaya*, it was found that although some of the defendants had not made an overt denial of the plaintiff's rights, yet they were acting in concert and sympathy with those who had and that all the defendants were acting in collusion:

Held, that the whole body of defendants were persons interested to deny the plaintiff's title within the meaning of section 42 of the Specific Relief Act. [p. 722, col. 1]

Where in a suit relating to land the plaintiff's title and possession within limitation is challenged, and he establishes his title by purchase, the presumption, in the absence of evidence to the contrary, is that he was in possession up to the time of the suit. [p. 722, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 13th May 1918, modifying the decree of the Munsif, Fatehpur (Bara Banki), dated the 21st January 1918.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Messrs. *H. C. Dutt* and *N. C. Dutt*, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a declaratory suit brought by the plaintiffs appellants against a large

number of defendants. The case for the plaintiffs was that they are the owners of certain *abadi* plots some 40 in number in the town of Kantur. They say that they had acquired these plots by purchase from a former owner, named, Mohammad Ali. In these plots, it was alleged, reside a number of defendants, mostly Kahars, who, it was claimed, were the *riaya* of the plaintiffs. It was set out in the plaint that these *riaya* by reason of their occupying a portion of the *abadi* area owned by the plaintiffs were liable to render certain customary services to the plaintiffs. The suit was brought for the purpose of obtaining a declaration that these defendants were the plaintiffs' *riaya* and for an injunction against the defendants Nos. 1, 2 and 3 restraining them from interfering with any rights which the plaintiffs might have to the services of these *riaya*. It may be explained that the defendants Nos. 1,2 and 3 are co-sharers in the Mouza of Kantur and are also owners of a portion of the *abadi* land. It was alleged, however, that the Kahars and others, who were impleaded as the remaining defendants, were not settled on any lands belonging to these three defendants and consequently the defendants Nos. 1 to 3 had no right to claim services from them.

The suit was contested practically by the first defendant only. Written statements were, indeed, filed on behalf of most of the defendants but with the exception of the first defendant they absented themselves at the time of the trial. One of the defendants, a Kayasth, named Mahesh Prasad, defendant No. 22 did not contest the suit at all. Defendants Nos. 23 and 24 were Kalwars. They filed a written statement but did not appear at the trial. The same was the case with defendant No. 25 a Behna. Defendants Nos. 26 and 27 were Muraos. They confessed judgment in favour of the plaintiffs and were discharged. They are no longer parties to the record.

The rest of the defendants, with the exception of the defendants Nos. 1 to 3 are Kahars as mentioned above. Various pleas were raised by way of defence, The title of the plaintiffs to the *abadi* plots was challenged. It was further pleaded that they had never been in possession within limitation and lastly it was pleaded that there was no cause of action for the suit. It had been alleged in the plaint, as amended, that certain of the Kahar defendants had executed agreements in favour of the defendants Nos. 1 to 3 denying that they were *riaya* of the plaintiffs. This fact was admitted for the defence and both the Courts below have found that so far as these persons are concerned, namely, those who executed written agreements in favour of the defendants Nos. 1 to 3, there certainly was a cause of action. That finding is no longer under discussion. It appears, however, that certain others of the Kahar defendants were not proved to have executed these documents. The Court of first instance nevertheless found that the plaintiffs had a cause of action against them inasmuch as it had been shown that these Kahars, as well as the other Kahars who had executed the agreements, were acting in collusion with the defendants Nos. 1 to 3. The Munsif pointed out that the whole of the case was being run on behalf of all these Kahar defendants by the defendants Nos. 1 to 3 who were paying all the costs of the defendants' case. The learned Judge of the lower Appellate Court seems to have agreed with the Munsif's opinion that the Kahars were all acting in collusion with defendants Nos. 1 to 3, but with respect to those Kahars who had not been shown to have executed any written document in favour of the first three defendants he held that no cause of action had been made out.

The principal matter for discussion in this appeal is whether or not the lower Appellate Court was right in this respect. A considerable quantity of oral evidence was adduced by the parties. Indeed the case was very hotly contested in both the Courts below. Neither of the Courts seems to have been disposed to attach much value to the oral evidence on either side.

In the Munsif's Court the case went in the plaintiff's favour on the ground that their oral evidence was corroborated by reliable documentary evidence which rendered it more reliable than that offered by the defendants who produced no documentary evidence at all. One of the plaintiffs went into the witness-box and described how the quarrel arose which

led to the institution of the present suit. He stated that on one occasion he had slapped a Kahar woman in the town and that as a result of this action the whole body of the Kahars residing in his portion of the *abadi* had refused to render him the usual services. He did not suggest that every one of this body of Kahars had executed an agreement in favour of the defendants denying that they were the plaintiffs' *rioya*, and asserting that they were the *riaya* of the defendants Nos. 1 to 3. It is, however, apparent that these Kahar people all form one body and are generally related to each other and it was principally on this ground, I take it, that the Munsif held that the plaintiffs had a cause of action against all the Kahar defendants. He also relied upon the fact that they were all being supported in this case by the defendants Nos. 1 to 3. The learned Judge of the Court below, as I have said, seems to have agreed with the opinion of the Munsif that there was a collusion between all the Kahar defendants and the defendants Nos. 1 to 3. But he thought as there was no definite proof that those Kahars, who had not executed agreements, had denied the title of the plaintiffs there was no cause of action against them and so he dismissed the suit.

The learned Counsel for the appellants here has relied on the language of section 42 of the Specific Relief Act. His case is that although it may not have been shown by evidence that a definite denial of the plaintiffs' title had been made by those Kahar defendants who had not gone the length of executing documents in favour of the defendants Nos. 1 to 3 nevertheless they were in the language of section 42, persons "interested to deny" the plaintiffs' title; and in this connection he relies upon the finding of both the Courts below to the effect that all the Kahar defendants, without exception, were acting in collusion with the defendants Nos. 1 to 3. I think this view is a correct one and ought to prevail. The evidence leaves no doubt that all these Kahars are acting together in a common cause, and that they have a common interest to deny the title of the plaintiffs. This is abundantly clear from the fact found by the lower Appellate Court in agreement with the first Court, namely, that the entire body of Kahars is working in collusion with the defendants Nos. 1 to 3. The latter, as observed by the Court of first instance, are backing the Kahars in this litigation, although it is proved that the Kahars are in no sense their *riaya* and the legitimate inference is that although some of the Kahar defendants have not made an overt denial of the plaintiffs' rights by executing agreements in favour of the first three defendants they are nevertheless acting in concert and sympathy with those who have. They are, in the words of section 42, persons interested to deny the plaintiffs' title and as such the plaintiffs had, in my opinion, a right to sue them. The Court below has taken too narrow a view of the case and has ignored its own finding regarding collusion on the strength of which it ought to have been held that there was a cause of action against all the Kahar defendants. The view taken by the first Court was correct.

A cross-objection has been filed by the learned Counsel for the respondents challenging the findings of the Court below on the question of the plaintiffs' title and on their possession within limitation. I have examined the evidence which is of considerable bulk. I agree with the findings of the Courts below that the plaintiffs have established their title to the plots in suit. In particular they produced documentary evidence upon which it was open to the Courts below to hold that they had got a title to these lands by purchase. It is proved that their purchase was made between 30 and 40 years ago and the Courts below were, I think, quite right in assuming that having shown a title to the property the presumption was that the plaintiffs were in possession up to the time of the suit. Indeed there was definite documentary evidence on the record to show that the plaintiffs had been realising dues as Zemindars within a period of 12 years before the present suit was brought. The defendants were not able to adduce any evidence whatever to show that they had any title to these lands. It is quite true that the plaintiffs were bound to prove their own title and could not succeed merely on the ground that the defendants

could not show any better title. But it was the case of the defendants that they had acquired a title to these lands by adverse possession and on this point they failed entirely. I agree with the findings of the Court below that the plaintiffs had established a title which justified the decree being made in their favour.

I allow the appeal, set aside the order of the lower Appellate Court and restore the order of the Court of first instance. The appellants will get their costs both here and in the lower Appellate Court. The cross-objection is dismissed with costs to the plaintiffs-appellants.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

November 1, 1918.

Present:—Lord Buckmaster, Lord Dunedin and Sir John Edge.

IDRIS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MRS. JANE SKINNER AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale - Vendor and purchaser, evidence of, value of—Representatives appointed to act on behalf of whole village - Minority of some villagers, effect of—Appeal to His Majesty in Council—Practice of Privy Council—Point, fresh, whether can be raised.

In a suit for pre-emption the persons engaged in the transaction and notably the vendors and the vendees are necessarily essential witnesses, and, in the absence of contradiction, their testimony ought not to be disregarded merely because they are interested parties [p. 725, col. 2.]

It is not in consonance with the practice of the Privy Council upon the hearing of an appeal to entertain a point not raised in either of the Courts below nor presented upon the appeal. [p. 726, col 1.]

Where in the matter of effecting a purchase of land two or three trusted and responsible inhabitants of a village are appointed to act on behalf of the whole village, very strong and cogent reasons would be required to hold that the arrangement, which is extremely wise and reasonable and so much in the interests of all the villagers, was bad, merely because one or more of the villagers happened to be an infant. [p. 726, col. 1.]

Appeal from the decree of the Chief Court of the Punjab (Rattigan and Chevis, JJ.), in Civil Appeal No. 1905 of 1912, dated the 6th April 1915.

FACTS appear from the following judgment of

RATTIGAN AND CHEVIS, JJ.—(*April* 6, 1915).—Plaintiffs who are occupancy tenants of Mauza Rahanwala in the Hissar District, have brought this suit for pre-emption in respect of a sale-deed, dated the 26th of May 1911, whereby the late owner, Mrs. James Skinner, sold the whole of her proprietary rights in the said village, together with all appurtenant rights to defendants Nos. 2 to 6 for an alleged consideration of Rs. 22,000. In their plaint plaintiffs assert that the consideration actually paid was Rs. 15,000 only, and that the sum of Rs. 22,000 was entered in the sale-deed in order to prevent plaintiffs from claiming their right of pre-emption.

Defendants-vendees admitted plaintiffs' right of pre-emption, but pleaded that plaintiffs had by their conduct estopped themselves from asserting it, inasmuch as it was through them that the sale in question had been effected in defendants' favour. They also pleaded that the sum of Rs. 22,000 had in fact been paid by defendants to the vendor.

The District Judge, after disposing in plaintiffs' favour of the preliminary issues that arise under the Punjab Pre-emption Act, found (1) that plaintiffs had not relinquished their rights in the land in suit or estopped themselves from suing, and (2) that the sum of Rs. 22,000 had actually been paid by the vendees to the vendor and that it fairly represented the market value of the property. He accordingly granted plaintiffs a decree for possession of the land conditional on their paying into Court the sum of Rs. 22,000 within three months from the date of decree; in default the decree to be null and void. He further directed that defendants who had "caused the litigation by purchasing land to which they had no right," should pay the costs of the suit.

From this decree defendants have appealed to this Court and the two points urged before us are, firstly, that the second issue should have been decided against plaintiffs, and secondly, that in any event defendants ought not to have been saddled with costs, especially as plaintiffs had failed to establish their allegation as to the amount actually paid to the vendor.

IDRIS *v.* MRS. JANE SKINNER.

After hearing Mr. Oertel for appellants and Mr. Badr-ud-Din for respondents and considering the evidence on the record, we are satisfied that there is force in defendants vendees' contention that plaintiffs are not now at liberty to claim the right of pre emption to which they would under ordinary circumstances have been entitled. According to the vendees, the vendor being desirous of selling her proprietary rights in the village, offered to sell them in the first instance to plaintiffs who are the occupancy tenants; that plaintiffs being unable to find the money for the purchase, applied to defendants for assistance and that it was agreed between them that defendants should pay three fourths and plaintiffs one fourth of the purchase money (Rs. 22,000) to the vendor, and that three-fourths of the land should thereupon become the property of defendants and one fourth the property of the plaintiffs; but at the time of sale plaintiffs were unable to procure their share of the purchase money and as a result, the whole land was sold with the consent of plaintiffs, to defendants. This agreement according to defendants was made by Idris, Naushera and certain other plaintiffs who in these negotiations acted for, and represented, the occupancy tenants generally.

Plaintiffs, on the other hand, deny this story *in toto* and allege that the defendants surreptitiously and without the knowledge of plaintiffs had the sale effected in their favour.

The question we have to decide is whether defendants or plaintiffs are telling the truth and after due consideration we believe that the story told by the former is in the main true. It is, we think, impossible to hold that there is no truth whatever in the evidence given by the witnesses Bhagwan Das (the agent of Mrs. James Skinner who negotiated the sale); Fateh Din, the Nabha School Master; Rulya; Batu Raghunath Sahai (the general agent of Mrs. Skinner) and Hakim Abdul Hakim, a legal practitioner of Nabha. If these witnesses are telling the truth, and no good reason has been given for our finding otherwise, an agreement of the kind set up by the vendees was undoubtedly entered into between the parties, and the evidence of Mrs. Jane Skinner, though somewhat vague, is to the same effect.

On the other hand, the alternative story is that of the plaintiffs who assert that the allegation that they had an understanding with the defendants is an absolute myth. Clearly, if plaintiffs' denial is true, everyone of the witnesses above mentioned (including Mrs. Skinner) has been guilty of wilful perjury and has sworn to a story which is wholly without foundation, the sale in question having (according to plaintiffs) been effected secretly and without the knowledge of plaintiffs.

We cannot believe that such is the case. On the contrary we are satisfied that the original intention of the parties was that plaintiffs should provide one fourth of the purchase money, defendants providing the balance, and that the sale should be effected proportionately in their respective favours that plaintiffs subsequently found that they could not raise even the one-fourth part of the purchase-money and accordingly consented to the sale being made in favour of defendants, it being understood that if plaintiffs were later on in a position to pay their one-fourth share, they should be given one fourth of the property. At some subsequent date some third party in all probability instigated plaintiffs to repudiate the transaction and to claim pre-emption of the whole property, for it is obvious that there must be some one behind plaintiffs in this suit. They were unable in May 1911 to procure even Rs. 5,500 and it is scarcely likely that in December 1911 they would be in a position to pay Rs. 15,000 (or Rs. 22,000 if necessary) to secure the bargain.

We accordingly find that the sale to defendants Nos. 2 to 6 was brought about by some of the leading members of plaintiffs' party including Idris and Naushera, and that as these persons were acting not merely on their own behalf, but as the representatives of all their fellow occupancy tenants (just as they are admittedly conducting the present suit on behalf of all plaintiffs) the latter are estopped from now claiming to pre empt the property, and are not entitled to deprive the vendees of a bargain which the vendees succeeded in obtaining through the active instrumentality of Idris, Naushera and the others.

We accordingly accept the appeal and dismiss plaintiffs' suit with costs throughout.

JUDGMENT.

LORD BUCKMASTER.—The appellants in this case are occupancy tenants of the village of Rahanwala in the District of Hissar, and as such they claim to possess and to be entitled to exercise a right of pre-emption in respect of the said village. It is undisputed that they originally enjoyed this right; the question is whether, in the circumstances that have transpired, they enjoy it still.

The first respondent (Mrs. Jane Skinner) was the proprietor of the said village, and she having decided to sell her proprietary interest, placed the matter in the hands of her agent, Bhagwan Das, who notified the occupancy tenants of the proposed sale.

It appears from the evidence that the tenants had not the necessary funds for the purchase, and that certain of them known as Idris and Naushera, acting, as is alleged, on behalf of the whole village, introduced the other respondents to the said agent as prospective purchasers, at the same time informing him that an arrangement had been come to whereby these respondents should pay the money and acquire the property, which should then be held as three-quarters for them and one-quarter for the appellants. The sale-deed was accordingly written out in the presence of Idris and Naushera, and the purchase was completed in favour of the proposed vendees. It is this purchase which the appellants seek to set aside asserting that it constituted an unlawful defeasance of their rights.

If, in fact the transaction was effected in the circumstances and manner described, it is plain that their claim could not succeed unless Idris and Naushera were acting on their own responsibility and without the knowledge or authority of the other occupancy tenants. This, in fact, is the appellants' contention, which they established to the satisfaction of the District Judge of Hissar, who on the 12th August 1912 granted them the relief they sought. But the Chief Court of the Punjab, on the 6th April 1915, reversed this decree and made, in favour of the respondents, the decree against which the present appeal is brought.

Now the evidence as recorded is abundant to establish the respondent's case. Bhagwan Das, the agent, said that the village was under his supervision, and that when asked to procure a purchaser, he spoke to the villagers about it. They said they were anxious to purchase, but could not afford the whole of the money, and would try to procure partners, and that they then came to the arrangement to which reference has been made. He stated in plain terms that the plaintiffs, Naushera and Idris, represented the whole of the village in the matter. There were other witnesses who spoke to the same effect, but the learned District Judge regarded the whole of their evidence with suspicion, because they were connected with the vendees. This, of course, is inaccurate with regard to Bhagwan Das, but the learned District Judge thinks that his evidence cannot be trusted because he was the agent of the vendor, and cannot, therefore, be called an uninterested witness.

Whatever weight might be given to these considerations, if the plaintiffs—and notably Idris and Naushera—had been called to give evidence in answer, it appears to their Lordships to be but slender material upon which to base a judgment that consists in disbelieving the whole story, which, so far as evidence is concerned, is uncontradicted in a single particular.

In cases of this kind the persons engaged in the transaction—and notably the vendors and the vendees—are necessarily essential witnesses, and in the absence of contradiction, to disregard their testimony because they were interested parties is to carry the vigilance, with which the Court ought always to regard interested testimony, beyond all reasonable and trustworthy limits. There appears to be no reason in the recorded evidence to impute collusion or dishonesty to any of these witnesses, and as their evidence is wholly unanswered, it must in their Lordships' opinion prevail.

There remains the question as to the authority of Idris and Naushera to act on behalf of the remaining villagers, and it was urged before their Lordships that the authority was lacking because some of the

villagers were infants, and could not properly confer authority except through the agency of guardians properly appointed through the Court.

This point was not raised in either of the Courts below nor in the case presented upon this appeal, and, in these circumstances it is not consonant with there Lordships' practice that it should be entertrined upon the hearing before them. They ought, however, to add that no authority has been placed before them in support of such a proposition, and it would require very strong and cogent reasons that would compel them to hold that an arrangement so extremely reasonable and wise, and so much in the interest of all the villagers as that effected by appointing, on behalf of the whole village, two or three trusted and responsible inhabitants to act on their behalf should in a matter like the present, be held to be bad, simply because one or more of the villagers happened to be an infant.

The point that was urged both in cross-examination and argument as to the lack of authority was, that Idris and Naushera had no powers of attorney from the other villagers, but, in their Lordships' opinion, no such power was needed, nor was any reason given why it should be required, apart from this contention their authority does not appear to have been seriously challenged at the trial.

For these reasons their Lordships are of opinion that this appeal must fail, and they will humbly advise His Majesty that it should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 64 OF 1919.

December 3, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Justice Sir Earnest Fletcher, KT.

NILKANTA GHOSE—RECEIVER —APPELLANT

versus

SWARNAMOYEE DASSI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Inherent power—Misapprehension as to result of suit—Substitution of parties—Appellate Court, power of.

A Judge sitting on the Original Side of the High Court, under a misapprehension as to the result of a suit, disallowed an application for substitution of parties. On appeal:

Held, that as under section 151 of the Civil Procedure Code the Court had inherent power to make such order as may be necessary for the ends of justice, the application for substitution should be allowed. [p. 728, col. 1.]

Appeal against the following order of Mr. Justice Greaves, dated the 23rd June 1919.

GREAVES, J.—This is an application by one Nilkanta Ghose, who has been appointed Receiver of the estate of Jadunath Sircar deceased in Title Suit No. 30 of 1918 of the Court of the Second Subordinate Judge of Alipore, for an order that the applicant, as such Receiver, may be substituted as plaintiff in the records of this suit and that the order dismissing the suit and the decree, dated 23rd May 1919, may be set aside except as relates to the direction as to payment of the costs of Babu Pannalal Dey and that the suit may be restored.

The facts are shortly as follows:—Srimati Swarnomoyi Dassi, as one of the legal personal representatives of Jadunath Sircar, commenced, with the representatives of the estate, a suit against the defendant J. C. Galstaun in the year 1916, being Suit No. 329 of that year. The suit came on for hearing before me on 23rd May last. The plaintiffs did not appear and I dismissed the suit and decreed in favour of the defendant a claim for a set-off which he had pleaded in his written statement against the plaintiffs. The legal personal representatives of Jadunath Sircar apparently, after the institution of the suit, fell out among

themselves and it became necessary, for an application to be made for the appointment of a Receiver of the estate of Jadunath Sircar. An application was accordingly made to the Alipore Court and on 12th May 1919 Nilkanta Ghose was appointed Receiver of that estate. It is said that thereupon the plaintiffs' claim in this suit, which was a claim for rent, devolved upon and vested in the Receiver Nilkanta Ghose hence he applies for the order which I have already stated.

The Code of Civil Procedure provides, in Order XXII, for the devolution or survivorship of rights of suit upon the death, marriage or insolvency of parties, and for the procedure to be adopted. That is to say, in the case of death, the right of substitution, if it survives to the representatives of the plaintiff or the defendant, can be exercised within the period stated in the order. Order XXII, rule 10, provides that in other cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may by leave of the Court be continued by or against the person to or upon whom such interest has come or devolved, that is to say, in a case like the present, assuming that the right to sue for rent devolved on the Receiver upon his appointment, he would be entitled, if he had come at the right time and the Court had thought fit, to be added as a party to the suit. It does not seem to me, however, upon the reading of Order XXII, rule 10, that any right of substitution devolved upon him as of right by reason of his appointment: and I have to consider whether in the circumstances I ought to interfere. I do not think that I ought. If the applicant is right and the right to sue for and recover rent accrued to him upon his appointment on the 12th May 1919, he is not precluded from bringing a fresh suit, and so far as the question of set-off is concerned, if he is right in saying that no valid or binding order could have been made against the plaintiffs after the date of his appointment, then he will be entitled to dispute that order if and when that comes to be executed. The suit has, however, already been dismissed and although I accept Nilkanta Ghose's statement that he did not know of the existence of the suit until after the decree, it seems to me that having regard to questions of limitation and so on which may have arisen in favour of the defendant I should not be justified in the circumstances in making the order I am asked to make. I must, therefore, refuse the application and the defendant will be entitled to the costs of the application.

Messrs. *N. N. Sircar* and *B. K. Lahiri*, for the Appellant.

Messrs. *Langford James* and *W. Gregory*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves. I think, I may say at once that the judgment, judging from the terms of it, must have been given under some misapprehension, because the learned Judge seems to have been under the impression that there was an order dismissing the plaintiff's suit. He says in the first paragraph of his judgment: "This is an application that the Receiver may be substituted as plaintiff in the records of the suit and that the order dismissing the suit and the decree dated the 23rd May 1919 may be set aside except as relates to the direction as to payment of the costs of Babu Pannalal Dey and that the suit may be restored." Later on, towards the end of his judgment he says again: "The suit has, however, already been dismissed and although I accept Nilkanta Ghose's statement that he did not know of the existence of the suit until after the decree" and so on. I do not think it is the learned Judge's fault. He evidently based his judgment upon the form of the application which was, that the order of dismissal, and the decree, dated the 23rd of May 1919, may be set aside except as it relates to the direction as to payment of the costs, and so on. We have the decree now before us and it appears that there was no order of dismissal. It appears therefrom that there was a declaration that there was due to the defendant in respect of his advance of Rs. 15,000 after debiting the rents, (which were the subject-matter of the plaintiff's claim) and crediting the interest a sum of Rs. 7,190. Therefore, it appears that, far from dismissing the plaintiff's suit, the learned Judge [illegible]

the plaintiff's claim as having been admitted by the defendant, and apparently he deducted from the amount of the defendant's advance, that which was due to the plaintiff. The learned Judge thought that the matter was one for his discretion, and that inasmuch as the suit had been dismissed, questions of limitation might arise and that he ought, therefore, to exercise his discretion in refusing the application. Now, that we are made aware of the real facts of the case, and it appearing that the suit was not dismissed, I think we ought to exercise the power vested in us under section 151 of the Code of Civil Procedure the inherent power of the Court to make such orders as may be necessary for the ends of justice.

It appears that the decree of the learned Judge was made on the 23rd of May 1919. Before that, the Receiver had been appointed by the Alipore Court on the 12th of May 1919. The learned Judge has found that the Receiver did not know of this suit, until after the decree and it is clear that the learned Judge himself did not know when he gave his judgment on the 23rd of May, of the appointment of the Receiver by the Alipore Court. Consequently, in my judgment, the matter should be set right, and the order which we propose to make is as follows: The decree of the 23rd of May 1919 will be set aside. We direct that the Receiver should be added as a plaintiff to the suit and in case the present plaintiffs may desire to raise any point, of which we are at present not aware, we direct that the present plaintiffs, instead of remaining as plaintiffs in the suit, should be added as defendants: that will involve striking out their names as plaintiffs and adding them as defendants.

As regards the costs of the application before Mr. Justice Greaves and of this appeal, we think that each party should bear his own costs. We bear in mind that Mr. James' client was not responsible for the Receiver not being aware of the suit, nor was he responsible for the Court not being aware of the appointment of the Receiver, on the other hand, when those facts were made known, his client did oppose the application of the Receiver for proceeding with the suit. We think that the justice of the case will be met if we order that each party shall bear his own costs of the application in the Court below and of this appeal.

The costs of the Receiver are to be taxed as between Attorney and client.

The Costs of the suit will be in the discretion of the learned Judge who tries the suit.

MOOKERJEE, J.—I agree.

FLETCHER, J.—I agree.

Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 859 OF 1919.

July 18, 1919.

Present:—Mr. Justice Broadway.

DIWAN—PLAINTIFF—APPELLANT

versus

JAGTA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 26—Easement—Right of way—Open user for 20 years—Presumption—Appeal, second—Failure to make presumption allowed by law—Error of law.

An open user of a right of way continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of section 26 of the Indian Limitation Act. [p. 730, col. 1.]

The failure by a Court to make a presumption allowed by law amounts to an error of law. [p. 730, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 18th February 1919, dismissing the claim.

Mr. *Jiyan Nath*, for the Appellant.

Mr. *Ghulam Rasul*, for the Respondents.

JUDGMENT.—The plaintiffs Diwan and Gulab instituted a suit against Jagta and others claiming that they had a right of way to a well, known as Jandwala, which the defendants had recently obstructed, and, therefore, they claim a perpetual injunction preventing the said defendants from obstructing the road. It has been held by the Courts below that the well known as Jandwala has been in existence for over 20 years.

DIWAN v. JAGTA.

The plaintiffs and the defendants are apparently co-sharers in this well. In order to gain access to this well from a road running between Muli and Birk it is necessary for the plaintiffs to go across certain fields belonging to some of the defendants. The Courts below have held that this road has been in existence for over 20 years, ever since the well came into being. The trial Court dismissed the plaintiffs' suit, however, on the ground that this road is not entered in the revenue papers, and in the absence of such an entry the Court found it impossible to hold that the existence of this road had been "entirely proved." The learned District Judge considered that the absence of an entry in the revenue record of this road was immaterial as it was not a public but a private one. From an examination of the plan on the record, Exhibit P-1, the learned District Judge came to the conclusion that it was difficult, if not impossible, for the plaintiffs to take their cattle to this well without using the disputed roadway. He, however, held that the plaintiffs had not proved that they had been using this road without let or hindrance for more than 20 years as of right. From these findings it will appear that the Courts below have agreed in holding that this road is practically the only road by which the plaintiffs can gain access to the well in which they are co-sharers. They have also held that this road as well as the well have been in existence for more than 20 years and that the plaintiffs have been using the said road for the purpose of getting to their well. The learned District Judge has held, however, that this user was not as of right.

On behalf of the plaintiffs-appellants Mr. Jagan Nath has referred me to Gale on Easements, *Kyinan* v. *Set Lal* (1) and *Rana Ganpat Singh* v. *Kangra Valley Slate Company* (2) and has contended that the term "as of right" does not necessarily imply an original grant, but that when user of a roadway has been established for a period of over 20 years—user effected without force, secrecy or evasion and not dependent upon the consent of the defendants—the inference to be drawn according to law is that a user was a user as of right. On the other hand Mr. Ghulam Rasul for the respondents has referred me to *Baroda Kant Karmakar* v. *Sreenath Sil* (3), *Shaikh Khoda Buksh* v. *Shaikh Tajuddin* (4), *Meser Mullick* v. *Hafieuddi Mullick* (5) and *Mahomed Ali* v. *Joogul Ram* (6). His contention is that the law in England and the law in India are different and that the inferences contended for by Mr. Jagan Nath, though permissible under the English Law, are not so in this country. The authorities cited by him do not, however, appear to me to go quite as far as Mr. Ghulam Rasul would wish. In *Baroda Kant Karmakar* v. *Sreenath Sil* (3) the right claimed was to use a pathway which lay through the courtyard of the defendants' *bari* close by their dwelling house and kitchen and not far off from a tank used by the female members of their families. The learned Judges of the Calcutta High Court who decided that case held that when, on the facts of that case, the Court below had held that the inference to be drawn was that the user was permissive, they were unable to say that this finding was opposed to any principle of law.

In *Shaikh Khoda Bahsh* v. *Shaikh Tajuddin* (4), Banerji, J., held that in a suit to establish a right of way the propriety of the English rule that the presumption from user should be that it is of right must depend upon the circumstances not only of each particular case but also of each particular country, regard being had to the habits of the people of that country. With this decision I have no quarrel. It does not, however, seem to me to rule out the presumption that may be drawn under the law. Similarly *Muhomed Ali* v. *Joogul Ram* (6) may be distinguished. In *Rana Ganpat Singh* v. *Kangra Valley Slate Company* (2), Chatterji and Anderson, JJ., held that the principle of the English Law regarding the presumed dedication of a road to the public arising from user of such road by the public being founded on reason and common sense and conducive to public convenience is applicable to India. It seems to me that similarly the presumption arising out of user in a case like the present would be the same, having due regard to the habits of the people

(1) 8 Ind. Cas. 1196; 3 Bur. L. T. 100.
(2) 62 P. R. 1898.
(3) 18 Ind. Cas. 211.
(4) 8 C. W. N. 359.
(5) 9 Ind Cas 965; 13 C. L. J. 316.
(6) 14 W. R. 124.

of this country. In *Kyinan* v. *Set Lal* (1) it was held that when a right of way has been used peaceably and openly without interruption for 20 years its user as of right might be legally inferred. [See also *Sahib Ditta* v. *Daya Singh* (7).] It seems to me that an open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of section 26 of the Indian Limitation Act. In the present case it has been found that the plaintiffs have got a right of easement as of necessity for the trial Judge after an inspection of the spot came to the conclusion that the road claimed by the plaintiffs was the only road that they could use to gain access to the well. As I read the judgment of the learned District Judge he holds that this road has been used without let or hindrance for a period of 20 years, but he has failed to draw the inference that the user was as of right. It seems to me that in failing to make this presumption or to draw this inference he has erred in law.

I, therefore, accept the appeal with costs and grant the plaintiffs a decree as prayed.

Appeal accepted.

(7) 3 Ind. Cas. 271.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

April 27, 1920.

Present:—Viscount Cave, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

AMBALAVANA PANDARA SANNIDHI AVERGAL—PLAINTIFF—APPELLANT

versus

Sri MEENAKSHI SUNDARESWARAL DEVASTANAM OF MADURA AND OTHERS—RESPONDENTS.

Religious endowment—General and particular trusts—General trustee, claim by, for possession of property, subject to particular trust, whether maintainable—Idol, position of—Adverse possession—Limitation.

The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property in the possession of persons who have the right and the duty to manage such property, collect the income and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee is not entitled to the possession of the properties out of which that portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. [p. 732, cols. 1 & 2.]

An idol may have not merely a general trustee but also other subordinate representatives having the right to manage certain special portions of his property, and pay over the income so collected to the endowment, and even to some degree control its use. Such rights are not inconsistent with the existence of a general trustee, but they are fatal to his claim to possession of the properties from which those revenues are derived. [p. 732, col. 2.]

When in such a case it is necessary to consider limitation, the possession of such subordinate representatives will be held to be adverse to that of the general trustee. [p. 732, col. 2.]

Appeal from a decree of the High Court of Madras, (Wallis, Officiating Chief Justice and Seshagiri Aiyar, J.), dated the 10th November 1914, reported as 26 Ind. Cas. 841, affirming the decree of the District Judge, Madura.

FACTS.—The suit was brought by the plaintiff (appellant) claiming to be Hukdar or trustee of a religious and charitable endowment for the performance of certain ceremonies in a temple at Madura against the manager of the temple and the members of the temple committe for possession of four villages. The trial Court dismissed the suit on the ground that plaintiff had failed to prove that he was trustee of the endowment, and also that the suit was barred by limitation. On appeal the High Court (Wallis, Offg. C. J. and Seshagiri Aiyar, J.) agreed with the finding that the suit was barred, but differed in opinion as to whether plaintiff had established his claim to be trustee of the endowment.

Mr. *De Gruyther*, *K. C.*, Messrs. *Kenworthy Brown* and *Palat*, for the Appellant.—Plaintiff and his predecessors have held the position of general trustee of the endowment, which included not only such villages as were in their possession, but also the villages claimed, whose

revenues form part of the endowment, which must, as a matter of law, be his and which he was entitled to possess. The people who manage the villages and collect the revenues are local agents acting for him and cannot set up an adverse title; their possession has been his in law, and the rights of the Pandara Sannidhi as hereditary trustee have never been lost under any law.

Mr. *Dunne, K. C.* and Mr. *Dube*, for the Respondents.—Defendants and their predecessors have been in adverse possession for a known period of nearly sixty years, they have been appointed by Government, and Government, who had previous possession handed over the villages to the then manager of the temple at Madura, and no opposition was made by appellant's predecessors at the time the villages were so handed over.

Moreover, the plaintiff has failed to establish his title to the trusteeship of the Thanappa Mudali Kattalai, and even if he held such office respondents had rights of possession and management with which he could not interfere.

Mr. *De Gruyther* replied.

JUDGMENT.

LORD MOULTON.—This is a suit brought by the Pandara Sannidhi of an important Mutt situated in Tanjore to recover possession of four villages situated in the Madura District. He alleges that he is Hukdar or trustee of the Thanappa Mudali Kattalai, which is an endowment for the performance of certain ceremonies in a temple at Madura, and that these villages form part of that endowment, and that, therefore, as such trustee he is entitled to their possession. The defendants are the manager of the temple and the members of the Temple Committee appointed by the Government under Act XX of 1863. They deny that the plaintiff is trustee of the endowment, or that he has any right either to the management or to the possession of the properties in question, and they further allege that if he had at any time such right his claim is barred by limitation.

In the Court of first instance the Subordinate Judge decided in favour of the defendants on the ground that the plaintiff had failed to prove that he was trustee of the endowment, and also on the ground of the Statute of Limitations. On appeal to the High Court, both Judges agreed with his finding that the plaintiff's suit was barred by limitation, but they differed in opinion as to whether the plaintiff had proved his claim to be trustee of the endowment. In the result, therefore, the plaintiff's suit was dismissed in both Courts and from these decisions the present appeal is brought.

The history of the villages in suit has been examined in great detail in the proceedings in the Courts below, and certain points in that history may be taken to have been established. The documents relating to the creation of the Kattalai appear to be lost, but it is agreed that the founder was Thanappa Mudali, who was Prime Minister to the Ruler of Trichinopoly between the years 1704 and 1735. It is not clear at what date or how these villages became connected with the endowment, but it must have been at an early date because very shortly after the foundation of this Kattalai the Muhammadan Government attached these villages, and retained possession of them until about 1790, when the Madras Government assumed possession of the Madura District. Ultimately in 1801 the villages came into the possession of the East India Company, and remained in their possession until 1849, when the general manager of the temple at Madura (who had been appointed by the Company in 1842 in exercise of the powers given them under Regulation VII of 1817) was placed by the Company in possession of the villages.

The income derived from the villages in suit has been applied in various ways during this period. During the time that they remained under attachment by the Muhammadan Government it would seem that a portion of the income was applied to the uses of the endowment, and the remainder was appropriated by that Government. There is no evidence as to what happened between 1790 and 1801. From 1801 to 1849, while the villages in question were in the possession of the East India Company, the revenue from them was applied in whole or in part by the Company to the uses of the endowment. In the earlier years it appears to have been handed over as a whole, but from the year 1817 the Government followed the practice of settling each year a budget showing the

amount necessary for the expenses of the Katalai for that year, paying over only so much of the income as was sufficient to satisfy that budget, and retaining the remainder. Since 1849, the villages have been in the hands of the predecessors of the defendants, and the whole of the revenue has been used for the purposes of the endowment (including the expenses of the temple) according to the directions of the temple manager and the Temple Committee.

Throughout the whole of the history of these villages from the date of the Muhammadan attachment to the present time, there is one fact that is clear from the evidence, *i. e.*, that these villages have never been in the possession of the plaintiff or his predecessors. Other villages form part of the property of the endowment, and these have been in the possession of the plaintiff and his predecessors throughout. These latter villages appear not to have been attached by the Muhammadan Government, but to have been left in the possession of the predecessors of the plaintiff on behalf of the endowment. But in all the records relating to possession the contrast between those that relate to the villages in suit and those that relate to these other villages is marked. The latter are entered as being in the possession of persons representing the predecessors of the plaintiff. This is never the case with regard to the villages in suit.

The argument in favour of the plaintiff's claim is, therefore, in reality an argument which is not founded on evidence relating to the past history of the villages, but is of a legal nature. It avers that he and his predecessors have held the position of general trustee of the endowment, and that as such the villages in suit whose revenues form part of that endowment must, as a matter of law, be his and he must, therefore, be entitled to possession. The people who manage the villages and collect the revenues are, he contends, acting for him, and cannot set up an adverse title, so that their possession has been, in the eye of the law, his own. In their Lordships' opinion, there is a fallacy in this reasoning. The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the revenue comes. His rights do not commence untile after the collection of the revenues by and under the management of those who hold possession. It must be remembered that after all the general trustee is only a representative of the Idol who is a juridical personage, and who is the true owner, and there is nothing legally incongruous in that personage having other subordinate representatives who have the right to manage certain special portions of his property, and pay over the income so collected to the endowment, and even to some degree to control its use. Such rights would, as has been said, not be inconsistent with the existence of a general trustee, but they would be fatal to his claim to possession of the properties from which these revenues are derived. Possession would be in the hands of those entitled to manage these special properties and their possession would be adverse to his.

Their Lordships, therefore, do not consider it necessary to decide whether the claims of the plaintiff to be Hukdar or general trustee of the endowment are or are not well-founded. The history of these villages from the year when they came into the possession of the Company, and even from a far anterior date, indicates that their relationship to the endowment was such as has been just described. The possession was always in some other person than the predecessor of the plaintiff or any person appointed by him, or, indeed, any other person claiming title from the founder of the endowment. The sole interest of the endowment in them has

been an interest in the revenues collected from them by such other persons who were in possession of and managed the villages themselves. Their Lordships would be very unwilling to value lightly the testimony of a long course of dealing with the possession of these villages such as the history of this case has disclosed, which, as already stated, indicates that the relationship of the villages to the general endowment has throughout been of this nature. But they consider that it is not necessary to base their decision on the testimony of the earlier history. It suffices to consider the events that have happened from 1849 onwards.

In the year 1849 the Government, which was undoubtedly then in possession of the villages in suit, handed them over to the manager of the temple of Madura (the appointment of whom was in their hands), and there is no doubt that from that time they have been in the possession of such manager and the Temple Committee which is also appointed by Government. The *Pandara Sannidhi* made no opposition to their being so handed over. From that time forward it is beyond question that the plaintiff has been out of possession of these villages. If he has any right to claim possession in his suit he undoubtedly had the same right in 1849, and, therefore, as at the date of the suit he had been out of possession of these villages for nearly sixty years, his claim is barred by the Statute of Limitations, and this appeal fails.

Originally a claim for some alternative relief was included in this action, but no case has been made out for it.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should stand dismissed, and that the appellant should pay the costs.

Appeal dismissed.

Solicitor for the Appellant.—Mr. *Douglas Grant*.

Solicitors for the Respondents.—Messrs. *T. L. Wilson & Co.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 441 OF 1919.

July 18, 1919.

Present:—Sir Henry Rattigan, KT, Chief Justice.

HARNAMAN AND OTHERS—DEFENDANTS——APPELLANTS

versus

DASONDHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 144—Custom—Gift—Donee, failure of direct line of—Reversion of gifted property—Trespasser, possession of, whether adverse to nearest reversioner or all reversioners—Trees planted by donee, whether revert with the land—Compensation.

Where on the failure of a donee's line of descendants the gifted property is taken possession of by a trespasser his possession is adverse, within the meaning of Article 144 of Schedule I to the Limitation Act, to the nearest reversioner who is entitled to claim immediate possession of the property and not to the more distant collaterals who cannot at once claim possession. [p. 734, col. 1.]

A donee has a precarious tenure of the gifted land and any permanent fixtures, *e. g.*, trees which he attaches to it and any permanent structures which he erects upon it would, in the event of the failure of his direct line, go to the reversionary owner of the land, and not to the collateral heirs of the donee. The latter are not in such a case entitled to any compensation. [p. 735, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 21st November 1918.

Bakhshi *Tek Chand*, for the Appellant.

JUDGMENT.—A gift of certain land was made by one *Musammat* Naraina, widow of Harbhaj, deceased, to her daughter's sons Dittu and Nihalu on the 25th December 1897. Nihalu died on the 1st January 1900 and Dittu obtained possession of his share and retained it till his own death in 1909. After the death of Dittu mutation of all the lands was effected in favour of defendants, Dittu's first cousins, and as mutation was accepted by the nearest reversioner, Achhru, nothing was done by the other reversioners. Achhru died in 1914 and in 1918 plaintiffs, who are collaterals in the fourth degree of the original donor's husband, sued for possession on the ground that the donees' direct lineal descendants having failed, the lands revert to plaintiffs.

The first question before me upon this appeal is whether the suit is barred by limitation as regards the share of Nihalu,

Mr. Tek Chand contends that Dittu when he took possession of Nihalu's land was a mere trespasser, that his possession was adverse not only to Achhru, the next reversioner, but to all the reversioners and that *qua* this part of the claim, the suit is barred. The learned Vakil relies upon the decision of a single Judge reported as *Kahla Singh* v. *Diala* (1).

The District Judge has held that the suit is not barred as regards any part of the claim and I entirely agree. In order that the possession of Dittu should be adverse to the plaintiffs it is necessary in the first instance to prove that the plaintiffs had a right to claim possession which they could have enforced against Dittu. But as long as Achhru was alive plaintiffs had no right to sue for possession and the principle of the Full Bench decision in *Sundar* v. *Salig Ram* (2) is directly in point in the present case. *Kahla Singh* v. *Diala* (1) was a case decided on its own facts, but if the learned Judge who decided it intended to hold that the possession of a trespasser would be adverse within the meaning and for the purposes of Article 144 of the Limitation Act, to a person who had at the time no right to claim possession, I must, with every deference, venture to differ from such an exposition of the law. I hold, therefore, that the suit is within time.

The next question is whether defendants who are the collaterals of the donees are entitled to claim compensation in respect of certain trees planted on the land by Dittu and Nihalu. It is urged by Mr. Tek Chand that these trees were the self-acquired property of the donees and that the latter's collaterals and not the owners of the land are entitled to claim them or their value. I know of no authority in support of a claim such as this, and it appears to me that the ordinary principle must prevail *quicquid plantatur solo, solo cedit*. The donees had a precarious tenure of the land and any permanent fixtures which they attached to it or permanent structures erected by them upon it would in the ordinary course of things go to the reversionary owner of the land and not to the collateral heirs of the donees. I think that this part of the defendants' claim has also been rightly rejected by the lower Appellate Court.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 64; 113 P. R. 1916; 175 P. W. R. 1916.

(2) 29 Ind. Cas. 300; 26 P. R. 1911 (F. B.); 34 P. L. R. 1911; 33 P. W. R. 1911.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 69 OF 1919.

December 5, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Justice Sir Ernest Fletcher, KT.

CHIRANJILAL RAMLAL—PLAINTIFF—APPELLANT

versus

TULSIRAM JANKIDASS—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, rr. 1, 4, 7—Review—Discovery of new evidence—Order granting review—Appeal, when maintainable.

Where in granting an application for review on the ground of the discovery of new evidence, the Court does not come to any finding whether there was a discovery of new evidence, or that the evidence was of such an important nature that a review ought to be granted, nor does it come to any finding whether due diligence was exercised with regard to the production of such evidence at the trial, the order granting review contravenes rule 4 of Order XLVII of the Code of Civil Procedure and is appealable and liable to be set aside. [p. 736, col. 2.]

Appeal against an order of Mr. Justice Greaves, dated the 7th July 1919.

Sir *B. C. Mitter* (with him Messrs. *S. C. Ray* and *A. K. Ray*), for the Appellants.

Messrs. *A. N. Chowdhury* and *P. N. Chatterjee*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves and from an order made by him on the 7th day of July 1919.

The application was made by the defendant firm asking that a decree which had been made by the learned Judge in the

suit on the 4th of June 1919 should be reviewed. The application was based upon the following ground, that the evidence of one Baldeo Sahay which was very relevant and most material could not be produced by the defendant firm after the exercise of due diligence at the time when the decree was passed. It was alleged that the defendants believed that the evidence of Baldeo Sahay was of such a character that if it had been given at the said hearing it might possibly have altered the judgment. The suit was brought by the plaintiff for a declaration that a certain contract was void, inoperative, unenforceable and of no effect, and that the defendants were not entitled to enforce the said contract or any rights thereunder. The allegation was that the contract in question had been made through the individual to whom I have referred, Baldeo Sahay. He was not called as a witness at the trial. The result of the trial was that the learned Judge held that the defendants did not discharge the onus which lay upon them of proving the contract. Consequently he gave judgment in favour of the plaintiffs and a decree was drawn up in accordance with the judgment. That was the decree which the defendant firm applied to have reviewed. The learned Judge granted a rule. The hearing of that Rule was on the 7th of July this year. The learned Judge delivered no judgment, but he said "I think I will hear his evidence." Then there was a discussion as to the date when the further hearing should be held. The learned Judge directed "Have it a fortnight hence." He then made the Rule absolute and ordered that costs should be costs in the cause. The result of making the Rule absolute was that the decree which had been drawn up in pursuance of his judgment was set aside. The order drawn up was as follows: It is ordered that this suit be placed on the peremptory list of suits for hearing after a fortnight from the date hereof for re-trial for hearing the evidence of Baldeo Das as a witness on behalf of the defendant firm. The costs of that application and the order *nisi* were directed to be costs in the cause.

The learned Counsel for the appellant has urged that the order of review which the learned Judge made is appealable, because he argued that the order granting the review was in contravention of the provisions of rule 4, Order XLVII, of the Civil Procedure Code and if the learned Counsel is right in that contention, then it is clear that an appeal lies, because such an appeal is expressly given by Order XLVII, rule 7 of which is as follows:—

"(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was —(*a*) in contravention of the provisions of rule 2, (*b*) in contravention of the provisions of rule 4.....

.....Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit." Rule 4, sub. rule (*2*) is as follows: "Where the Court is of opinion that the application for review should be granted, it shall grant the same: Provided that.....(*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation." In order to see what is meant by "discovery of new matter or evidence" mentioned in this rule, reference must be made to rule 1 of Order XLVII which is the rule giving a right to the person aggrieved to apply for a review. That rule provides as follows: "Any person considering himself aggrieved, (*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or (*b*) by a decree or order from which no appeal is allowed, or (*c*) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

CHIRANJILAL RAMLAL v. TULSIRAM JANKIDASS.

The learned Counsel argued first, that there must be an allegation such as is referred to in Order XLVII, rule 4, sub-rule (2) (*b*), and then there must be strict proof of such allegation. It was further urged that the allegation must contain a statement that the evidence which is relied upon has been discovered after the decree was passed: further, that it must be new evidence; thirdly, that it must be important evidence, and, fourthly that it could not be produced at the time when the decree was passed by the exercise of due diligence. He further urged that with regard to the discovery and with regard to the newness of the evidence the allegations made by the applicants in this case did not comply with the rule.

It appears that Baldeo Sahay had made an affidavit on the 23rd of August 1918, some months before the trial took place, which contained allegations with relation to the alleged making of the contract in question and the defendants were aware of the evidence which he would be able to give. Consequently, the learned Counsel urged that his evidence was not new evidence within the meaning of the rule nor was there a discovery of the evidence after the decree was made, and that, therefore, the applicant had not complied with rule 4, sub rule (2) (*b*) of Order XLVII: I agree with his contention in that respect. Further he argued that even if there was a sufficient allegation, there was not strict proof of such allegation.

Now, the meaning of the words "strict proof" has been considered by the late Chief Justice Sir Lawrence Jenkins and by my learned brother Mr. Justice Woodroffe in the case of *Ahed Khondkar* v. *Mohendra Lal De* (1). The learned Chief Justice at page 839* said this: "Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under section 629" (the learned Chief Justice was then dealing with the Code of 1882) "it was to be open to the Appeal Court to say though there has been legal evidence, and in that sense strict proof, that proof did not convince it though it convinced the Judge who heard the witnesses and, therefore, the application and the order granting the review were *ultra vires* and beyond the competence of the Court." I intend to say nothing which would in any sense derogate from what the learned Chief Justice said in that case. But the case which we are now considering differs from the case which was then before the learned Judges, because in my judgment in this case there is a material defect, *viz.*, that there was no finding by the learned Judge who heard this application for review that he was convinced by the proof which was put before him upon the material matters which it was necessary for him to consider in deciding whether he should grant the review or not. The learned Judge merely said "I think I will hear his evidence." He has not come to any finding as to whether there was a discovery of new evidence: he has not come to any finding as to whether that evidence was of such an important nature that he ought to grant a review; nor has he come to any finding as to whether due diligence was exercised by the defendants, with regard to the production of such evidence at the trial. The result is that in my judgment the order for review was made in contravention of rule 4, Order XLVII, of the Civil Procedure Code. Consequently, there is a right of appeal.

There being a right of appeal, the next question, that I have to consider is whether the order of the learned Judge should be upheld or set aside.

In my judgment there is no doubt that this order should be set aside. In my judgment the defendants have not shown any ground which would justify this Court in making an order that the evidence of Baldeo Sahay should be taken on a re-hearing.

With regard to the kind of evidence which is necessary in an application of this kind, I need not say anything because my learned brother Mr. Justice Mookerjee and I had to consider this point, and we dealt with it in the case of *Nundo Lal Mullick* v. *Punchanon Mukherjee* (2). I do not intend to add anything to what I said in my judgment in that case. The facts

(1) 29 Ind. Cas. 282; 42 C. 830; 19 C. W. N. 804.

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(2) 42 Ind. Cas. 484; 45 C. 60; 26 C. L. J. 187; 21 C. W. N. 1076.

of this case are such as to convince me that the evidence which the defendants desired to put before the Court in no way comes within the ruling which we laid down in that case. As regards the class of new evidence, the rule is that the new evidence must be such that if adduced it would be practically conclusive,—that is, evidence of such a class as to render it probable almost beyond doubt that the decision or judgment would be different. What are the facts in this case? We find that the defendant firm in the application which they made to the Court could not say more than that if the evidence had been given at the hearing it might "possibly" have altered the judgment —an allegation which is not sufficient to support the application. Then again, as to what took place at the trial when there was some discussion about the calling of the individual in question, I find a statement in the affidavit of Ramlal, a member of the plaintiff's firm, which is not denied by the affidavit put in in reply thereto to this effect: "When the case came up for hearing on the 4th June last, not only no application for adjournment of the case on behalf of the defendant firm on account of its inability to arrest the said Baldeo Das was made, but on the contrary the learned Counsel appearing for the defendant firm went on to the trial of this suit and expressly stated to the Court that Baldeo could not be produced, and even if he could be produced, no reliance could be placed upon his evidence, he having given his statement to both sides." That is the man, with respect to whose evidence this application was made, in order that a further hearing of this case should take place to see whether his evidence would bring about a different decision. In my judgment it cannot be said that Baldeo Dass's evidence, which was described by the defendant's learned Counsel as being evidence upon which no reliance should be placed, is evidence which would be practically conclusive or which would render it probable almost beyond doubt that the decision would be different.

For these reasons on the merits, in my judgment, this appeal should be allowed, and the order for review which was made by my learned brother Mr. Justice Greaves should be set aside, and that the defendant firm should pay the costs of this appeal and of the application in the Court below.

MOOKERJEE, J.—I agree that the order made by Mr. Justice Greaves on the application for review cannot be supported. The suit was instituted on the 19th August 1918 for a declaration that a contract between the parties was void, inoperative, unenforceable and of no effect, and for an injunction to restrain the arbitration proceedings pending before the Bengal Chamber of Commerce. The suit was decreed on the 14th June 1919. On the 19th June the defendant made an application for review of the decree, on the ground that the evidence of one Baldeo Sahai which was very relevant and most material could not be produced by him at the trial after the exercise of due diligence. A Rule was granted on the same day. The Rule was made absolute on the 7th July 1919. An order was subsequently drawn up in the following terms: "It is ordered that this suit be placed on the peremptory list of suits for hearing after a fortnight from the date hereof for retrial on hearing the evidence of Baldeo Sahay in the pleading in this suit mentioned as a witness on behalf of the defendant firm." It cannot be disputed that the effect of this order was to set aside the decree made on the 4th June 1919. The plaintiffs have now appealed against the order made on the application for review.

The appeal is sought to be supported on the ground that the application for review was granted in contravention of the provisions of rule 4 of Order XLVII of the Code. Rule (1) of that Order provides that "Any person considering himself aggrieved, by a decree or order from which an appeal is allowed, but from which no appeal has been preferred...and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.....desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order." It is clear that the litigant who invokes the jurisdiction of the Court to

grant a review must allege the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made. When an application has been made on this ground, it may be granted under rule 4, sub-rule (2), if the Court is of opinion that the application for review should be granted. There is, however, an important proviso in these terms:— "No such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation." It will be observed that whereas the expression used in rules 1 and 2 is "new and important matter or evidence," the expression in clause (*b*) of the proviso to rule 4 is "discovery of new matter or evidence." In my opinion, the effect of this expression is the same as if the words used had been "new and important matter or evidence." The jurisdiction of the Court to grant a review depends upon the circumstances mentioned in rule 1; and it cannot be urged that rule 4 is intended to prescribe a different test. Rule 7 next provides that an order granting an application for review may be objected to on the ground that the application was in contravention of the provisions of rule 4. Consequently when, as in the case before us, an application for review has been granted, it is open to the appellant to impeach the propriety of the order on the ground of contravention of the provisions of clause (*b*) of the proviso to rule 4. The appellant here argues that the application has been granted on the ground of discovery of new matter or evidence, which, the applicant urged, was not within his knowledge or could not be adduced by him, when the decree or order was passed or made, without strict proof of such allegation. In my opinion, it is plain that this objection is well-founded. Before a Court can exercise the jurisdiction vested in it to grant an application for review on the ground of discovery of new and important matter or evidence, it is incumbent on the Court to be satisfied with the allegation of the applicant that the evidence in question constituted new and important evidence within the meaning of rule 1. There is no adjudication by the learned Judge in this case that he was so satisfied. The Court must further have strict proof of the allegation that the evidence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made. The learned Judge in the case before us has not stated that there was in his opinion strict proof of the allegation. The expression "strict proof" was considered by this Court in the case of *Ahed Khondkar* v. *Mohendra Lal De* (1) and the substance of the decision of Sir Lawrence Jenkins was that strict proof means proof according to the formalities of the law. But proof according to the formalities of the law does not imply merely an allegation in accordance with the formalities of the law that the facts contemplated by rule 1 exist. The Court must be convinced that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. If any other view were taken, the result would follow that a party would be entitled to an order for review in his favour upon the mere allegation that the evidence which he seeks to produce was not within his knowledge or could not be produced by him at the time when the decree was passed. In my opinion, it is the duty of the Court to come to the conclusion, before it grants the application, that the evidence in question is new and important and that it was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made. If a Court without such adjudication grants an application for review, the order is, in my opinion, contrary to the provisions of rule 4 and cannot be supported. In the present case, the order made by Mr. Justice Greaves is open to that objection and must consequently be set aside.

The question next arises as to whether this Court should consider the materials on the record and come to a decision or whether the matter should be remitted to

the learned Judge. There can be no doubt that it is competent to this Court to deal with the matter finally and it is in the best interest of the parties that we should so dispose of the matter. Now when the materials on the record are considered, it becomes plain that the application for review should never have been granted. As regards the point whether the evidence was important evidence within the meaning of rule 1, it is clear that the answer must be against the applicant. The word 'important' serves the purpose explained in the leading decisions on the subject mentioned in the judgment of this Court in the case of *Nundo Lal Mullick* v. *Punchanon Mukherjee* (2). In that case reference was made by the learned Chief Justice to the decisions in *Young* v. *Kershaw* (3) and *Brown* v. *Dean* (4). In the first of these cases Smith, L. J., observed that the new evidence must be such as would have been conclusive of the case if it had been adduced at the trial. Collins, L. J., similarly observed that the party asking for the new trial must show that there was no remissness on his part in adducing all possible evidence at the trial; and as to the class of new evidence the rule is that the new evidence must be such that if adduced it would be practically conclusive, that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different. In the second case, *Brown* v. *Dean* (4), Lord Loreburn observed that the new evidence must at least be such as is presumably to be believed and if believed would be conclusive. I am not unmindful that in this latter case Lord Shaw sounded a modified note. He observed that it was possible to figure cases in which evidence might not be conclusive but might be so gravely material and so clearly relevant as to entitle the Court to say that that material and relevant fact should have been before the Jury in giving its decision. But, whether we adopt the language used by Collins, L J., or by Lord Shaw, it is clear that the applicant in the case before us must fail. The evidence which he seeks to produce now is not *important* evidence in any sense of the term. It is undoubtedly not *conclusive* evidence, as on the materials on the record it is plain that the person had made contradictory statements before the trial and that at the trial his Counsel declared that he could place no reliance on him by reason of such circumstance. It is impossible for us to hold that evidence of this description would be such evidence as would justify the grant of an application for review.

I desire to emphasise what was said in the case of *Nundo Lal Mullick* v. *Punchanon Mukherjee* (2) that applications for review on the ground of discovery of new and important matter or evidence should be considered with great caution. In the case before us there can be no doubt that the application has been granted very lightly. No doubt rule 4 of Order XLVII states that where the Court is of opinion that an application for review should be granted it shall grant the same. But the opinion of the Court must be opinion according to law, and the principles laid down in the case mentioned are rules which must be borne in mind before applications of this character are granted. I have no doubt at all that we should as a Court of Appeal set aside the order of the learned Judge in order to secure for the plaintiff the fruits of the lawful judgment which he obtained at the first trial.

FLETCHER, J.—I am of the same opinion and I have very little to add. The first question in this case is, does an appeal lie from the order made by Mr. Justice Greaves. It seems to me clear that it does. Order XLVII, rule 7, Code of Civil Procedure, gives a right of appeal in case a review is granted in contravention of the provisions of rule 4. Did the learned Judge in this case grant the order for review in contravention of the provisions of Order XLVII, rule 4? It seems to me quite clear that he contravened all the provisions of Order XLVII, rule 4 (2). The application ought to have been rejected *in limine*, as it did not contain the proper allegations provided for by the terms of the order; and, also I think that the learned Judge, even if the application contained the proper allegations, was bound, before he could proceed to make an order granting the review, to find that there

(3) (1899) 81 L. T. 531; 16 T. L. R. 52.
(4) (1910) A. C. 373; 79 L. J. K. B. 69?; 102 L. T. 661; 54 S. J. 442.

allegations were strictly proved; that means "proved" within the meaning of the Indian Evidence Act. "Proved" is defined in section 3 of the Act as follows: "A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." The learned Judge in this case has altogether failed to consider whether the allegations were proved, and the only remark that he has made is that he thinks that he will hear the evidence of this additional witness. It is quite clear that that does not satisfy the provisions contained in Order XLVII as to granting a review on the grounds set up in this case. In that veiw it is quite clear that an appeal lay from the judgment of the learned Judge. If an appeal lay, I agree with the remarks of the learned Chief Justice that no case has been established on which the Court ought to grant a review on the discovery of new and important matter or evidence mentioned in Order XLVII. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 142-B OF 1919.

April 13, 1920.

Present:—Mr. Macnair, A. J. C.

CHHOGALAL MEGHRAJ—PLAINTIFF—APPELLANT

versus

KANHAYALAL TARACHAND—DEFENDANT—RESPONDENT.

Minor—Contract by guardian, when binding on minor's estate—Creditor, rights of—Subrogation.

Where a contract is entered into by a guardian on behalf of a minor in a case in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor is subject, a decree might be passed against the estate of the minor. [p. 741, col. 1.]

Where a guardian borrows money for the necessities of a minor in such circumstances as to give him a right to be reimbursed from the minor's estate, his creditor may in a proper case be subrogated to the guardian's rights. [p. 741, col. 2.]

Appeal against the decree of the District Judge, Amraoti, in Civil Appeal No. 146 of 1918, decided on the 27th of January 1919, arising out of Civil Suit No. 25 of 1918, decided by the Munsif, Chandur, on the 29th of June 1918.

Mr. *M. V. Joshi*, for the Appellant.

Mr. *M. Gupta*, for the Respondent.

JUDGMENT.—The plaintiff sued to recover money advanced for the marriage of the defendant during his minority together with a small sum advanced for the purchase of seed for cultivation. At an early stage the plaintiff gave up his claim for a personal decree but pressed for a decree against the estate of the minor. The Judge of first instance held that Rs. 216-12-3 was borrowed for legal necessity, namely, the marriage of the minor. He held, however, (1) that the plaintiff had not sued for reimbursement in accordance with the provisions of section 68 of the Contract Act, (2) that that section applied only when the minor was supplied with necessaries for the purpose of his maintenance, (3) that the suit was based on a contract with the guardian, and the guardian could not bind his ward's estate except by a document purporting to bind it. He, therefore, dismissed the suit.

The lower Appellate Court appears to have held that if it was necessary for the minor to marry, sums requisite for the marriage and expended on the marriage might be recovered under the provisions of section 68 of the Contract Act. The learned Judge, however, held that as the plaintiff had not taken his stand on section 68 of the Contract Act and had not proved that it was necessary for the defendant to marry during his minority or that the sums actually expended were not excessive, he could not be allowed to set up a new case. He agreed with the lower Court that a guardian could not bind his ward's estate except by a document purporting to bind it.

In second appeal it is urged that although a guardian cannot bind his ward's estate except by a document purporting to bind it, it is still the case that a contract executed by a guardian does in certain cases assist

the obligor in obtaining a decree against the estate of the minor. Thus, in the case of *Jhitibai* v. *Tejmal* (1), Stanyon, A. J. C., points out one exception:—

"We may take it as sound law that where a Hindu family maintains itself by trade, and a minor becomes by inheritance the sole owner of such business, if the trade is thereafter carried on by the guardian, the assets of such business will be liable for debts contracted by the guardian necessarily incidental to or flowing out of the carrying on of the trade along its normal course."

Again in the case of *Batchu Ramajogayya* v. *Vajjula Jagannadham* (2) though Wallis, C. J., was of opinion that in the case of a Hindu, money advanced for the expenses of a marriage which the minor has to perform may be recoverable under section 68 of the Contract Act from his estate, the other Judges held that a decree might be passed against the estate of a minor on a contract entered into on his behalf by a guardian, in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he was subject. In *Subramania Ayyar* v. *Arumuga Chetty* (3), a case cited apparently with approval in *Tukaram Manaji Dhargar* v. *Ramchandra Hari Peshkar* (4), it was held that though the suit was brought against the minor on a promissory note executed by the guardian, still in the circumstances the defendant was liable to the extent of his share in the ancestral estate.

It seems clear then that a suit based mainly but not solely on a simple contract executed by a guardian may succeed in certain cases. To hold otherwise would lead to extreme inconvenience, as a guardian might not be able to obtain a small advance even if such an advance was necessary for the welfare of the minor or the protection of his estate, unless the guardian executed a document purporting to bind the minor's estate.

I agree with the opinions of the learned Judges who decided *Batchu Ramajogayya* v. *Vajjula Jagannadham* (2). Wallis, C. J., remarks:—

"Where a guardian himself borrows money for the necessities of the minor in such circumstances as to give him a right to reimbursement from the minor's estate, his creditor may in a proper case be subrogated to his rights."

Seshagiri Ayyar, J., considers that a charge is created on the estate in a case in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. The plaint in the case I am considering may not be artistically framed, but the pleadings show that the plaintiff really urged that money was borrowed by the guardian and expended by the guardian in such circumstances as to give the guardian a right of reimbursement. The finding of the lower Court is that certain sums were expended on the marriage of the minor and that this expenditure was necessary: the guardian could claim reimbursement for such expenditure.

I, therefore, set aside the decree of the lower Appellate Court and direct that the appeal be re-heard. The Court will consider any argument advanced to the effect that the marriage was not necessary or that the expenditure on the marriage was excessive: and will also consider whether the guardian expended any other sums from the advance and whether such expenditure was legally necessary. I remark that the defence in this suit does not appear to be frank. The defendant does not deny that he was married and has in this way received benefit. It was for him to urge that the marriage might, without prejudice to him, have been delayed till he attained majority or that the marriage was celebrated in an extravagant manner. At the time of the alleged advance he was also 16 years old, and his assertion of complete ignorance regarding the advances appears improbable. If the lower Appellate Court then decides that the pleadings are imperfect, the plaintiff's suit should not be dismissed on that ground, but steps should be taken to obtain full pleadings. Costs up to date will be costs in the suit.

Appeal allowed;

Case remanded.

(1) 41 Ind. Cas 35; 13 N. L. R. 109.

(2) 49 Ind. Cas. 872; 42 M. 185; 25 M. L. T. 23; 9 L. W. 209; 36 M. L. J. 29; (1919) M. W. N. 148 (F. B.).

(3) 26 M. 350.

(4) 2 N. L. R. 25.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1176 OF 1916.

June 1, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

TANI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RIKHI RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mitakshara—Father's sister's sons, whether heirs—Presumption of continuance of life—Burden of proving death—Evidence Act (I of 1872), s. 108.

In places where the Mitakshara system of Hindu Law prevails, the father's sister's sons of the last male owner are heirs [p. 743, col. 1.]

The presumption is in favour of the continuance of life and the onus of proving the death of a person lies on the party who asserts it. [p. 743, col. 2.]

Plaintiffs sued for possession of certain land of which their maternal uncle's son *S.* was the last male owner. Upon the death of *S.* the land was held by his mother *A.*, on whose death the village proprietors took possession. *A.* was said to have died in May 1902 and the present suit was instituted on the 5th May 1914:

Held, (1) that according to Hindu Law the plaintiffs were entitled to succeed to their maternal uncle's son as *bandhus*; [p. 743, col. 1.]

(2) that there was no presumption that *A.* died before the 5th May 1902; [p. 743, col. 1.]

(3) that the onus of proving that *A* died before the 5th May 1902 lay upon the defendants; [p. 743, col. 2.]

(4) that in the absence of any proof of the exact date of death the suit was within time. [p. 743, col. 2.]

Second appeal from the decree of the District Judge, Ambala, dated the 7th March 1916, reversing that of the Munsif, 1st Class, Ambala, dated the 20th November 1915, dismissing the plaintiff's claim with costs.

Lala *Durga Das*, for the Appellants.

Mr. *Devi Dial*, for the Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiffs-respondents claimed possession of certain land of which their maternal uncle's son Sardha was the last male owner. Upon Sardha's death the land was held by his mother *Musammat* Atri, (see pedigree table on page 7 of the paper-book) and on her death in May 1902 the village proprietors, represented by defendants-respondents, took possession thereof. The parties are Brahmans of Tahsil Kharar, District Ambala and the lower Appellate Court held that they were governed by Hindu Law, under which the plaintiffs as Bandhus of the last male owner were heirs in preference to the village proprietors. The trial Court held that the plaintiffs had not proved any special custom in their favour and that they were not heirs according to Hindu Law and accordingly dismissed their suit. The questions of limitation and *res judicata* were also raised by the defendants and decided adversely against them by both the lower Courts. The point of *res judicata* is not now raised but that of limitation is, and we shall deal with it later.

The first point urged by Lala Durga Das on behalf of the appellants is that there should be a remand for further enquiry as to whether the parties are governed by the Hindu Law or by custom. He urges that though Brahmans, they are agriculturists living in a village, and the initial presumption is that they follow the general custom applicable to agriculturists. No certificate for second appeal has been granted by the lower Appellate Court, and in the absence of such a certificate we do not think it is open to the appellants to urge that they are governed by custom. They are high caste Hindus living in Ambala, and we do not think there is any initial presumption that they are governed by agricultural custom. No special custom has been proved, and the lower Appellate Court was, therefore, correct in applying the Hindu Law. What Lala Durga Das wants us to do is to remand the case in order that his clients may have further opportunity of proving the existence of a custom governing the parties. In the absence of a certificate we hold that the question of custom cannot now be raised.

The next point raised by Lala Durga Das is that the plaintiffs, who are the father's sister's sons of the last male owner, are not heirs according to Hindu Law. There is, however, ample authority for holding that in places where the Mitakshara system of Hindu Law prevails the father's sister's sons are heirs. It is only necessary to refer in this connection to Mayne's Hindu Law, 8th Edition, Chapter XVI, where at page 704 is given a table which shows the Bandhus *ex parte paterna*. Amongst these is the father's sister's son, who is specially mentioned both in the Dayabhaga and the

Mitakshara. See also Hindu Law by Trevelyan, 2nd Edition, page 402, where the father's father's daughter's son, *i.e.*, father's sister's son, is shown as an heir. In the case reported as *Tahaldai Kumri* v. *Gaya Prasad Sahu* (1) it was held that in the Bengal Presidency under the interpretation of the Mitakshara Law a step-mother is not entitled to succeed to the estate of her step-son in preference to the father's sister's son. We accordingly agree with the lower Appellate Court that plaintiffs are heirs and, therefore, entitled to the land in preference to the defendants, proprietors in the village. It is not contended before us that the defendants are entitled to keep the land in accordance with the doctrine of reversion because, as is alleged, the land was gifted to Mina, the ancestor of Sardha, the last male owner, by the village proprietors.

There remains the question of limitation which only affects Rikhi Ram plaintiff, Arja Nand, his brother, being still a minor. After the death of Sardha the land was held by *Musammat* Atri, his mother, who had the usual woman's life estate, and the plaintiffs had 12 years from the date of her death within which to bring the present suit. The suit was instituted on the 5th May 1914 and *Musammat* Atri is said to have died in the month of May 1902. There is nothing to show on what date in May 1902 she died. If she died at any time after the 4th of May, the suit is obviously within time. The only evidence that she died in May 1902 is a report of the Patwari to that effect in the mutation proceedings dated the 11th September 1902. Both parties rely upon this; the trial Court held that there was no presumption that she died before the 5th May 1902, and after carefully considering the point we are in agreement with this view. In the Law of Evidence by Ameer Ali and Woodroffe, 5th Edition, at page 682, in the commentary on section 108, the learned authors say: "These sections and the following section deal with certain instances of the presumption which exists in favour of continuance of immutability. It is on the principle of this presumption that a person shown to have been once living is, in the absence of proof that he has not been heard of within the last 7 years, presumed to be still alive. * * * * * * *

The presumption is in favour of the continuance of life and the onus of proving the death lies on the party who asserts it." In accordance with this principle we are of opinion that the onus of proving that *Musammat* Atri died before the 5th of May 1902 lies upon the defendants who assert it. There is no proof of the exact date of death and we, therefore, hold that the suit is within time.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 5 Ind. Cas. 135; 37 C. 214; 14 C. W. N. 443; 11 C. L. J. 538.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 707 OF 1918.

April 28, 1920.

Present:—Mr. Justice Das.

TOKHAN PANDEY—APPELLANT

versus

SIVAKANTA PROSAD SINGH—RESPONDENT.

Mortgage, usufructuary—Mortgagee to pay rent—Failure to pay—Redemption—Mortgagor, whether entitled to deduction of rent agreed to be paid.

A usufructuary mortgage provided that the mortgagee should pay the annual rent to the landlord, but he failed to do so and the debt became time-barred The mortgagor in suing for redemption claimed to be entitled to deduct from the principal mortgage money the sum which under the mortgage should have been paid by the mortgagee:

Held, that the mortgagor was not entitled to the deduction he claimed and that the mortgagee was entitled to the benefit of the non-payment. [p. 744, col. 1.]

Appeal from a decision of the District Judge, Saran.

Messrs. *Parmeswar Dayal* and *Jadubans Sahai*, for the Appellant.

JUDGMENT.—This appeal arises out of a suit instituted by the respondent for recovery of possession of certain lands or in the alternative for redemption. It appears that defendants Nos. 1 and 6, who are the tenants, gave the lands in dispute in usufructuary mortgage to defendant No. 7 with a condition that defendant No. 7 should

pay Rs. 6·8 as rent to the landlord. The interest of defendant No. 7 is now vested in defendant No. 8. The plaintiffs themselves are the landlords and purchased portions of the lands which were mortgaged to defendant No. 7. His suit for possession is on the ground that the usufructuary mortgage was a collusive document not binding on him and in the alternative for redemption. The question whether the document was a collusive one or not has not been considered in the Court below, possibly for the reason that the Court of first instance had found that the document was a genuine one. Therefore, we cannot be embarrassed by that question at all in this appeal.

Now the only question is whether the plaintiffs are entitled to redemption. Clearly they are entitled to redemption on payment to the mortgagee of what is now due by the mortgagors. The question, however, arises whether the plaintiffs are entitled to deduct Rs. 6-8-0 per year which under the terms of the document the defendant No. 7 should have paid to the plaintiffs. The case of defendant No. 8 was that the sum was all along paid to the landlord. The landlord, however, denied that. The Court below has found that it has not been paid and has directed that this sum should be deducted in the accounts which have to be taken of the sum due by the mortgagor to the mortgagee. It seems to me that the case of *Fakir Muhammad Khan* v. *Ali Sher Khan* (1) is directly in point. In that case precisely the same question was raised and it was held that the mortgagee was entitled to the benefit of such non-payment of rent to the Zemindar and that the mortgagor was not entitled to redeem the mortgage on payment of the principal sum after deducting the rent not so paid. It rests on the principle that that is a separate matter altogether in respect of which the landlord had a right of action against the mortgagee in possession or if the landlord had brought rent suits against the original tenants, the tenants could have recovered the sums from the mortgagee in possession, but there cannot be an equitable set-off in a suit of this nature. I would accordingly set aside the judgment and decree of the Court below and allow the appeal and direct that the plaintiffs will be entitled to redeem the properties on payment of the sum of Rs. 439 to defendant No. 8. The plaintiffs will have three months to redeem.

Appeal allowed.

(1) 10 Ind. Cas. 113.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST APPEAL No. 932 OF 1919.

July 21, 1919.

Present:—Mr. Justice Martineau.

GUJAR SHAH—CREDITOR—APPELLANT

versus

BARKAT ALI SHAH—INSOLVENT—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 43, 46—Application by creditor asking action should be taken against insolvent under s. 43, dismissal of—Appeal, whether lies—Revision, whether competent.

No appeal lies against an order of a District Judge refusing to take action against an insolvent under section 43 of the Provincial Insolvency Act, nor is such an order open to revision [p. 745, col. 1.]

Miscellaneous first appeal from the order of the District Judge, Gurdaspur, dated the 7th January 1919.

Mr. *Mehr Chand Mahajan*, for the Appellant.

Mr. *Fakir Chand*, for the Respondent.

JUDGMENT.—This is an appeal by a creditor from an order of the District Judge of Gurdaspur dismissing an application for action to be taken against an insolvent under section 43 of Act III of 1907. Mr. Fakir Chand for the respondent takes the preliminary objection that a creditor has no right of appeal under section 46, not being an aggrieved person, and he relies on *Iyappa Nainar* v. *Manikka Asari* (1) and *Ladu Ram* v. *Mahabir Prasad* (2) which support his contention

Mr. Mehr Chand, for the appellant contests the correctness of those decisions

(1) 27 Ind Cas 241; 40 M. 630.
(2) 37 Ind. Cas. 996; 39 A. 171; 15 A. L. J. 31.

and he has referred to the following passage on page 35 of Baldwin's Law of Bankruptcy and Bills of Sale, where a definition is given of the expression "person aggrieved" contained in section 108 of the English Act. The expression "person aggrieved" means a person who has suffered a legal grievance by a decision which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something ..... "So a person who makes an application to a Court for a decision or any person who is brought before a Court to submit to a decision is, if the decision is against him, a person aggrieved by that decision."

It is contended on the strength of this definition that as the appellant's application was dismissed he is a person aggrieved and can appeal. Mr Mehr Chand has also cited *Burden, In re*; *Wood, Ex parte*, (3) in which a creditor appealed in circumstances similar to the present, and his appeal was heard on the merits. The question, however, whether he had a right of appeal was not considered in that case.

With regard to the definition given in Baldwin's Law of Bankruptcy and Bills of Sale, it appears to me that the second part of the passage quoted above must be read in connection with the first part, and that the appellant could be regarded as a person aggrieved by the dismissal of his application only if the application was one which the Insolvency Act entitled him to make. Now the Act does not provide for any application being made at all, either by a creditor or by anyone else, for action to be taken against the debtor under section 43; sub section (2) of that section merely says that if a debtor does certain acts, the Court may pass a certain sentence on him. Although it is usually on the application of a creditor that a Court takes action under section 43, the Court is in no way bound to entertain such an application, which is not one recognized by the Act, and consequently if the Court declines to entertain it, the creditor cannot be said to be a "person aggrieved." For this reason, rather than for the reason given in *Iyappa Nainar* v. *Manikka Asari* (1) the decision in which appears to me to be based on a wrong analogy, I hold that the creditor has no right of appeal.

Further, in my opinion, the order appealed against is not really an order under section 43 (2) of Act III of 1907 at all, and for that reason also is not appealable. The only order contemplated in section 43 (2) is an order sentencing the debtor.

The section contains no provision whatever for the passing of an order dismissing an application against the debtor (the making of such an application being itself not provided for) or even of an order exonerating the debtor in respect of the offences mentioned, and any such order, however proper it may be, is not an order passed "under" section 43 or any other section of the Act. This conclusion may seem anomalous, but I think it is unavoidable.

Mr. Mehr Chand asks that if the appeal does not lie it may be treated as an application for revision, but it is clear that an application for revision also is not maintainable, for, as the District Judge was not bound to entertain the application made to him by the creditor, he committed no illegality or irregularity in dismissing it.

I dismiss the appeal with costs.

Appeal dismissed.

(3) (1888) 21 Q. B. D. 24; 57 L. J. Q. B. 570; 59 L. T. 149; 36 W. R. 896; 5 Morrell 166.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 143 OF 1919.

January 27, 1920.

Present: —Mr. Lindsay, J. C.

PUDAI RAM—PLAINTIFF—APPELLANT

versus

BAIJNATH LAL AND OTHERS—DEFENDANTS —RESPONDENTS.

Hindu Law—Joint family—Ancestral property, nature of—Property inherited from collaterals, whether ancestral—Alienation—Father, power of, to alienate family property—Antecedent debt, meaning of.

Under the Hindu Law property acquired by inheritance from a collateral relation is not ancestral property. [p. 747, col. 1.]

PUDAI RAM v. BAIJNATH LAL.

Joint family property may be sold or charged by the father in order to discharge an antecedent debt, that is to say, a debt incurred not only prior to the date of the sale or charge but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be afforded by it. Where joint family property is thus sold or mortgaged, no question arises as to whether the antecedent debt was incurred for legal necessity or for other purposes binding upon the sons or as to whether the transaction entered into by the father is enforceable against the sons during his lifetime. [p. 747, col. 2.]

Appeal from the decree of the District Judge, Fyzabad, dated the 24th February 1919, confirming that of the Subordinate Judge, Sultanpur, dated the 25th February 1918.

Mr. *A. P. Sen*, for the Appellant.

Mr. *Niamatullah*, for Respondents Nos. 12 and 13.

Mr. *S. N. Roy*, for Respondents Nos. 15 to 17.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiff-appellant Pudai Ram to recover a sum of Rs. 2,023 alleged to be due on a mortgage executed by the first defendant Baijnath Lal on the 26th May 1910. The principal money secured by the mortgage was a sum of Rs. 450. This principal money, according to the recitals in the bond, was applied in the discharge of four bonds previously executed by Baijnath Lal; three of them were unregistered and one registered. The balance of Rs. 10-8-0 is alleged to have been the costs incurred in executing and registering the deed. The defendants Nos. 2 to 18 were impleaded as subsequent transferees from the mortgagor and the defendants Nos. 19 to 21 are the sons of the mortgagor. The property mortgaged is said to consist of two Zamindari shares, one in Allahdadpur and the other in Sudapur.

The principal contesting defendants were the sons of the mortgagor. They pleaded that there was no legal necessity for the mortgage, that the property in suit was ancestral property, that the property in Sudapur was in any case only an interest created by a lease for cultivation and was not, therefore, capable of transfer and lastly that the rate of interest was unconscionable and penal.

On the question as to whether the property was ancestral or not, the first Court did not come to any definite finding as regards the item of property situated in Sudapur. All that the Subordinate Judge said regarding this property was that it was only a cultivatory holding and, therefore, incapable of transfer. As regards the item in Allahdadpur he held that the property was ancestral. Regarding the question of legal necessity he was of opinion that the four bonds referred to in the mortgage deed had been executed by Baijnath Lal. As regards two of them, however, he found that Baijnath Lal was not the only executant. In one case there was joined with him as co executant a man named Dukhobhor, in the other the co-executant was Nepal Singh. The Subordinate Judge found that there was nothing to show how much each co-executant borrowed. The plaintiff's story was that Dukhobhor and Nepal Singh were merely sureties for Baijnath Lal, but the Subordinate Judge has held that this fact was not proved. In this view he exempted the sons from liability in respect of these two bonds, holding further that there was no evidence of legal necessity. With regard to the other two bonds he found that although they represented antecedent debts, still there was no proof that the sums had been borrowed for purposes of legal necessity. With regard to the item of Rs. 10 8-0 he pointed out that this sum was declared by the deed to be payable before the Sub Registrar. No mention of payment having been made before the Sub Registrar was to be found in the registration endorsement, although there was an admission in the endorsement that this money had been received. In any case the Subordinate Judge held that this did not constitute an antecedent debt. It appears that the Subordinate Judge was pressed with the argument that if the debts were proved to be antecedent debts, there was no need to prove legal necessity. He disposed of this argument by saying that the Privy Council had rejected this view in a case recently decided, namely, the case of *Sahu Ram Chandra* v. *Bhup Singh* (1). The result was that he refused to give any decree on the mortgage. He gave a simple money decree against the first defend-

(1) 39 Ind. Cas. 280; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 218; 39 A. 437 (P. C.).

ant Baijnath Lal. He overruled the defence regarding the high rate of interest and decreed interest at the contract rate.

The case then came in appeal before the learned District Judge. The first question which was argued before him was whether or not the property in Sudapur was ancestral. It seems that this property had been acquired under a lease (Exhibit S1) granted in favour of Ram Adhin, the uncle of Baijnath Lal. Accordingly to the view of the learned Judge this property, whether acquired by Ram Adhin for himself alone or whether acquired by him as a member and for the benefit of the joint family, was at the date of the mortgage by Baijnath Lal ancestral property in his hands. This is in my opinion an erroneous view. If it is found that the property descended to Baijnath Lal from his uncle Ram Adhin by inheritance, then it certainly is not ancestral property in the hands of Baijnath Lal. No property acquired by inheritance from a collateral relation can be ancestral property under the Hindu Law. As regards Allahdadpur he found that this property was ancestral, and in view of the evidence I think there can be no doubt that this finding is correct.

The next question argued before the learned Judge was whether the mortgage in suit was binding upon the sons of Baijnath Lal. The only ground upon which it was argued before the Judge that the mortgage was binding was that it had been executed to pay off antecedent debts contracted by Baijnath Lal. The Judge goes on to say that it had not been proved that any of these antecedent debts had been contracted for legal necessity or for any other purpose binding on the sons of the first respondent. Consequently as Baijnath Lal was still alive, his sons were not bound by the mortgage effected by him. The learned Judge says that he relies for this view upon the Privy Council ruling to which I have just referred.

In my opinion both the Subordinate Judge and the learned District Judge have misapplied the law laid down by their Lordships of the Privy Council. It is not correct to say that that judgment lays down that where the case for the plaintiff is founded upon a transaction entered into for the purpose of discharging antecedent debts, it must be shown that the antecedent debts were contracted for legal necessity or for other purposes binding upon the sons. This matter is clearly dealt with at page 134 of the report of 44 I A. [*Sahu Ram Chandra* v. *Bhup Singh* (1)]. After referring to the statement of the law by Lord Hobhouse in *Musammat Nanomi Babuasin* v. *Modhun Mohun* (2) their Lordships say as follows:—

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate."

It is clear from this statement of the law that their Lordships recognise an established exception to the rule that family property cannot be dealt with by one co-parcener without the consent of the other co-parcener. It clearly shows that joint family property may be sold or charged by the father in order to discharge an antecedent debt, that is to say, a debt incurred not only prior to the date of the sale or charge but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be afforded by it. In the present case the plaintiff shows that the mortgage in suit was executed for the purpose of discharging debts incurred under four bonds executed a long time prior to the date of the mortgage. There can be no question, therefore, that they are antecedent debts in the sense that they were in point of time anterior to the date of the mortgage; and further, as the debts were incurred by the execution of the bonds, it is equally clear that they were not incurred on the security of any joint family property. There can be no question, therefore, of the plaintiff's right to enforce this mortgage against the sons in the lifetime of their father to the extent to which it is shown that these bonds represent liabilities actually

(2) 13 I. A. 1; 4 Sar. P. C. J. 682; 13 C. 21; 10 Ind. Jur. 151; 6 Ind. Dec. (N. S.) 510.

incurred by the father. The case must be returned to the District Judge for findings on the following issues:—

(1) Is the Sadapur property ancestral property or not ?

(2) Further, is this property transferable or not ?

(3) To what extent do the bonds referred to in the deed of mortgage represent liabilities incurred by the first defendant Baijnath Lal himself ?

Findings on these issues will be returned to this Court within six weeks from the date of the receipt of this order of remand, and ten days to run from the date of the lower Court's finding will be allowed to the parties to file objections.

Issues remitted.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1717, 3201, 3203 TO 3206 OF 1915.

January 6, 1920.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

MADHABI SUNDARI DASYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SYAMA CHARAN BISWAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant – Additional rent for additional area, suit for—Standard of measurement—Presumption.

Where in a suit for additional rent for additional area the standard of measurement set up on behalf of the plaintiff is inconsistent with the *kabuliyat* upon which the suit is based, it cannot be presumed that the present standard of measurement was the standard in use at the time when the lands comprised within the tenancy were originally measured.

Appeal against the decision of the Special Judge, Faridpur, dated the 1st June 1915, reversing that of the Assistant Settlement Officer, Baliakandi, dated the 10th November 1914.

Dr. *Dwarka Nath Mitter* and Babu *Monindra Nath Mitter* for Babu *Baikant Nath Mitter*, for the Appellants.

Babus *Biraj Mohan Majumdar* and *Bepin Beĥari Mallick*, for the Respondents.

JUDGMENT.—The question involved in these cases is whether the landlord is entitled to additional rent for additional area.

The plaintiff proved that there was measurement in 1276 and adduced evidence to show what the standard of measurement was in that year. The learned Special Judge, however, has disbelieved that evidence.

It is contended before us that the present standard of measurement ought to have been presumed to be the standard in use in 1276, and reliance is placed upon the judgment of Mookerjee, J., in the case of *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (1).

It is unnecessary to consider the effect of the passage in the judgment of Mookerjee, J., at page 132 in that case, because in the present case the learned Special Judge finds that the standard of measurement set up on behalf of the plaintiff would be inconsistent with the *kabuliyat* upon which the suit is based; and he points out several circumstances showing that the standard of measurement set up could not be correct.

We are, therefore, unable to hold that the learned Special Judge has committed an error of law in holding that the plaintiff has failed to prove that the defendants were holding any land in excess of the area for which they were paying rent.

It may be mentioned that no case of encroachment beyond the boundaries mentioned in the lease was made in the plaint nor found by the Court below.

In the circumstances, the appeals must fail and are dismissed with costs.

Appeals dismissed.

(1) 2 C. L. J. 125 at p 132.

JHIBLIA *v.* DAWLATYA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 603 OF 1917.

January 2, 1920.

Present:—Sir Henry Drake-Brockman, KT., J. C.

JHIBLIA—PLAINTIFF—APPELLANT

versus

DAWLATYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Kotwar—*Village service tenant*—Kotwar *losing office, but continuing in possession of portion of village service holding—Settlement, new, effect of, on arrangement—C. P. Tenancy Act (XI of* 1898), *s.* 56 (2), *applicability of.*

J. and *N.* were Kotwars in a village and each held one of two fields which constituted the village service holding. It was subsequently decided that one Kotwar would suffice, and the question was which of the two should be dismissed; this was decided by the parties drawing lots, it being understood that the loser would continue for his lifetime in possession of the field he was cultivating. *J.* lost and was thus deprived of the office of Kotwar, but he continued in possession of the field he was cultivating, and the *wajib-ul-arz* was corrected accordingly. In the new settlement some years later the village service holding was recorded in the sole name of *N.*'s son *D.*, who consequently ejected *J. J.* brought the present suit for re-instatement in possession and correction of the *wajib-ul-arz.* The suit was resisted on the ground that the arrangement by which *J.* was displaced as Kotwar but was allowed to continue in possession did not bind the successors-in-office of *N.* and that under section 56 (2) of the C. P. Tenancy Act, *J.*'s sub-lease exceeding one year at a time was void:

Held, that section 56 (2) of the C. P. Tenancy Act did not apply; that as the sub-tenancy created in favour of *J.* was part of the arrangement whereby *N.* became the village service tenant, it would be inequitable to permit the ejectment of *J.* merely because a new settlement had been made or because *N.* had ceased to be Kotwar. [p. 751, col. 1.]

Appeal against the decree of the District Judge, Nagpur, in Civil Appeal No. 95 of 1917, decided on the 14th September 1917.

Mr. *A. C. Roy*, for the Appellant.

Messrs. *A. Bhagwant* and *V. V. Chitale*, for the Respondents.

JUDGMENT.—The suit out of which this second appeal arises was brought by the present respondent Jhiblia on the 25th February 1916 to obtain possession of Khasra numbers 104/1 and 104/2 in Mauza Jakhegaon. The original defendants were one Namia and his four sons, of whom the eldest is Dowlatia. While the suit was pending in the Court of first instance, Dowlatia's son Bodrie, a minor, was added as co-defendant. Namia died after the case was decided by the lower Appellate Court and his five co-defendans are now the sole respondents.

When Mauza Jakhegaon came to be settled in 1893-94, the plaintiff Jhiblia and the late Namia were the Kotwars, each having succeeded his father in this office. The village service holding enjoyed by the Kotwars consisted of survey numbers 104 and 105 of which Jhiblia occupied number 104 and Namia number 105. The Settlement Officer decided that one Kotwar sufficed for the village and Jhiblia was dismissed the question which of the two Kotwars should be retained having been decided by lot in Namia's favour. It was, however, arranged that Jhiblia should retain possession of number 104 paying the assessed rental of Rs 6 to Namia. The *jamabandi* of the settlement record (Exhibit P-3) shows Jhiblia as Namia's sub-tenant, Namia himself being recorded as the village service tenant.

The *wajib-ul-arz* (Exhibit P 4) contains an entry on the subject which has been translated thus:—

"As Jhiblia is a Kotwar of long standing, he should himself cultivate Kotwardung which is at present under his cultivation and should pay Rs. 6 rent of Kotwardung to Namia, son of Lahu."

It also appears from Exhibit P-1 that the total rent assessed upon numbers 104 and 105 was Rs. 9 and that Namia's cash remuneration payable by the *malguzars* was to be reduced by the whole of this amount.

The new settlement came into force on the 1st July 1913. The defendant Dowlatia was appointed the sole Kotwar and the entire village-service holding, consisting of new numbers 104/1, 104/2 and 105, was recorded in his sole name. Numbers 104/1 and 104/2 correspond to the old number 104 and the assessed rental thereon is now Rs 8. The new *wajib-ul arz* contains on clause like that above reproduced from the *wajib-ul-arz* of 1893-94.

The allegation in the plaint is that Namia and his son, after accepting rent for the agricultural years 1913-14 and 1914-15, ejected the plaintiff in July 1914. The plaintiff claimed, in addition to re-instatement in possession, correction of the new *wajib ul arz* and the connected *jamabandi* by inclusion of a clause in the

former terms, the rent payable being Rs. 8. In the course of these trials the defendant Dowlatia resigned his post and obtained the appointment of his son Bodria as Kotwar with the defendant Bitkia as his guardian.

The defence was that the plaintiff remained in possession of old number 104 by virtue of a private arrangement between himself and Namia, according to which Namia was to be assisted in the Kotwar's duties, and that this arrangement did not bind any of Namia's successors-in-office. It was also contended that under section 56 (2) of the Tenancy Act, 1898, which is practically identical in terms with section 50 B (2) of the Act of 1883, the plaintiff's sub lease, if for a period exceeding one year at a time, was void. Other pleas also were put forward, but with them we are not now concerned. The following issues among others were framed:—

"1. Whether the plaintiff continued to remain in possession of the field under the orders of the Settlement Office at the settlement of 1893 94, or whether the plaintiff was in possession of the field under the private arrangement between defendant No. 1 and plaintiff as alleged by the defendants?

2. What is the effect of the settlement entry on the rights of parties?

6. To what relief are the parties entitled?"

The trial Judge held that a right of sub-tenancy was created in favour of the plaintiff by the settlement of 1893-94 and that the plaintiff was entitled to remain in possession of number 104 for his lifetime, provided he paid the assessed rent. The plaintiff accordingly obtained a decree directing insertion in the *wajib-ul arz* of a clause similar in effect to that above quoted from the *wajib ul arz* of 1893 94 and ordering the defendants to re-instate him in possession of new numbers 104/1 and 104/2.

In appeal the District Judge took a different view. He considered that the Settlement Officer could not do more than obtain from Namia an undertaking that he would sub-let number 104 annually to Jhiblia and that such a promise, though doubtless given, could not bind Namia, who was entitled under section 56 (2) of the present Tenancy Act to treat the plaintiff as at best a yearly sub tenant. The trial Judge's decree was, therefore, reversed and the plaintiff's claim was dismissed, each side being ordered to bear its own costs.

The plaintiff has now preferred this second appeal.

In this Court it is again contended on behalf of the plaintiff that there was no private arrangement between him and Namia and that the settlement of 1893-94 constituted a binding decision that the plaintiff should remain in possession of old number 104 during his lifetime. For the respondents it is urged that unless the plaintiff held by virtue of an agreement with Namia he could have no rights at all, inasmuch as section 72 of the Land Revenue Act, 1881, did not empower the Settlement Officer to create any sub tenancy but merely to ascertain and record the status of all tenants occupying the lands respectively held by them, the conditions on which they respectively held such lands, and the rents (if any) payable by them respectively.

There is evidence which the District Judge evidently believed that the clause in the *wajib-ul-arz* of 1893 94 was inserted with Namia's concurrence. There is also no reason to suppose that the Settlement Officer arrogated to himself a power of creating a sub-tenancy which he did not possess. The Tenancy Act of 1883 did not contain any provision corresponding to the proviso in section 56 (1) of the present Act, and I think it must be taken that the Settlement Officer did the best he could for the plaintiff by arranging for him to be Namia's sub tenant. The question, however, remains whether this arrangement between the plaintiff and Namia should not be treated as binding upon the Kotwar for the time being for the term of the plaintiff's natural life. This point is raised in the third ground of appeal in connection, with which it is conceded for the plaintiff-appellant that the arrangement come to at the settlement of 1893 94 cannot enure after the plaintiff's death.

In my opinion the question just mentioned should be answered in the affirmative.

RAGHUNATH SINGH v. HAR DAYAL SINGH.

I do not think that sub-section (2) of section 50-B in the Tenancy Act, 1883, should be regarded as governing the case. The arrangement by which the plaintiff-appellant became a sub-tenant should be taken as merely part of one which settled the question which of the two Kotwars should remain as the single Kotwar required. Each of the two men agreed to settle by drawing lots which should be the Kotwar, but this was surely on the understanding that the loser would, as part of the arrangement, continue for his lifetime in possession of the land which he was actually cultivating. In the words of the learned District Judge: "Before the ballot both candidates would readily agree that whichever was chosen would not at once disturb the other: they would even insist on the agreement being made as permanent as possible and would be likely to make a special request that mention should be made of it in the *wajib ul-arz*." Had it been a condition of this solution of the problem that the plaintiff should assist Namia in discharging the duties of Kotwar, the fact would have been mentioned in the *wajib ul-arz* and in the *jamabandi*. The position then was, not that Namia having been recognised as Kotwar and village-service tenant made a transfer of his interest in part of the holding, but the sub tenancy was in effect created as part of the arrangement by which Namia became the village service tenant. In this view it would be inequitable to allow the plaintiff to be ejected merely because a new settlement has been made or because Namia has ceased to be Kotwar.

I, therefore, set aside the decree of the lower Appellate Court and restore that of the trial Judge, with the modification that the entry to be inserted in the new *wajib-ul-arz* will make it clear that the sub-tenancy enjoyed by the plaintiff until his ejectment will enure for his lifetime only. The defendants will pay the plaintiff's costs in all three Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 4 OF 1919.

March 12, 1919.

Present:—Mr. Daniels, A. J. C.

RAGHUNATH SINGH—DEFENDANT—APPELLANT

versus

HAR DAYAL SINGH—PLAINTIFF—RESPONDENT.

Profits, suit for—Evidence of collections, absence of—Presumption—Basis of calculation.

Where in a suit for profits of land the recorded collections are suspiciously low, and the defendant neither produces nor gives any evidence to show what was collected, the Court would be justified in presuming that the full amount of the rents had been collected and in assessing the profits on the basis of the gross rental. [p. 751, col. 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 4th January 1919, confirming that of the Honorary Assistant Collector, 1st Class, Sandila, dated the 10th August 1918.

Babu *Bisheshwar Nath Srivastava*, for the Appellant.

Syed *Ali Mohammad*, for the Respondent.

JUDGMENT.—This is an appeal in a suit for profits and the question for decision is whether the lower Courts were right in assessing the profits on the basis of gross rental. The learned District Judge has done this on the ground that the recorded collections are suspiciously low, being only 60 per cent. of the rental, and that the defendant Lambardar has neither produced any accounts nor given any evidence to show what he collected.

This finding is attacked on the ground that it was admitted by the plaintiff that he had collected rent from a few tenants. This would ordinarily be strong argument against the learned District Judge's decision, but the facts in this case are peculiar. The Assistant Collector appointed a Commissioner to verify the collections on the spot. The plaintiff produced the tenants from whom he had collected, but the defendant did not do likewise and the Commissioner found reason to believe that a number of tenants were shown as in arrear who had really paid. The Assistant Collector gave the defendant an opportunity of producing witnesses or accounts before him, but he failed to do so.

Under the circumstances it seems to me that the Assistant Collector was fully justified in presuming that the full amount of the rent had been collected and I decline to disturb the decision of the Court below.

Cross objections have been filed claiming future interest and Pleader's fee in the first Court which was disallowed. On the whole I see no reason to interfere with the discretion of the lower Courts in these respects. I dismiss the appeal with costs and also dismiss the cross-objections but in this case without costs.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 803 OF 1918.

April 28, 1920.

Present:—Mr. Justice Das.

SUKHAN RAI AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS

versus

CHAKOWRI SINGH AND OTHERS—PLAINTIFFS AND LALDHARI GOPE AND OTHERS—DEFENDANTS 2ND PARTY—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Oral evidence to vary or contradict terms of document, admissibility of.

Evidence of acts and conduct of parties is not admissible in order to contradict or vary the written terms of an agreement. [p. 753, col. 1.]

Appeal against the order of the District Judge, Darbhanga.

Mr. *A. B. Mukerji*, for the Appellants.

Messrs. *Kulwant Sahay* and *Jadubans Sahay*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit instituted by the respondent Chakowri Singh for recovery of possession of 1½ *bighas* of land. The plaintiff relies upon a Kobala executed in his favour in December 1915 by the defendants first party, who admittedly at one time had title to the land in dispute and were competent to deal with it. It appears that prior to this Kobala the defendants second party had executed a mortgage deed in favour of defendants first party and the Kobala in favour of the plaintiff was expressly subject to the mortgage in favour of the defendants first party. The plaintiff deposited the mortgage money under section 83 of the Transfer of Property Act and then instituted the present suit for recovery of possession of the land in dispute.

The suit was contested by defendants 1st party on the ground that though the document in their favour on the face of it was a mortgage document, still in reality it was a sale and that consequently the plaintiff could not oust them from possession of the land in dispute. It is conceded that the document purports to be an usufructuary mortgage. The question whether evidence of acts and conduct of the parties is admissible to contradict the terms of a document has been considered in many cases and has now been finally decided by the Judicial Committee in the case of *Maung Kyin* v. *Ma Shwe La* (1). In the case of *Balkishen Das* v. *W. F. Legge* (2) the Judicial Committee had held that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible under section 92 of the Indian Evidence Act, 1872. This case was considered in many subsequent, cases especially in a case reported as *Khankar Abdur Rahman* v. *Ali Hafez* (3) on which the Court of first instance strongly relied. The learned Judges in that case pointed out that though section 92 of the Indian Evidence Act excluded evidence of any oral agreement or statement, it did not exclude evidence of the acts and conduct of the parties not being in the nature of an oral agreement. The authority of that case was very much shaken by a subsequent decision where the learned Judges held that evidence of the acts and conduct of the parties could only be proof either of a contemporaneous oral agreement varying the terms of the written agreement or of a

(1) 42 Ind. Cas. 642; 27 C. L. J. 175; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 20 Bom. L. R. 278; (1918) M. W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P.C.).

(2) 22 A. 149; 27 I. A. 58 at p. 65; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar P. C. J. 601; 9 Ind. Dec. (N. S.) 1130.

(3) 28 C. 253; 5 C. W. N. 351.

subsequent oral agreement having the same effect. In the first case clearly it would be inadmissible under section 92. In the second case such a subsequent oral agreement must obviously be pleaded. I am only referring to the subsequent case for the purpose of showing that the authority of the only decision of the Calcutta High Court subsequent to *Balkishen Das* v. *W. F. Legge* (2), namely, the decision reported as *Khankar Abdur Rahman* v. *Ali Hafez* (3), has been much shaken. It is, however, unnecessary to consider all these cases, because the Judicial Committee in the latest case reported as *Maung Kyin* v. *Ma Shwe La* (1) has finally decided that evidence of acts and conducts of parties is not admissible in evidence in order to contradict or vary the written terms of an agreement. In my view, therefore, the Court below has taken a correct view of the law on the subject.

But it was argued with very great ingenuity by Mr. Abani Bhushan Mukherji on behalf of the appellant that though he could not rely upon the document executed in his favour by the defendants second party, still he was entitled to rely upon the facts showing that a new tenancy was created in his favour from the year 1309. He relies upon the eighth paragraph of his written statement, in which he states that "in the beginning of 1309 Fasli the name of defendant No. 1 was entered in the office of the Malik with respect to the disputed land and on the consent of Dhanoo Gope the *jama* of the said land was separated and a separate receipt was since then granted to these defendents." I do not think that the defendant is really pleading a new contract of tenancy in the eighth paragraph of the written statement. He is merely relying upon the acts and conduct of the parties showing that the document executed in his favour by defendant second party, though it purported to be a mortgage deed, was in reality a conveyance. But even if Abani Babu's construction of the written statement is right, namely, that he was pleading a new tenancy, I do not think that there is any finding of the Court below which supports him. The Court of first instance considered this point and having considered the point, it came deliberately to the conclusion that the rent receipts were not sufficient to establish that the defendants first party were recognised by the Maliks and the only finding of the Court of first instance was to the effect that the defendants first party used to pay rent separately for the disputed land on their own account, whether or not they were formally recognized as required by law. This finding was accepted by the lower Appellate Court and is, therefore, binding on me. Therefore, I must accept that the defendants first party paid rent to the Maliks and got rent receipts. But this is equally consistent with the defendants first party having paid rent as usufructuary mortgagee in actual possession of the land in dispute. In my view this does not amount to a finding that there was a new tenancy created in favour of the defendants first party.

I am of opinion that the lower Appellate Court has taken an entirely correct view of the matter and I would accordingly dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 302 OF 1918.

December 11, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

ANNADA MOHAN ROY—OBJECTOR—APPELLANT

versus

ATUL CHANDRA CHAKARBARTI CHOWDHURY AND OTHERS—PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, r. 19—Decree entitling two persons to recover unequal sums from each other—Party entitled to execution—Method of executing decree.

Where under a decree two persons are entitled to recover two unequal sums from each other, execution can only be taken out, under Order XXI, rule 19, of the Civil Procedure Code by the person entitled to the larger sum, and for so much only as remains after deducting the smaller sum. If execution is taken out without making this deduction, the Court has power, under section 151 of the Code, to compel a refund of the sum taken in excess.

[p. 754, col. 2; p. 755, col. 1.]

ANNADA MOHAN ROY *v.* ATUL CHANDRA CHAKRABARTI.

Appeal against the order of the Subordinate Judge, 2nd Court, Mymensingh, dated the 21st August 1918.

Babu *Kishori Lal Chatterjee*, for the Appellant.

Babu *Krishna Kamal Maitra*, for the Respondents.

JUDGMENT.—The appellant in this case obtained a decree for rent for Rs. 5,292 annas 10, 5 *gandas* together with Rs. 551 annas 13 as costs. Under the same decree the defendant also was to get from the plaintiff the sum of Rs. 345, 1 anna on account of costs. There was an appeal against that decree by the plaintiff on the question whether the lower Court was right in holding that the plaintiff must proceed against certain property in execution of the rent decree and his appeal succeeded.

In the decree of this Court it was stated that "the decree of the lower Court be varied in the manner following, namely, that the decree, in so far as it directs that the plaintiff shall recover the decretal amount with costs and interest by auction sale either of *miras ijara* or the property given in security, be and the same is hereby set aside and in lieu thereof it is ordered and decreed that the execution of the decree for the realisation of the decretal amount do proceed against the properties in Schedules A and B of Schudule I, if still unsold, and then against the other properties of the defendants: And it is further ordered and decreed that save and except the variation as aforesaid, the decree of the lower Court be and the same is hereby affirmed." The decree then goes on to state that the plaintiff would be entitled to certain costs of this Court as also the costs of the lower Court from the defendant. Nothing was said as to the costs payable by the plaintiff to the defendant.

The plaintiff decree holder applied for execution of the decree and realised the entire amount of the decree without setting off the amount of costs which the defendant was to get from him under the decree under the provisions of Order XXI, rule 19, Civil Procedure Code. The defendant then made this application for execution of the decree in respect of Rs. 345, 1 anna, the amount of costs awarded to him against the plaintiff. The plaintiff raised objections to the execution of the decree which were disallowed by the Court below.

The plaintiff-appellant before us has raised two contentions. The first is that under the decree of the High Court, the defendant was not entitled to any costs at all, and secondly, that the defendant was not entitled to execute the decree, his only remedy having been to set off the amount due to him under the provisions of Order XXI, rule 19.

The first contention relates to the construction of the decree. It is true that in the decree of this Court, there is nothing said as to the costs which the defendant was to get from the plaintiff under the decree of the lower Court, although it mentions the costs which the plaintiff is to get from the defendant. But in the earlier portion of the decree, it is expressly stated that "save and except the variation as aforesaid, the decree of the lower Court be and the same is hereby affirmed." That shows that the decree of the Court of first instance was affirmed except as to the matter with respect to which this Court varied the decree, and the mere fact that the costs payable to the plaintiff by the defendant were mentioned in the latter part of the decree (as in the printed form) does not necessarily show that the decree of the lower Court in so far as it awarded costs to the defendant was set aside. We are accordingly of opinion that the lower Court was right in holding that the defendant was entitled to get costs from the plaintiff.

The next question is whether the defendant is entitled to execute the decree. Now, Order XXI, rule 19, of the Code lays down that where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then (*a*) if the two sums are equal, satisfaction for both shall be entered upon the decree, and (*b*) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree. Under this rule, therefore, the only party entitled to execute the decree is the party entitled to the larger sum, but the party entitled to the larger sum is, under that rule, to take out execution for so much only as remains after deducting the smaller sum and satisfaction for the smaller sum has to be entered upon the decree. This

was not done. The plaintiff, therefore, in taking out execution for the entire amount of the decree without deducting the sum due to the defendant, had acted in contravention of the provisions of that rule.

Had the attention of the Court been drawn to the fact that the defendant was entitled to a certain sum under the decree, there is no doubt that the amount would have been deducted and the plaintiff would not have been allowed to take out execution for the entire amount and satisfaction of the amount due to the defendant would have been entered upon the decree. In these circumstances, we think that the plaintiff ought to refund the amount which he had improperly taken under the decree and although, strictly speaking, the defendant is not entitled to proceed in the ordinary way for execution of his decree, we think that having regard to the circumstances of the case, the defendant should be given relief under the provisions of section 151, Civil Procedure Code, upon the application made by the defendant.

The result is that the appeal is dismissed, but in the circumstances we direct that each party do bear his own costs in both Courts.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 61 OF 1917.

March 15, 1920.

Present :—Mr. Lindsay, J. C.

Musammat RATIPALI—PLAINTIFF—APPELLANT

versus

BHAGWAN DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 110, 111—Partition proceedings pending—Suit in Civil Court to determine question of title, whether competent—Jurisdiction of Civil Court.

Where the partition of a village is applied for and notices of the application are served on the parties under section 110 of the U. P. Land Revenue Act, and they have ample opportunity of raising a claim to the land under section 111 of the Act, but they fail to do so, and no reference is made to the Civil Court for the purpose of having the question of title determined, nor does the partition Court decide any such question, the Civil Court has no jurisdiction to entertain a suit for a declaration of ownership of a particular plot of land in the village. [p. 756, col. 2.]

Appeal against the order of the Subordinate Judge, Sultanpur, dated the 19th September 1917, upholding the order of the Additional Munsif, Sultanpur, dated the 25th June 1917.

Syed *Ali Mohammad*, for the Appellant.

Pandit *Harkaran Nath Misra*, for the Respondents.

JUDGMENT.—This is an appeal against the order of the lower Appellate Court directing a certain plaint to be returned to the plaintiff for presentation in the proper Court. The question, which is to be decided here, is whether or not the view taken by the Court below regarding the question of jurisdiction was a correct one.

The dispute relates to a certain plot of land situate in a village called Khargipur, namely, Plot No. $\frac{87 \text{ old}}{365 \text{ new}}$. The plaintiff was *Musammat* Ratipali and she claimed as against the seven defendants, who were impleaded, a declaration that she was the owner of this particular plot. The defence on the merits was that Ratipali had no title.

The plea of want of jurisdiction in the Civil Court to entertain the suit was raised in the Court of first instance. The Munsif held that the Court had no jurisdiction. He also proceeded to deal with the case on the merits and dismissed the claim on the ground that the plaintiff had failed to make out any title to the property in question. In appeal the Subordinate Judge has upheld the view of the Court of first instance that the suit was not entertainable. It appears from the perusal of a partition record which I have had called for that on the 14th or 15th of August 1913 an application for partition of this village was made by a number of co-sharers. It is proved that a notice was issued under section 110 of the U. P. Land Revenue Act. It is proved that a notice was also sent to *Musammat* Ratipali, who on the date fixed for the filing of objections put in a petition to the effect

that she had no objection to partition being made. She asked that a separate allotment of her property should be made to her. It is perfectly clear, therefore, that if *Musammat* Ratipali had any question of proprietary title to raise she had the opportunity of doing so. She was served with the notice under section 110 of the Land Revenue Act. In the year 1916 the defendants presented an application to a Revenue Court regarding the number now in dispute. They asked for correction of the *khewat*, alleging that this plot had been held in mortgage by certain persons and that the mortgage had been redeemed a good many years before. The notice of this application was served upon the plaintiff. She appeared in the mutation Court and put forward the plea that the property was not held in mortgage but belonged to her under a certain deed of sale which she was unable to produce. Her story was that the deed had been destroyed. The Revenue Court ordered mutation to be made in favour of the defendants, and it is in consequence of this order that the present suit for declaration has been filed. At the time the suit was filed the partition of the village was still going on, proceedings having been delayed owing to the absence of one of the necessary parties on war service.

The law relating to the authority of Civil Courts to entertain suits regarding title in cases where the partition of a village has been applied for has been laid down in a Bench ruling of this Court reported as *Mukhtar Ahmad* v. *Barati Lal* (1). Bearing in mind the principles which have been laid down in that judgment, it is apparent that the plaintiff here had no right to invoke the jurisdiction of the Civil Court. It has already been mentioned that a notice of the application for partition was served upon her and that she had the opportunity of raising a claim to the land in suit under section 111 of the Land Revenue Act. She failed to raise any claim and consequently none of the conditions which must be established in order to give the Civil Court jurisdiction have been fulfilled. No reference has been made to the Civil Court under the provisions of section 111 for the purpose of having the question of title determined. Nor has the partition Court itself decided any such question so that its order is liable to be appealed to a Court of civil jurisdiction. I am satisfied, therefore, that the decison of the lower Appellate Court is correct and that the Civil Court had no jurisdiction to entertain this suit for declaration.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 2[illegible] Ind. Cas. 310; 17 O. C. 224; 1 O. L. J. 635.

PATNA HIGH COURT.
CIVIL REVISION No. 131 OF 1919.
November 24, 1919.
Present:—Mr. Justice Adami.
SUGGI LAL DURJI AND OTHERS—
PETITIONERS
versus
Sheikh MOHAMMAD WALI ULLAH
AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Application to withdraw with leave to bring fresh suit—Procedure—Permission to withdraw granted without leave to bring fresh suit, effect of.

Where a plaintiff applies for permission to withdraw his suit with leave to bring a fresh suit, the proper order to pass, if the Court does not grant leave to bring a fresh suit, is to dismiss the application. [p. 757, cols. 1 & 2.]

Ordinarily, an application to withdraw with permission to bring a fresh suit does not mean an application to withdraw if such permission is not granted. Where, therefore, on such application permission to withdraw is granted without leave to bring a fresh suits, this amounts to a refusal of the application. [p. 757, col. 2.]

Appeal against the order of the Munsif, Sewan (Chapra), dated the 27th January 1919.

Mr. *Baikuntha Nath Mitter*, for the Petitioners.

Messrs. *Rajendra Prasad* and *Siveswar Dayal*, for the Opposite Party.

JUDGMENT.—This is an application under section 115 of the Civil Procedure Code and section 107 of the Government of India Act. The petitioner instituted a suit in the Court of the Munsif at Sewan (No. 471 of 1916) for a declaration that the deed of sale of the 13th

June 1916 executed by the opposite party No. 1 in favour of the opposite pary Nos. 2, 3 and 4 in respect of a house was null and void, and that on the 9th June 1916 the petitioner contracted with the opposite party No. 1 for the purchase of the house, and for specific performance of the contract. On the 1st September 1917 the petitioner applied to the Munsif to be allowed to withdraw the suit with liberty to institute a fresh one on the ground of defects in the plaint and on the ground that material witnesses had not been summoned. The Munsif granted the permission and then the opposite party Nos. 3 and 4 applied to the High Court in Civil Revision No. 305 of 1917 [*Mahendra Ram* v. *Singi Lal* (1)] to set aside the Munsif's order. The case was remanded to the lower Court and the Munsif was directed to pay attention to Order XXII, rule 1, of the Code and to come to a decision whether or not permission should be granted on the grounds mentioned in rule 1 of Order XXIII.

On the 27th January 1919 the Munsif refused permission to the plaintiff to withdraw his suit and to institute a fresh suit. This order of refusal is entered on the order-sheet and it runs: "He is allowed to withdraw from the suit without any permission for a fresh suit on the same cause of action." On the 13th February 1919 the petitioner applied to the Munsif that the Original Suit No. 471 of 1916 should be proceeded with, since no permission had been granted to him to file a fresh suit, and on the 14th February the Munsif passed an order on the application to the effect that the suit had already been disposed of and so the application must be rejected. As a matter of fact after the order of the 27th January 1919 had been passed, a decree had been drawn up in the suit and had been signed by the Pleaders of both parties.

It is now contended here that when the plaintiff petitioner asked to be allowed to withdraw with permission to institute a fresh suit, this did not amount to a willingness on his part to withdraw without that permission.

The learned Vakil for the petitioner has relied chiefly on the case of *Suradhani Debya* v. *Chandra Nath Pramanik* (2), where it was held that where a plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit and the Court considers that that liberty ought not to be granted, the proper course is simply to dismiss the application. There is no doubt, I think, that in this case under the circumstances the Munsif rightly refused the prayer to withdraw with permission to institute a fresh suit, but I do not take it that when such an application as was made by the petitioner is refused, a Court is entitled to understand that a refusal of a part of the prayer amounts to an allowance of the rest, or that the petitioner himself meant that, if he could not get one part of his prayer, he was content to take the rest. Ordinarily an application to withdraw with permission in no way means an application to withdraw if such permission will not be granted. In the present case I am of opinion that the Munsif would, if at the time he passed the order refusing the petition he thought that the petitioner meant to withdraw the suit even without permission, have stated this on the order sheet and would then and there have entered the case as withdrawn. There is no final order on the order-sheet at all in support of this, and it seems to me that the Munsif should have noted on the order-sheet that the plaintiff not having been ready to adduce further evidence the suit must be dismissed. The petitioner certainly has throughout shown a degree of negligence in the preparation and conduct of his suit which does not entitle him to much consideration, but I consider that the lower Court was mistaken in believing that the petitioner meant to withdraw his suit whether his prayer was granted or not. I would thus allow the application and order that the petitioner do pay two gold *mohurs* as costs to the opposite party. The suit will accordingly be remanded to the lower Court to its original number to be proceeded with from the stage at which it was on the 27th January 1919.

Case remanded.

(1) 48 Ind. Cas. 197; 3 P. L. J. 651.
(2) 37 Ind. Cas. 131; 20 C. W. N. 1011.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 13 AND 20 OF 1918.

June 23, 1919.

Present:— Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

HEM CHANDRA CHOWDHURY—PETITIONER—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 23—Land acquisition—Vacant land—Assessment, method of.

In a land acquisition case the amount of compensation cannot be enhanced upon the basis of conveyances of lands which have no similarity to the lands acquired. [p. 758, col 2.]

In awarding compensation for land acquired under the Land Acquisition Act it is unsound to assert that the value of a *raiyat's* interest is so much without specification of the conditions of the tenancy. How much is recoverable by a landlord from a hypothetical tenant may be determined with some approach to accuracy from the rent receivable by him. But the exact value of the *raiyat's* interest is dependent on a number of unknown factors. [p. 758, col. 2; p. 759, col. 1.]

In awarding compensation for a vacant piece of land the existence of a hypothetical tenant on each plot was assumed and calculation was made of the respective values of what was designated as landlord's interest and *raiyat's* interest. The total of the sums which represented the values of these interests was taken as the value of the land:

Held, that the award was based on unsound principles. [p. 759, col. 1]

Appeal against the decision of the Additional District Judge, Pabna and Bogra, dated the 9th October 1917.

Babus *Ram Charan Mitra* and *Srish Chandra Chowdhury*, for the Appellant in No. 13 and Respondent in No. 20.

Mr. *Pugh*, Babus *Jogesh Chunder Roy*, *Ramani Mohan Chatterjee*, *Framatha Nath Banerjee* and Maulvi *Abdul Hai*, for the Respondent in No. 13 and Appellant in No. 20.

JUDGMENT.—These two appeals are directed against the same award made by the Land Acquisition Judge of Pabna and Bogra in respect of lands acquired for public purposes. Appeal No. 13 of 1918 has been preferred by the Secretary of State on the ground that the sum awarded is excessive and has been calculated on an erroneous principle. Appeal No. 20 of 1918 has been preferred by the claimant on the ground that the sum awarded is insufficient. We are clearly of opinion that there is no foundation for the appeal of the claimant. Reliance has been placed upon conveyances of lands which have no similarity to the lands acquired; and we cannot possibly enhance the amount of compensation on the basis of those transactions. The really substantial appeal is that preferred by the Secretary of State. The Senior Government Pleader has contended that the award as made by the Judge is based on unsound principles. The land when acquired was vacant. But both the Collector and the Land Acquisition Judge have assumed the existence of a hypothetical tenant on each plot and have calculated the respective values of what was designated as landlord's interest and *raiyat's* interest. The total of the sums which represent the values of these interests has been taken as the value of the land. The Land Acquisition Judge has accepted the figures of the Collector in respect of the valuation of landlord's interest; but he has substantially raised the figures for the valuation of *raiyat's* interest. The Government Pleader has argued that what the lower Court has done in substance is to award to the claimant, in the shape of the value of the *raiyat's* interest, the entire value of the land and has added thereto the value of the so called landlord's interest calculated by the Collector who has adopted an entirely different basis for the calculation of the *raiyat's* interest. In our opinion, this criticism is well-founded. The method adopted by the Collector and the Judge is wholly unreliable and is not based on any solid foundation. How much is recoverable by a landlord from a hypothetical tenant may be determined with some approach to accuracy from the rent receivable by him. But the exact value of the *raiyat's* interest is dependent on a number of unknown factors; for instance if the imaginary *raiyat* were to sell his tenancy in the open market, the value it would fetch would depend upon his status. It is conceivable that he may not have any transferable interest at all. It is possible that he may be a tenant for a term and that his tenancy may be transferable only with the assent of the landlord. It may be, again, that this rent is not fixed in perpetuity, and is enhanceable. It is obvious that a purchaser of such a tenancy would

offer a price in view of the circumstances and conditions of the tenancy. Consequently to assert that the value of a *raiyat's* interest is so much without specification of the conditions of the tenancy is obviously unsound. We must, therefore, reject the figures given by the Collector as also by the Judge. But this places us in a difficulty. Are there really materials on the record which may enable the Court to determine the market value of the lands on some sound principle? If one of these plots was offered for sale as a vacant piece of land, the purchaser, in making an offer, would obviously have in view the income likely to be derived from it. Now, it has been found that the land can be let out at a rent of Rs. 24 per Bigha, so that if 20 years' purchase is taken, this would give a rate of Rs. 480 per Bigha. But, at the same time, the landlord who let out land to a tenant would in ordinary circumstances demand a premium and if the interest of the tenant were not permanent and transferable, he would ask for a premium on each transfer. There is no evidence on the record to show precisely what may be derivable by the landlord in these contingencies. But in view of the facts which have been stated to us, we are of opinion that substantial justice will be done if in addition to Rs. 480, we allow the landlord another Rs. 100. This judgment will affect the awards in respect of two plots—313 and 314—where the lower Court allowed, in addition to the valuation of the *raiyat's* interest, the value of the so called landlord's interest. In these two cases the award will be diminished from Rs. 680 to Rs. 580. In respect of the other plots, we do not think it necessary to reduce the sums awarded.

The result is that the appeal of the Secretary of State (No. 13 of 1918) will be allowed and the decree of the Court below will be varied as indicated above. There will be no order for costs. The appeal of the claimant (No. 20 of 1918) is dismissed with costs to the Secretary of State.

Appeal No. 13 allowed;
Appeal No. 20 dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 193 OF 1917.
March 15, 1920.

Present:—Mr. Lindsay, J. C.

NADIR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat ANPURNA KUNWAR—DEFENDANT—RESPONDENT.

Adverse possession—Person in continuous possession without title for over 12 years, status of—Under-proprietary rights, acquisition of.

Where a person who has lost all his rights in certain land retains possession thereof, to the knowledge of the superior proprietor, without any title whatever, and is continuously recorded for more than 12 years as under-proprietor, he acquires the status of under-proprietor by adverse possession. [p. 760, col. 2.]

Appeal from the decree of the District Judge, Fayzabad, dated the 27th February 1917, upholding the order of the Subordinate Judge, Fyzabad, dated the 14th September 1916.

Mr. *A. P. Sen*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, the Hon'ble Syed *Wazir Hassan* and Pandit *Harkaran Noth Misra*, for the Respondent.

JUDGMENT.—This case has already been before me and by my order of the 27th May 1918* an issue was remanded for determination to the lower Appellate Court. The finding on the issue has now been returned and the points which were left for decision have now to be determined.

The facts have been set out in my order passed on the date above mentioned. They may be briefly recapitulated here. The dispute now is with regard to certain lands in a village called Benipur. The claim which the plaintiffs made related also to certain other lands in Mauza Arjunpur, but there is no longer any dispute as regards these latter lands. It has been definitely decided that the plaintiffs have no title. We are concerned only with the lands situated in Benipur, a list of which was attached to the plaint; and the matter to be decided is whether or not the plaintiffs are entitled to a declaration that they are under-proprietors of these lands. It is not denied that the plaintiffs were at one time under-proprietors in this

* *See Nadir Singh v. Babu Indar Sen Singh*, 47 Ind. Cas. 652; 5 O. L. J. 426.—*Ed.*

village of Benipur. It is proved that a mortgage of the lands now in dispute was made in favour of one Kamta. That mortgage was a mortgage by conditional sale. Kamta brought a suit for foreclosure and obtained a decree in the year 1893. In 1895 an order for possession (*dakhal dihani*) was made in favour of the mortgagee. Thereafter a pre emption suit was brought by the defendant respondent Indar Sen Singh, who is now represented by *Musammat* Anpurna Kunwar. Babu Indar Sen Singh obtained a decree for pre-emption and possession was delivered to him in the usual way by the Civil Court in the year 1897.

It is not disputed that notwithstanding these proceedings by way of giving possession through the Civil Court, the plaintiffs remained in occupation from the year 1895 onwards. It is an admitted fact that they were ejected from these lands by an order of the Revenue Court after the present civil suit had been brought. In consequence of this continuous possession the fact of which is admitted by the defendant-respondent, the plaintiffs set up a case that they have acquired an under-proprietary title by adverse possession. Both the Courts below decided this point against the plaintiffs. The learned Judge of the lower Appellate Court was of opinion that inasmuch as the plaintiffs had alleged that the lands were their *sir* lands, they could not claim anything higher than the status of tenants with a right of occupancy. This right of occupancy, it was said, had arisen under the provisions of section 25 of the Oudh Laws Act of 1876, which was in force at the time the foreclosure decree was made.

This section, however, did not create a right of occupancy in *sir* lands as such. It only gave the ex proprietor the right of occupancy in such lands as were in his cultivating occupation at the date upon which the transfer of the land was made. It does not necessarily follow that lands which may properly be described as *sir* lands are actually in the cultivating occupancy of the former proprietor. It was for this reason, therefore, that it was necessary to send down the issue to which the answer has now been received. The finding is that it is not proved that these lands now in dispute were in the cultivating occupancy of the plaintiffs at the time foreclosure was made. In these circumstances it is not possible for the defendant to say that the plaintiffs, after the foreclosure decree had been given effect to, became merely tenants with a right of occupancy. The fact is that they were left without any rights at all, the whole of the property passing to the mortgagee from whom it was subsequently pre-empted by the superior proprietor.

The Subordinate Judge was quite right, therefore, when he said in his judgment that after the proceedings under the foreclosure and those which were taken in execution of the pre-emption decree the plaintiffs were in possession without any title whatever. He decided against the plaintiffs on the ground that although they were in possession without title, they nevertheless failed to prove that they had put forward any adverse claim to the knowledge of the defendant. He pointed out that the mere non-payment of rent would not amount to an assertion of adverse title and in this connection he referred to certain authority. The point is, however, that the defendant has failed to show that the plaintiffs ever held possession as tenants after the foreclosure decree had been executed. For the reasons above given, he cannot appeal to the provisions of section 25 of the Oudh Laws Act for the purpose of showing that the status of the plaintiffs had become that of tenants and there is no evidence whatever on the record to show that the plaintiffs ever accepted any tenancy from the defendant. The fact is that although they had lost all their rights under the foreclosure decree, they hung on to the land and were continuously recorded for more than twelve years as under-proprietors.

In these circumstances it must, I think, be held in favour of the plaintiffs that they have acquired the status of under proprietors by adverse possession. The facts speak for themselves. The plaintiffs have been in possession to the knowledge of the defendant, who knew or at any rate must be taken to have known that they were in possession without any right whatever. Even if there is no evidence of an openly avowed claim of right on the part of the plaintiffs, all the acts and circumstances attending the

occupation of these lands by the plaintiffs can be referred to for the purpose of showing the intention with which they retained possession. It seems to me that all those acts and circumstances clearly imply and denote an intention on the part of the plaintiffs to hold as under-proprietors against the defendant, the superior proprietor.

The defendant was well aware of the situation and he has allowed these people to continue in possession without title for more than twelve years from the date upon which he himself was entitled to actual possession as against them.

The result is that the appeal is allowed and the decree of the Court below is set aside. The plaintiffs are entitled as against the defendant to a declaration that they are the under-proprietors of the lands specified in list A attached to the plaint. The plaintiffs will get their costs in all three Courts.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 258 OF 1919.

April 26, 1920.

Present:—Mr. Mittra, Offg. J. C.

Babu HARIDAS CHATTERJI—

PLAINTIFF—APPELLANT

versus

Musammat GAHENABAI—DEFENDANT—RESPONDENT.

Accounts, suit for, against lambardar—*Parties, necessary—Co-sharers, whether must be joined.*

A suit against a *lambardar* for accounts in respect of one item of village property by one of the persons jointly interested in a portion of the village is not maintainable, unless all the other persons jointly interested are joined either as plaintiffs or as defendants. [p. 762, col. 1.]

As between a *lambardar* and a person who is jointly interested with others in a *patti*, there is no such privity of contract as would entitle the latter to treat the former as his agent in respect of the item owned by him. [p. 762, col. 1.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 183 of 1918, decided on the 26th February 1919.

Dr. *H. S. Gour*, for the Appellant.

Mr, *M. Gupta*, for the Respondent.

JUDGMENT.—The plaintiff sues for a half share of the profits of one *abadi* plot No. 569 in Mauza Khandwa, Taraf Kunbi. His allegations are that Govindram and Rajaram, who were the owners of a half share in that Mauza, mortgaged their share in plot No. 569 together with a house in the town to one Ibrahim Kachi by a possessory mortgage deed, dated the 12th of March 1903, and this mortgage was assigned to him. It appears that subsequent to this mortgage, Govindram and Rajaram sold 2-annas share of the village and mortgaged the remaining 6 annas by way of usufructuary mortgage to Seth Radhakishan Jaikishan.

The only defendant in the suit is the *lambardar* who owns the remaining 8-annas share. The plaintiff claims profits of this plot for the last six years against the defendant in his capacity as *lambardar*. The defence is that the *lambardar* is not an accounting party to the plaintiff in respect of this plot and that the suit is not tenable apart from a suit for village accounts. The plaintiff has not cared to amend the plaint by asking that village accounts should be gone into in the presence of all persons interested and thereafter his share of profits determined and decreed. Moreover, the plaintiff does not seek accounts of the rents of the house in the town of Khandwa, which he says he is realizing separately. The Courts below have dismissed the suit, following *Fandu* v. *Pandu* (1) where it was laid down that a co sharer cannot sue the *lambardar* for each item of village profits, but must bring a general suit for village accounts.

In this second appeal it is contended on behalf of the plaintiff-appellant that the rule laid down in the case cited only applies where a co-sharer is entitled to the profits of more than one item and that the rule is meant to prevent multiplicity of suits. This is no doubt the *raison d'etre* of the rule. But the question still arises whether the *lambardar* undertakes to render account to each holder of a fragment of right in the village not having a definite fractional share therein. To accept the

(1) 5 C. P. L. R. 80.

plaintiff's contention would be to impose upon the *lambardar* an onerous duty which would make his position intolerable. If the plaintiff's suit succeeds, there may be a deficit in the village accounts and the *lambardar* will be forced to bring a suit to recover such deficit from the plaintiff's transferor and any adjudication come to in this suit will not bind the latter. If the plaintiff's transferor cannot claim an account of one item of property, he cannot transfer to the plaintiff the right to demand such an account apart from a suit for general village accounts. The *lambardar* undertakes to explain village accounts to all those who are jointly interested in the 8-annas *patti* and any apportionment of profits as between them is a matter which does not concern him. If those who can jointly claim with the plaintiff an account refuse to do so, the plaintiff may make them defendants in the suit. There is no such privity between the plaintiff and defendant as entitles the former to treat the latter as his agent in respect of this item of property. The right inheres in the plaintiff jointly with persons interested in the *patti*. The suit as framed against an agent is not maintainable at the instance of the plaintiff alone and in respect of one plot.

It was further contended that apart from the defendant's position as *lambardar*, he should be treated as a bailiff on the analogy of the English Statute of 4 Anne, c. 16. That Statute, as explained in *Henderson* v. *Eason* (2), is inapplicable to the usual mode of enjoyment of joint *malguzari* villages in India. Section 27 provides that an action of account may be brought and maintained by one joint tenant and tenant-in-common against the other as bailiff for receiving more than comes to his just share. Parke, B., in delivering the judgment says: "Every case in which a tenant in common receives more than his share is within the Statute; and account will lie when he does receive, but not otherwise * * What, then, is a 'receiving' of more than comes to his just share, within the meaning of that provision in the Statute of Anne? It appears to us that, construing the Act according to the ordinary meaning of the words, this provision of the Statute was meant to apply only to cases where the tenant-in-common receives money or something else, where another person gives or pays it, which the co-tenants are entitled to simply by reason of their being tenants-in-common, and in proportion to their interest as such, and of which one receives and keeps more than his just share according to that proportion." Accordingly it was held that a tenant does not receives more than his share within the meaning of the Statute if he merely has the sole enjoyment of the property, even though by the aid of his own industry and capital he makes a profit by the enjoyment, and takes the whole of that profit. The analogy of that Statute cannot be adopted as a rule of equity, justice and good conscience, as in that case contrary to our practise homefarm land would have to be excluded from accounts between co-tenants. In *Mahesh Narain* v. *Nowbat Pathak* (3) Harington, J., doubted whether the principle enunciated in the Statute of Anne could be applied in this country, but it is clearly inapplicable to *malguzari* villages. It seems to me that even under the Statute the account of the entire joint property will have to be taken to determine whether a co-tenant has received more than comes to his just share and this in the presence of all persons interested.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(2) (1851) 85 R. R. 628; 17 Q. B. 701; 21 L. J. Q 82; 16 Jur. 518; 117 E. R. 1451.

(3) 42 C. 837 at p 847; 1 C. L. J. 437.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 454 OF 1918.

April 28, 1920.

Present:—Mr. Justice Ocutts and Mr. Justice Adami.

Babu MOHINI MOHAN MISSER AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS

versus

Babu GOUR CHANDRA RAI AND OTHERS—PLAINTIFFS, *Babu* PIRTHI CHAND LAL CHOWDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Valuation of suit—Objection as to correctness of

MOHINI MOHAN MISSER *v.* GOUR CHANDRA RAI.

valuation—Court, jurisdiction of, to decide question—Declaration, suit for, value of—Appeal, second—Valuation, objection to—Suits Valuation Act (VII of 1887*), s.* 11, *applicability of.*

Where a plaintiff puts a value, for the purpose of jurisdiction, upon the subject-matter of a suit, and an objection is taken to the correctness of such valuation, the Court has jurisdiction to decide the question. [p. 763, col. 2.]

The value of a suit for a declaratory decree must, for the purpose of jurisdiction, be taken to be the value of the property in respect of which the declaration is asked for. [p. 763, col. 2]

Where an objection to valuation is taken in the pleadings, and again before issues are framed, and again in the Appellate Court, section 11 of the Suits Valuation Act is no bar to the objection being taken and entertained in second appeal. [p. 763, col. 2; p. 764, col. 1.]

Appeal from a decision of the District Judge, Purneah.

Messrs. *Susil Madhab Mullick* and *Shiveswar Dayal*, for the Appellants.

Messrs. *C. C. Das*, *S. N. Palit* and *Ram Prasad*, for the Respondents.

JUDGMENT.

Coutts, J.—This was a suit for a declaration of title to certain fishing rights. In the plaint the suit was valued at Rs. 1,400. The suit was tried by the Subordinate Judge of Purnea and was decreed in favour of the plaintiffs. From this decree an appeal was preferred to the District Judge, who confirmed the decree of the Subordinate Judge.

In the Court of first instance one of the grounds taken by the defendants was that the suit was under-valued for purposes of jurisdiction. No issue, however, was framed and the point was undecided. On appeal to the District Judge the same point was taken but again without having considered the matter the District Judge said "it seems to me the value named by the plaintiffs in respect of the property was not inadequate." On second appeal to this Court the question of valuation for the purposes of jurisdiction was the main point taken in the appeal, and it was decided by the learned Judges who heard this appeal that there was no proper finding as to the valuation of the suit and an issue on this point was referred to the lower Appellate Court for a finding. The finding of the District Judge on this issue has now been received, and it is that the proper valuation of the property in respect of which a declaration is asked for is Rs. 16,275. Now it is not contended that this is not the correct valuation of the property, but it is contended on behalf of the respondents that the Court has no jurisdiction to question the valuation of the plaintiff. This contention is not sustainable. If the valuation put on the plaint for the purposes of jurisdiction is contested, the valuation must be decided by the Court. This was the view taken in the case of *Dayaram Jagjivan* v. *Gordhandas Dayaram* (1) and though there is no case directly to the point in this Court it is in accordance with the view which has been taken of cases coming under section 7 (*iv*) (*c*) of the Court Fees Act. In my view, therefore, the Court must determine the value of the subject-matter of the suit.

The next question is, what this value is and it is contended that the suit being a suit for a declaration, the value must be what the plaintiff says it is and cannot be the value of the property in respect of which a declaration is sought as contended by the appellant. I am unable to accept the respondents' contention. It is difficult to see how the value of the declaration can be other than the value of the property in respect of which the declaration is asked for, and I am supported in this view by the decision in *Ganapati* v. *Chathu* (2), where it was held that for the purposes of jurisdiction the value of a suit for a declaratory decree must be taken to be what it would be if the suit were one of possession of the property regarding which the plaintiff seeks to have his title declared. The value of the suit for purposes of jurisdiction then in this case is Rs. 16,275; the appeal to the District Judge was, therefore, incompetent and his order is without jurisdiction unless the case be covered by section 11 of the Suits Valuation Act. It is contended that the case is covered by section 11, inasmuch as objection was not taken at the proper time and in the proper manner and the appellant has not been prejudiced. With these contentions I am unable to agree. The objection was taken at the first possible moment, namely, in the written statement. It was again taken after issues were framed and it was taken before the lower Appellate

(1) 31 B. 73; 8 Bom. L. R. 885.
(2) 12 M. 223; 4 Ind. Dec. (N. S.) 505.

Court. Nor can it be said that the appellant is not prejudiced inasmuch as if the suit had deen properly valued, there would have been an appeal to the High Court in the first instance. The High Court would have gone into the facts of the case and the appellant would not have been confined to urging points of law. The case, therefore, does not come under section 11 of the Suits Valuation Act and the decision of the learned District Judge being without jurisdiction, the decree passed by him is void. In these circumstances I would discharge the order of the District Judge and decree this appeal with costs. The memo. of appeal presented in the Court of the District Judge will be returned to the appellant.

ADAMI, J.—I agree.

Order set aside.

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 45 OF 1919.

May 5, 1920.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

MA THU DAW AND ANOTHER—APPELLANTS

versus

MA NGWE NU—RESPONDENT.

Probate and Administration Act (V of 1881), s. 23—Letters of Administration, application for, by two persons—Status of one admitted and of other disputed—Procedure.

Where two persons apply for Letters of Administration to the estate of a deceased person, and the status of one of the applicants to so apply is disputed, while the other is entitled to a portion of the estate, the correct procedure for the Court is to ignore the question of status and grant Letters of Administration to the applicant entitled to a part of the estate.

Mr. *Das*, for the Appellants.

Mr. *Ba Dun*, for the Respondent.

JUDGMENT.—In this case Ma Ngwe Nu, claiming to be surviving widow of Po Lu deceased, applied for Letters of Administration to his estate and her application was opposed by Ma Thu Daw who was admittedly the adopted daughter of Po Lu, a former wife. Ma Thu Daw denied that Ma Ngwe Nu was married to Po Lu and applied for Letters of Administration for herself.

In these circumstances the Court below ought undoubtedly to have followed the decision in *Ma Tok* v. *Ma Thi* (1) because there was a person, namely, the adopted daughter, who was entitled to a part of the estate of deceased, whether Ma Ngwe Nu was the widow or not. The Court should have refrained from going into the question of Ma Ngwe Nu's status at all in the circumstances.

Ma Thu Daw appeals. We consider it unnecesary to go into the question of Ma Ngwe Nu's status at all.

We set aside the order of the District Court granting Letters of Adminstration to Ma Ngwe Nu and direct that Letters of Administration shall be granted instead to Ma Thu Daw on her furnishing security in the sum of Rs. 3,000 for the due administration of the estate.

The respondent will pay the appellant's costs in both Courts.

Advocate's fee two gold *mohurs*.

Order set aside.

(1) 3 Ind. Cas. 719; 5 L. B. R. 78.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 9 OF 1919-20.

March 16, 1920.

Present:—Mr. Hopkins, S. M., and Mr. Harrison, J. M.

WIDHYA RAM—APPELLANT

versus

SOBHA RAM AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s 14—Hindu joint family, holding let to member of—Ejectment—Holding let to other members of family—Tenancy, whether continuous.

A member of a Hindu joint family taking land on lease from a landholder in his individual capacity is the sole tenant of that landholder to the exclusion of the other members of the joint family and when he is ejected from the holding, and the holding is immediately let to his brothers, the latter are not entitled to count the period of cultivation when their brother was recorded as tenant towards the period necessary for acquiring occupancy rights. [p. 765, cols. 1 & 2.]

Second appeal from the order of the Commisioner, Agra Division, dated the 20th of October 1919, in the case of ejectment.

JUDGMENT.

HARRISON, J. M.—(*February* 18, 1920.) —This is a Zamindar's second appeal in an ejectment suit, in which the Commissioner has held that the respondents have a right of occupancy because they are entitled to count a period of cultivation when their brother was recorded as tenant towards the period necessary for acquiring occupancy rights.

It appears from the record, and particularly from the 12 years' abstract admitted in evidence when the appeal was before the Commissioner, that the respondents' brother Kallu had been tenant-in chief for 10 years in 1313 F. At the end of 1315 F. he was ejected, and his brothers, the respondents, were admitted to the holding from 1316 F. at an enhanced rent. It is claimed that the nominal change of tenants, when considered with section 14 of the Tenancy Act, does not operate to break the continuity of the tenancy of the family as a whole. In the first place, I may note that the Commissioner seems to have been mistaken in considering that the holding had descended to Kallu from his father, Nilkanth. The beginning of Nilkanth's tenancy was as a sub tenant holding under one Moti. This is proved by a lease executed by Moti in favour of Nilkanth in 1884 and receipts put in the Commissioner's Court also tend to show, if they are regarded as admissible in evidence, that Nilkanth paid his rents to Moti and not to the Zamindar. This weakens the assumption made by the Commissioner that the holding was the family holding from the time of Nilkanth, the father of respondents.

There is no doubt that Kallu was ejected, and the only question is whether the admission of his brothers to the holding can be considered a re admisssion of Kallu himself. The chief ruling on the point is the Board's Selected Decision No. 5 of 1918, in which it was held that a member of a Hindu joint family taking land on lease from a landholder in his individual capacity is the sole tenant of that landholder to the exclusion of other members of the joint family. This ruling of the Board followed that of the High Court in the case of *Kallu* v. *Sital* (1). In the circumstances, I think, I must follow this decision and regard the respondents alone as tenants of the landholder from 1316 F. They have not, therefore, acquired occupancy rights and are liable to ejectment. I would, therefore, set aside the decree of the Commissioner and restore that of the Assistant Collector with costs to the appellant in both Appellate Courts.

HOPKINS, S. M.—(*March* 16, 1920.)—The landholder ejected Kallu from this holding and immediately let it to Kallu's brothers Sobha and Kashi at an enhanced rent. It is, in my opinion, a question of fact as to whether there was a real or only a nominal change of the tenants, the decision of which rests on a finding on the issue whether Sobha and Kashi were joint in cultivation with Kallu during the time that the holding was recorded in his name. There was evidence on both sides in the trial Court. The Assistant Collector took into consideration the fact that Kallu's sons had an occupancy holding separate from Sobha and Kashi, and stated definitely that he disbelieved the evidence of the witness who spoke to the joint cultivation.

The Commissioner does not state that he disagreed with this finding of fact or that he believes the evidence on the other side to the effect that Kallu was joint in cultivation with Sobha and Kashi. If he had done so, it would have been difficult for this Court in second appeal to disturb his finding of fact. The basis of the Commissioner's decision is that there is a presumption in favour of jointness and that he accepts the defendants' assertion that they have all along cultivated the holding jointly with Kallu and his sons. The Commissioner, in my opinion, erred in law in deciding the case upon a presumption while the matter was one for decision upon the evidence. The presumption in question was rebuttable and had, as a matter of fact, been rebutted on the evidence as accepted by the trial Court.

In this view, I concur in the order proposed.

Appeal allowed.

(1) 44 Ind. Cas. 717; 16 A. L. J, 225; 40 A. 314.

MANNA SINGH *v.* KARU SINGH.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

July 29, 1919.

Present:—Lord Atkinson, Lord Phillimore, Sir John Edge, and Mr. Ameer Ali.

MANNA LAL—PLAINTIFF—APPELLANT

versus

KARU SINGH ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father—Necessity—Immorality—Burden of proof.

Where in a suit to enforce a mortgage, by the father of a Hindu joint family, the sons advance the defence that the father was of immoral life and there was no necessity for the loan, the burden of proving not only that there was necessity to borrow but that it was not unreasonable to borrow at the rate of interest stipulated lies upon the plaintiff, while it is for the defendants to prove that the money was borrowed for expenses incident to an immoral life. [p. 768, cols. 1 & 2]

Consolidated appeals against the decision of the Calcutta High Court (Holmwood and Walmsley, JJ.), dated the 18th May 1915, modifying that of the Officiating Additional Sub-Judge, Patna, dated the 27th June 1912.

JUDGMENT.

LORD PHILLIMORE.—These are consolidated appeals from two decrees of the High Court of Calcutta, dated the 18th May 1915, varying two decrees of the Additional Subordinate Judge of Patna, dated the 27th June 1912.

The suits were brought to enforce two mortgages, the earlier one, which was, however, put secondly in suit, dated June, 1896, and the later one July, 1897. The appellant and plaintiff is the representative of the original mortgagee. The defendants and respondents are the mortgagor Karu Singh and his two sons, one of whom was an infant at the date of the suits. The first mortgage, which was for a sum of Rs. 2,122, was expressed to be made for re-payment of the third part of some antecedent mortgage-debts created by Karu Singh and his brothers, which debts it was now proposed to apportion and divide so that each of the three should be severally liable for his share.

The second mortgage, which was for Rs. 1,000, was expressed to be for payment of "Zerpeshgi" (*i. e.* "premium on a lease") due in respect of a certain Mauzah, "and for the cultivation and improvement of my Mauzahs, and for meeting household expenses."

At the time that the mortgages in suit were executed the elder of the two sons was born, though the younger was not; and Karu Singh must, therefore, be treated as the manager of a joint Hindu family, and his mortgages will only be good so as to bind family property if they were effected to meet necessary expenses, or as it is otherwise expressed for joint family purposes.

Karu Singh put in a defence raising objections to the rate of interest and denying the title of the plaintiff to represent the original mortgagee. No importance is to be attached to this defence. The serious defence is that put in on behalf of the two sons. They set up the case that their father was a man of loose character and a licentious person, that the sums had really been borrowed to spend on his mistress, that the necessities mentioned in the bonds were totally false, got up and concocted, and that they were not benefited by the money claimed and not bound by the mortgages. Issues were accordingly framed in each case in which the important one was "Whether the bond debt was contracted for joint family purposes? Whether the bond-debt was contracted for and spent on immoral purposes?"

When the case was ready to come on for trial, several applications were made on behalf of the defendants for postponement. At last the Subordinate Judge came to the conclusion that the applications for postponement were not genuine, and that no further time ought to be granted. Thereupon the Pleaders for the defence declared that they could take no further part in the proceedings, and the Judge heard the case *ex parte* and thought that the evidence adduced by the plaintiff was sufficient to prove his case. He accordingly made decrees for the enforcement of the mortgages with costs and interest at a certain rate as provided in the bond.

From the decrees in the two suits the defendants appealed to the High Court of Calcutta, and the learned Judges in this Court, being of opinion that the plaintiff had not proved that the moneys were borrowed for necessary purposes, dismissed the suit as against the two sons, but

made a decree against the father to the following effect:—

"The result is that there will be a decree against the father Karu Singh, defendant No. 1, for the principal of the two bonds Rs. 2,122 and Rs. 1,000, with interest at 18 per cent. per annum from the dates of the bonds till the date of suit. If the amount found due on account is not paid within three months of the receipt of the decree in the lower Court, the father's share in the mortgaged properties will be liable to be sold on partition."

Upon the findings of the High Court this decree was too favourable to the plaintiff and incorrect. The law was finally established no doubt since that decision by this Board in the case of *Narain Prasad* v. *Sarnam Singh* (1), which determined that "A mortgage of the joint family property as a Mitakshara family by its Karta (or manager), unless necessity or an antecedent debt is proved, is void; the transaction itself gives to the mortgagee no rights against the Karta's interest in the joint family property."

Their Lordships, however, have now to examine whether the findings of the High Court were justified. Dealing first with the mortgage of 1896, the recital in it is that it is for the mortgagor's third part in the repayment of two antecedent bonds for family necessaries for which two earlier bonds of 1890 and 1892 had been given. There is no apparent attack on the bond, which the High Court describes as the bond of 1890 but which, if the Hindu chronology is properly translated, seems to be of October 1889, and which was for Rs. 2,000. But there is an attack upon the bond of 1892 as having a false recital, because it says that the money was borrowed to purchase a village called Naya Hajipur. The High Court says that the recital must be false as in 1889 the defendant had mortgaged two annas of that village with only one of his brothers. The family were, therefore, the Judges say, already in possession of the village.

There is nothing to show that the family, which was a joint family, had possession of the whole village. They apparently had then only a two-annas share. On the occasion of the mortgage of 1892 they are found in possession of a three annas share, from which one might conjecture that the money was borrowed to buy the additional anna share. The Judges apparently lay some stress upon the fact that there were only two mortgagors instead of three when the two-annas share was mortgaged. They do not say in terms that, because on the first occasion two brothers joined in the mortgage and two annas were mortgaged and on the second occasion the three brothers joined in the mortgage and three annas were mortgaged, therefore, it must be taken that each brother had an anna share. But unless this construction were to be put upon the transaction, it would appear that the joint family property had been increased by the purchase of the one-anna share. The statement in the judgment that the recital must be false is certainly unwarranted.

With regard to the second mortgage, the High Court took the recital as being that the money was borrowed for repayment of Zerpeshgi, laying a stress on the syllable "re". They proceeded to state that as the mortgagors were in possession of the Thika property there seemed no necessity for redemption; no doubt the translation did give the word as "repayment." But upon this point being taken, the plaintiff challenged the accuracy of the translation from the original, and he applied for permission to send to this country as part of the record another sworn translation which rendered the word as "payment" instead of "repayment." The High Court did not think itself warranted in authorising this, but it directed that the original mortgage should be sent to this country. This has been done and a member of their Lordships' Board, who can read the vernacular, has read it and says that the word is "payment", not "repayment." The fanciful superstructure, in any case a somewhat fanciful one, which the High Court based upon the syllable "re" falls to the ground.

These being the only objections raised in the judgment of the High Court, and they so failing, their Lordships are remitted to the question whether the Subordinate

(1) 40 Ind. Cas. 284; 44 I. A. 163; 15 A. L. J. 584; 2 P. L. W. 29; 21 C. W. N. 990; 33 M. L. J. 39; 19 Bom. L. R. 646; 26 C. L. J. 97; (1917) M. W. N. 516; 6 L. W. 334; 39 A. 500 (P. C.).

Judge was right in holding that sufficient proof had been given before him. The allegations made in the defence that the father was of immoral life, and borrowed the money for the expenses incident thereto, are of the class of allegation which is only too frequently made when a mortgage suit is contested. No evidence was given in support of them. The burden of proof lay upon the defendants and was not discharged; so these allegations fall to the ground. Upon the plaintiff lay the burden of proving necessity in such case. He called evidence and produced documents, not all that could have been called or produced, but enough to satisfy the Subordinate Judge, and there is material on the record to show that he had armed himself with further proof of witnesses who might be in attendance if it were required.

Their Lordships, having examined into the whole matter, see no reason to differ from the conclusions of the Subordinate Judge, now that the criticisms of the High Court have been removed, and they think that his judgment upon the main point in the case should be restored.

There is, however, a question as to interest, as to which their Lordships are inclined to agree with the view taken by the High Court. The covenant in the bonds was to pay interest at the rate of Rs. 1-8-0 per cent. per mensem, with provision for half yearly rests, and a further penalty in the event of default. When the suit came on, the plaintiff did not claim the penalty, and indeed he remitted a large amount of the interest and compound interest; but even so, judgment was given for sums of money fixed as Rs. 32,000, and Rs. 8,000 respectively, with further interest from the date of suit.

When the High Court arrived at the sum for which the Judges thought the father's share would be liable, they fixed it by taking the two original principal sums and allowing simple interest at the rate stipulated, which is equivalent to 18 per cent. per annum. It has been argued on behalf of the appellant that this is too little and is not right. Their Lordships have recently had occasion to consider this matter in the case of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2) decided on the 18th February 1919. In that case they had laid it down that:—"It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate, and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand."

They proceed to observe as follows:—

"It remains, therefore, that there was necessity and, in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority."

These principles must be applied to the present cases. In conformity therewith, the necessity for the high rate of interest secured by these bonds must be proved, if it is to stand. And in this matter their Lordships are not disposed to interfere with the view taken by the High Court. In the result, the appeal will be allowed and the decree of the Subordinate Judge will be restored, but with the respective variations that the sums found due and owing to the plaintiff will be those found due by the High Court, instead of those found due by the Subordinate Judge. The appellant will have his costs here and in the Courts below. Their Lordships will humbly recommend His Majesty accordingly.

Appeal allowed.

(2) 50 Ind. Cas. 434; 46 I. A. 145; 23 C. W. W 700; 36 M. L J. 521; 17 A L. J. 591; 21 Bom. L. R. 484; 26 M. L. T 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R (P. C.) 49; 41 A. 571; 11 L. W. 188 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 121 OF 1918.

April 1, 1919.

Present :—Mr. Crump, A. J. C., and Mr. Raymond, A. J. C.

BHAWAL KHAN AND OTHERS—APPLICANTS

versus

EMPEROR—OPPONENT.

Sind Frontier Regulation (III of 1892), ss. 17, 20, 24—Security for good behaviour, order for—Revision—Judicial Commissioner, power of, to interfere—Criminal Procedure Code (Act V of 1898), s. 439.

The Court of the Judicial Commissioner of Sind has no jurisdiction, either by express enactment or by necessary implication, to interfere in revision with an order made by a District Magistrate under sections 20 (1) and 24 (1) of the Sind Frontier Regulation requiring a person to furnish security for good behaviour. [p. 771, col. 2.]

Application for revision of the order of the District Magistrate, Upper Sind Frontier.

Mr. *F. J. DeVerteuil*, for the Applicants.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—This is an application praying this Court to exercise the powers of revision conferred by section 439 of the Code of Criminal Procedure with regard to an order made by the District Magistrate, Upper Sind Frontier, on November 29th, 1918, under sections 20 (1) and 24 (1) of the Sind Frontier Regulation, 1892. Though at the first hearing we were in some doubt as to the nature of the order, the copy produced at our request by the Public Prosecutor makes it clear that the order is one which is strictly within the scope of the Regulation.

The question for our determination—and it was for this purpose that the case was set down for hearing—is whether this Court has jurisdiction. The point is important and is not directly covered by authority, for we are unable to consider certain extra judicial opinions which have been alluded to in argument. Though certain provisions of the Sind Frontier Regulations have from time to time been considered by this Court, there has been no decision upon the precise point now before us. In *Emperor* v. *Imambux Rowal Khan* (1) the ground on which this Court held that it could interfere was that the order complained of was one which could not have been made under the provisions of the Regulation of 1892, and was in fact expressed to be an order under section 514 of the Code of Criminal Procedure. It was precisely for this reason that the Court held that it had jurisdiction, and we are unable to follow Mr. De Verteuil's argument that this case gives rise to an inference in his favour. In so far as it is in point at all, it suggests that the Court would have held that there was no jurisdiction had the order been strictly within the terms of the Regulation. In *Imperator* v. *Jaro* (2) the main question for decision was whether the Regulations applied to a certain area. The Court held that they did not and any remarks as to the effect of the Regulations in ousting the jurisdiction of the Court are *obiter*. In other respects also the case must be distinguished, as the order there was one under section 3 of the Regulation of 1872, and was, therefore, plainly of an executive nature. In *Imperator* v. *Ghulam Kadir* (3) the question was whether this Court had power to release on bail certain persons who were being tried by a Council of Elders under section 8 of the Regulation of 1872. It was held that there was no jurisdiction and the reason adduced was, put shortly, that under section 17 of the Regulation of 1872 general revisional jurisdiction is vested in the Commissioner and that the jurisdiction of this Court was, therefore, *pro tanto* excluded. If that decision can be extended beyond the facts then before the Court, it is clearly against the present applicants. The point is, however, not entirely free from doubt and requires further examination.

In the absence of any direct authority the question must be determined on the provisions of the Regulations themselves. The powers which are invoked are those which are conferred upon the Court by section 439 of the Code of Criminal Procedure.

(1) 24 Ind. Cas. 952; 7 S. L. R. 194; 15 Cr. L. J. 544.

(2) 12 Ind. Cas. 646; 5 S. L. R. 54; 12 Cr. L. J. 558.

(3) 12 Ind. Cas. 656; 5 S. L. R. 105; 12 Cr. L. J. 568.

The words "Any proceedings" in that section are no doubt very wide, but they must be confined to proceedings within the scope of the Code. This is not only an ordinary canon of construction but follows from section 1 (2). We are concerned here with a special or local law and we cannot interfere unless there is a specific provision empowering us to do so. The Criminal Procedure Code contains no specific provision of this nature and if it is to be found anywhere, it must be in the Regulations themselves.

By virtue of section 3 of the Regulation of 1892 both Regulations are to be read as one. In the Regulation of 1872 there is one section only which bears in any way upon the matter now before us, *viz.*, section 11. The object of the Legislature in enacting that section is manifest. The powers given by the Regulation are in certain respects inconsistent with the ordinary Criminal Codes. For instance section 7 is in direct conflict with section 497 of the Penal Code in so far as it makes a married woman punishable with the offence of adultery. Thus it was necessary in such cases to exclude the operation of the Codes. In those matters which are specifically dealt with in the Regulation the position is thus clear enough. The Codes, so far as they are in *pari materia*, apply unless their provisions are inconsistent with the Regulations in matters outside the scope of the Regulations, the Codes are plainly applicable. Section 11 of the Regulation, 1872, carries us no further than this. It cannot be invoked as laying down even by implication that an order for security made under section 20 (1) of the Regulation is subject to the powers of revision conferred by section 439 of the Code of Criminal Procedure.

Reliance has, however, been placed on section 27 of the Regulation of 1892. It may be observed that this Regulation is divided into parts by cross-headings. Sections 5 to 18 inclusive are in that part of the Regulation which deals with the Council of Elders and the powers of the District Magistrate or Commissioner to make decrees in civil matters or to pass sentence in criminal matters on the finding of such a Council. It may be noted that section 17, which gives powers of revision to the Commissioner, belongs to this part. The effect of that section will be dealt with later. The matter with which this Court is now concerned belongs to that part of the Regulation of 1892 which is headed "Security for good behaviour." This covers sections 20 to 27. This last section runs as follows: "Sections 20 to 26 both inclusive shall be read with and construed as part of Chapter VIII of the Code of Criminal Procedure which (*viz*, Chapter VIII) shall, except where the contrary is expressed or implied, be applicable so far as may be to cases of requiring or giving security under sections 20, 21 and 26". It is important to observe that what is made applicable is Chapter VIII of the Code of Criminal Procedure and nothing else. The powers which we are asked to exercise are not conferred upon us by Chapter VIII. Had the Legislature intended that Chapter XXXII or any portion of it should be applicable, surely it would have used apt words to express that intention. The meaning of section 27 appears to be that, in so far as the procedure in security cases is not prescribed by the Regulations themselves, it is to be sought in Chapter VIII of the Code of Criminal Procedure. It is not possible to argue that because the provisions of the Regulations giving power to take security are to be read as part of Chapter VIII of the Code of Criminal Procedure, therefore, orders made in the exercise of those powers are subject to the same revisional jurisdiction as orders made under Chapter VIII itself.

It would, therefore, appear that neither section 11 of the Regulation of 1872 nor section 27 of the Regulation of 1892 can be construed as conferring by implication upon this Court the powers of revision contained in section 439 of the Code of Criminal Procedure with regard to matters dealt with under the Regulations. It may be remarked that it is difficult to believe that the Legislature, had it desired that this Court should have power to interfere, would not have provided for this by express enactment. Further having regard to the nature of this legislation and of the area to which it is made applicable, it is not surprising if it was considered inadvisable that the proceedings should be sub-

ject to the jurisdiction of the regular Courts of revision and appeal. This consideration brings up once more section 17 of the Regulation of 1892. That this section gives to the Commissioner in Sind powers of revision in the case of decrees and sentences cannot be disputed. Is it to be supposed that the Legislature intended that decrees and sentences should be revised by the Commissioner and orders for security by this Court? That surely would be a most inconvenient construction, which a Court should decline to adopt unless absolutely constrained to do so. Nor again is it easy to understand why it was necessary to confer these powers expressly upon the Commissioner, and to leave the powers of this Court to be inferred by dubious implication. But it has been argued that section 17 confers a general power of revision on the Commissioner. If so, the jurisdiction of this Court is necessarily excluded on principles too well-known to need recapitulation. This indeed is the *ratio decidendi* in a case which has already been cited, *Imperator* v. *Ghulam Kadir* (3). If section 17 of the Regulation operates to exclude the jurisdiction of this Court to grant bail under section 498 of the Code of Criminal Procedure, it must equally operate to exclude our jurisdiction to interfere under section 439. It can, no doubt, be argued that section 17 deals with decrees and sentences only, and that an order for security is neither a decree nor a sentence and that, therefore, our powers under section 439 are not affected. But neither is an order refusing bail a decree or a sentence. It is not, therefore, possible to distinguish *Imperator* v. *Ghulam Kadir* (3), and it is an authority against the present applicants. It is difficult, however, not to feel a certain degree of doubt as to the true construction of section 17 of the Regulation of 1892. In terms it applies to decrees and sentences only, and the position which it occupies in the Regulation favours that construction. But apart from the authority of the last case cited there are certain further considerations to be taken into account. The order with which we are here concerned is an order committing certain persons to rigorous imprisonment for failure to give security. There is authority for holding, *Emperor* v. *Tula Khan* (4), that under the Code of Criminal Procedure an order such as this is a sentence. There are no doubt conflicting decisions on the point. The question, however, is whether such an order is a 'sentence' within the meaning of the word as used in the Regulations themselves. It may be that such was the view of the Legislature and, if so, the order would come within the scope of section 17 of the Regulation of 1892. If so, the power of revision rests with the Commissioner and not with this Court.

But whatever be the true construction of section 17 of the Regulation of 1892, it does not appear that the jurisdiction sought to be invoked is conferred upon this Court either by express enactment or by necessary implication. It follows that upon any view of the case this application must be dismissed.

Application dismissed.

(4) 30 A. 334; A. W. N. (1908) 133; 5 A. L. J. 318; 7 Cr. L. J. 427; 4 M. L. T. 41 (F. B.).

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 176 OF 1920.

March 20, 1920.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Rafique.

EMPEROR—APPELLANT

versus

SUNDAR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 395, 397—Dacoity with torture—Sentence—Leniency, whether should be shown—Jail identification—Magistrate superintending, evidence of, whether necessary—Court, duty of.

A person found guilty of the offence of dacoity with torture ought not, in the matter of sentence, to be treated with any considerations of leniency. [p. 773, col. 1.]

Where a jail identification is held in the presence of a Magistrate, the Magistrate should be produced at the trial as a witness, and it is the duty of the Court to call him before the conclusion of the trial. [p. 774, col. 1.]

Order on application of the Government Advocate on behalf of the Local Government

against the order of acquittal passed by the Sessions Judge, Mainpuri, dated the 19th of December 1919.

Mr. *Hyves* (Government Advocate), for the Crown.

Mr. *Buleshwari Prasad*, for the Respondent.

JUDGMENT.

RAFIQUE, J.—The Appeal No. 176 of 1920 and Revision Application No. 129 of 1920 are connected inasmuch as they arise out of one trial. Both the appeal and the revision application are on behalf of the Government. It appears that a dacoity was committed at the house of one Khiali Ram, a Brahman, at the village of Amarpur, on the night of the 4th of February 1919. More than 20 persons, armed with guns, pistols, swords, spears and *lathis*, raided the house of Khiali Ram and that of his nephew Din Dayal and maltreated the inmates of the two houses in order to find out from them where they had buried their treasure. The dacoits burnt Din Dayal's hands with a torch and set fire to his wife's skirt which resulted in her leg and hand being slightly burnt. They brutally ill-treated the daughters of Khiali. All the women of the two houses were stripped of their ornaments and the two houses were ransacked entirely. The dacoits kept off the villagers by firing off guns from time to time. They remained in the houses of Khiali and Din Dayal for more than an hour. Immediately after the departure of the dacoits the Chowkidar of the village ran to the Mainpuri Police Station, a distance of about four miles from Amarpura, and reported the occurrence. The first report was made at 6 A.M. Sheo Shunker Lal, the second officer at the Kotwali, promptly proceeded to the scene and arrived there at 7 A.M. He took with him Ajudhia Prasad, a neighbouring Zamindar. On arrival at Amarpur and after an inspection of the house of Khiali, the Sub-Inspector traced the footsteps of the dacoits for a considerable distance and at a spot a mile and a half from the village found several articles which had been accidentally dropped by the dacoits. One of these articles was a piece of paper which subsequently turned out to be a jail release ticket. The Police continued the investigation when on the 15th of February, the senior Sub-Inspector Irtaza Husain took it up. He went on the clue supplied by the jail release ticket and after enquiry at the jail found that it belonged to one Narain, who had been released on the 13th of April 1917 after undergoing a year's sentence of imprisonment under section 110 of the Code of Criminal Procedure. In fact the jail register showed that Narain was the only prisoner released on the 13th of April 1917. Irtaza Husain at once proceeded to the village of Narain and arrested him and got from him information which led to the arrest of Radha Brahman. Radha gave more detailed information which led to the arrest of several persons. Radha turned an approver. On the materials thus collected the Police sent up several men to the Magistrate for trial on a charge of dacoity, six of whom were committed by the Magistrate to the Court of Session. It was stated then that 4 or more of the dacoits were absconding and could not be traced. Their names were known to the Police on the authority of Radha. The learned Sessions Judge of Mainpuri, Mr. Kisch, after hearing the evidence for both sides, convicted the accused before him of participation in the dacoity at the house of Khiali and sentenced them on the 10th of May 1919 to transportation for life. The appeals of the prisoners to this Court were duly heard and rejected. Subsequently two other men were arrested by the Police, namely, Sukhi and Sardar, and were put up before a Magistrate on the charge of dacoity. Radha, the approver, and some other persons were examined, and the Magistrate committed Sukhi and Sardar to take their trial before the Sessions Court. Immediately after the committal of Sukhi and Sardar a third person was arrested, namely, Sundar. He was also challaned before the Magistrate, who after hearing some of the witnesses committed him also to the Court of Session. The learned Sessions Judge of Mainpuri, not Mr. Kisch who had been transferred from the district, tried all the three men together, namely Sukhi, Sardar and Sundar; he convicted the first two and sentenced them to seven years' rigorous imprisonment. He acquitted Sundar, holding that the evidence for the prosecution had not brought the charge home to Sundar. The Government has appealed from the acquittal of

Sunder and has filed a revision with regard to the sentences passed on Sukhi and Sardar.

I shall dispose of both the appeal and the revision application by one judgment. The revision application may be disposed of with a few words. No one appears on behalf of Sukhi and Sardar to show cause. The learned Sessions Judge has found, and I think correctly on the evidence in the case, that Sukhi and Sardar were guilty and that they did take part in the dacoity on the night of the 4th of February 1919. The dacoity, as I have mentioned already in the opening part of this judgment, was attended with brutal treatment of the inmates of the houses and was not an ordinary dacoity. The persons who participated in that dacoity do not deserve any consideration of leniency. It is unintelligible to me how the learned Sessions Judge, who tried Sukhi and Sardar, came to sentence them only to seven years' rigorous imprisonment without any attempt to make a distinction between their offence and that of their comrades, who were tried, convicted and sentenced by Mr. Kisch. In fact the present learned Judge does not even refer to the former trial. In my opinion it is highly reprehensible that men who are guilty of such brutal crimes as the dacoits who raided the houses of Khiali and illtreated the inmates of his household should be, after being found guilty, treated with leniency. To my mind the judgment of the learned Judge is highly unsatisfactory. It is a sketchy judgment and does not set out the facts or the reasoning in a manner that is required in a judgment of Sessions trials. In my opinion the sentences on Sukhi and Sardar should be the same as those that were passed against their comrades in the former trial, namely, transportation for life. I would, therefore, sentence both of them to transportation for life.

As to the case of Sundar I have read the whole evidence in the case with great care and have heard the learned Counsel on his behalf. I regret to say that the impression left on my mind by the record of the evidence taken by the learned Judge is that he has not paid that attention to the recording of evidence which is required in a case of importance like that of a dacoity with torture or with murder. The evidence leaves the impression on one's mind of having been recorded hastily, and there is no connection or system as to how one statement leads to another. The judgment, as far as it concerns Sundar, is really in a few sentences and is highly unsatisfactory. Now the evidence against Sundar consists of the statements of three persons, namely, Khiali, Radha and Bhikam. Khiali is the man at whose house the dacoity was committed. He says that he saw Sundar among the dacoits and that it was Sundar who was in a room tying up a bundle of clothes. Radha, the approver, mentioned Sundar in his first statement, recorded on the 21st of February 1919, and adhered to that statement throughout. Radha has made five statements and in all those five statements he has mentioned the name of Sundar. In fact if Radha is to be believed, Sundar was not an unimportant member of the gang. It was at the field of Sundar that the members of the gang met in the evening of the night of the dacoity. It is true that Radha says that he did not see Sundar in the room tying up a bundle of clothes; and upon the difference in the statements of the two men (namely Khiali and Radha) as to the tying up of a bundle of clothes by Sundar the learned Judge rejects the evidence of both Khiali and Radha. I am not prepared to agree with the learned Judge that the said difference in the two statements is such as to discredit the two witnesses entirely. It seems to me that Radha himself must have been busy in looting and getting property and had no time to think or see what his other comrades were doing. In fact this reason by itself is sufficient to explain the apparent discrepancy. Bhikam is the Mukhia of the village of Sundar. He swears that he saw a number of people at the field of Sundar about 6 in the evening of the 4th of February 1919. The learned Judge discards his evidence on the ground that Bhikam Singh made the statement under pressure of the Police. I have examined the statement of Bhikam Singh and I cannot find anything in it to show that he was persuaded by the Police to make a false statement. It is highly unlikely that Bhikam Singh would implicate an innocent man of his own village

at the instance of the Police when there was no enmity between him and that man. I think the depositions of Khiali, Radha and Bhikam Singh are worthy of credit and they prove beyond a reasonable doubt that Sundar took part in the dacoity on the night of the 4th of February 1919 at the house of Khiali.

Before concluding the judgment I would also draw the attention of the learned Judge to an omission in the trial of the case. Khiali stated on oath that he had been taken to the jail and identified Sundar from among seven other under-trial prisoners. There are Police papers on the record to show that jail identification was demanded. The Committing Magistrate, it seems, forgot to send up the Deputy Magistrate before whom the identification of Sundar took place. But it was the duty of the learned Judge to have called that evidence before the conclusion of the trial. However, the omission to do so does not, in my opinion, weaken the case against Sundar or throw any doubt upon his guilt. I would, therefore, convict him and sentence him to transportation for life.

MEARS, C. J.—I agree that the appeal of the Government in the case of Sundar must be allowed and I also agree that the appropriate sentence is transporation for life.

As regards the other two men who were sentenced to seven years' rigorous imprisonment, I am also in agreement that the application for enhancement of sentence must be allowed and those men be sentenced to transporation for life.

The reasons why Mr. Justice Rafique and I have given separate judgments in this case is that both of us were dissatisfied with the way in which the learned Sessions Judge had dealt with the cases. To me it seemed to show a lack of thought and a lack of care and failure to appreciate how grave was the matter that was before him. But I thought it better that the substantial criticism should proceed from a Judge who has had a wide experience of the administration of criminal work here and knowledge of the procedure of the Courts in this country. For this reason I thought it better that Justice Rafique should be asked to pronounce the principal judgment whilst I pronounce the second judgment though I am entirely in accord with what he has said.

BY THE COURT.—The order of the Court is that the appeal of the Government as against Sundar be allowed. Sundar is convicted under section 395 of the Indian Penal Code and is sentenced under section 397 to transportation for life.

In the case of Sukhi and Sardar we direct that they be sentenced under section 397 of the Indian Penal Code to transportation for life, the period to run from the date from which they are undergoing the sentence of seven years' rigorous imprisonment.

Appeal allowed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 400 OF 1919.

September 18, 1919.

Present:—Mr. Justice Broadway.

CHANAN SINGH—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 338, 339—Pardon tendered to accused—Order directing trial—Jurisdiction—Procedure.

At the conclusion of a Sessions trial the Sessions Judge directed the commitment for trial of two of the accused to whom a pardon had been tendered by the District Magistrate:

Held, (1) that the Sessions Judge had jurisdiction to make the order; [p. 775, col. 1.]

(2) that on being placed on trial the accused would first plead their pardons and it would be for the trial Court to decide whether or not the pardons had been forfeited. [p. 775, col. 1.]

Revision from the order of the Sessions Judge, Ludhiana, dated the 6th March 1919.

Lala *Jagan Nath*, for the Petitioner.

Mr. *Herbert* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—The relevent facts are that Chanan Singh and *Musammat* Bishni were tendered pardons by order of the District Magistrate on the 3rd October 1918. The case in connection with which the pardons were tendered was duly heard by the Sessions Judge, who at the conclusion of the trial

directed the commitment of both of these persons to the Sessions for trial on the original charge, *i. e*, one under section 302, Indian Penal Code. Chanan Singh and *Musammat* Bishni have preferred separate petitions against this order directing their commitment. I have heard Lala Jagan Nath for Chanan Singh and Mr. Devi Dayal for *Musammat* Bishni, while Mr. Herbert has addressed me on behalf of the Crown.

That the learned Sessions Judge had jurisdiction to pass the order he has passed is clear, and it is obvious that most of the grounds taken by Lala Jagan Nath are based on a misunderstanding of the order complained of. This case is, as near as may be, on all fours with that of *Crown* v. *Kadu* (1) and relied on by Mr. Herbert.

I am unable to see any justification for interfering with the order of the Sessions Judge. When the petitioners are placed on their trial they will first of all plead their pardons, and it will be for the trial Court to decide whether or not the said pardons have been forfeited. I dismiss both petitions.

Petition dismissed.

(1) 176 P. L. R. 1905; 31 P. L. R. 1904 Cr.; 1 Cr. L. J. 1082.

PATNA HIGH COURT.

CRIMINAL REVISION No. 85 OF 1920.

March 15, 1920.

Present:—Mr. Justice Jwala Prasad.

GOWKARAN LAL—COMPLAINANT—PETITIONER

versus

SARJU SAW—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 179, 181 (2), 202—Penal Code (Act XLV of 1860), s. 403—Criminal misappropriation—Place of trial—Preliminary inquiry, when necessary.

Accused was charged by his master with having misappropriated a sum of money. He received the money on behalf of his master at Jamiganj, and deposited it in his master's name with a firm at Barh; he withdrew it from this firm and failed to account for it, the complaint was filed in the Court of the City Magistrate of Patna, who dismissed it on the ground that the case was of a civil nature for the adjustment of accounts:

Held, (1) that the facts alleged did not necessarily involve an adjustment of accounts, and the complaint should not have been dismissed on that ground alone; [p. 776, col. 2; p. 777, col 1.]

(2) that as the offence was complete the moment the accused received or retained the money with the dishonest motive of appropriating it or converting it to his own use, and as he received the money at Barh, the City Magistrate of Patna had no jurisdiction to entertain the complaint. [p. 777, cols. 1 & 2.]

Where upon a complaint it is doubtful whether an offence has been committed, the Magistrate should hold an inquiry under section 202 of the Criminal Procedure Code before summoning the accused to ascertain whether a *prima facie* case has been made out and the accused should be summoned or not. [p. 777, col. 1.]

Application against the order passed by the Officiating Sessions Judge, Patna, dated the 23rd December 1919, affirming that of the Sub-Divisional Magistrate, Patna City, dated the 18th November 1919.

Messrs. *Akbari* and *Rai Guru Saran Prasad*, for the Petitioner.

Mr. *Janak Kishore*, for the Opposite Party.

JUDGMENT.—This is an application against the order of the Magistrate of the 18th of November 1918, dismissing the complaint of the petitioner under section 203 of the Code of Criminal Procedure. The order, on motion to the Sessions Judge, was upheld by him on the 23rd of December 1919. The complaint was under section 403 of the Indian Penal Code in respect of a sum of Rs. 2,000 said to have been misappropriated by the accused, who was an agent and a servant of the petitioner's master.

The ground stated by the Magistrate for dismissing the complaint was that the case was one of a civil nature for adjustment of accounts, and not of a criminal nature. The learned Sessions Judge amplified this ground in his order of the 23rd December 1919, stating "that in the present case the accused was dealing with the money of his master as an agent and had got the money honestly."

The learned Sessions Judge has also referred to his order of the same date passed in respect of another complaint filed by the petitioner against the accused under section 406 of the Indian Penal Code.

that on the same date, namely, the 18th of November, the petitioner lodged two complaints against the accused, one in respect of defalcation said to have been committed by him in regard to Rs. 945 alleged to have been given to the accused by the master of the complainant to open business at Badaya with the firm of one Pahari Singh in March 1917. In that case also it was held both by the Magistrate and the Sessions Judge that the accused dealt with certain firms on behalf of the petitioner's master and was liable for accounts and that no criminal charge would lie. The petitioner moved this Court against the order of the Magistrate and the Sessions Judge in both the aforesaid cases. His application to this Court in the case under section 406 was rejected by a Division Bench of this Court presided over by Mullick and Sultan Ahmed, JJ., on the 2rd of February 1920. The application in regard to the present case, however, was admitted by the said learned Judges by their order of the 23rd of February 1920 and a Rule was issued upon the District Magistrate and upon Sarjoo Saw to shew cause why further enquiry should not be ordered. The District Magistrate has shown no cause. The accused now appears through Mr. Janak Kishore, a Vakil of this Court.

The question for consideration is whether the complaint in this case raises a question of account between the petitioner and his agent, or whether it is in respect of a specific sum said to have been entrusted to the accused by a firm with which the complainant's master had dealings in order to be handed over to the petitioner's master. Paragraph 4 of the petition sets out the duties of the accused which he had to perform in connection with the firm of Mahabir Lal, master of the complainant. The accused, as an agent of Mahabir Lal, was to go out to the said firms of Ranigunj, Barh, etc., to purchase grains etc., with the money kept in those firms and to get them sold at a profitable rate through those firms. He had also to bring money and accounts from those firms to the complainant's master's firm at Mansurganj, Patna City. The complaint against the accused in respect of Rs. 945 said to have been made over to him in 1917 related to his failure to deposit the said sum with the firm of Pahari Singh of Badaya or to carry on business with the firm on behalf of the complainant. That was possibly a matter of adjustment of accounts between the parties. In the present case the charge against the accused laid in the complaint is that on the 6th of Aswin Sudi Sambat 1976, corresponding to the 30th of September 1919, the firm of Sant Lal-Makund Lal made over to the accused Rs. 2,000 out of Rs. 3,762 belonging to the complainant, which was in deposit with the firm of Sant Lal Makund Lal. The accused was asked to make over the said sum to the complainant's master at Mansurganj, Patna City. It has already been said that, according to the case of the complainant, it was one of the duties of the accused to carry money and accounts from the several firms mentioned in paragraph 4 of the complainant's petition to the firm of the petitioner's master. The complainant's case is stated in the following terms:—

"The accused, after receiving the money to be handed over to the complainant, deposited the same in the firm of Chhatu Das Kanhai Lal at Barh in the name of the complainants's master's firm on the 20th Aswin Sudi corresponding to the 6th October 1919, two days after he again withdrew that money from the firm of Chhatu Das-Kanhai Lal at Barh, telling them that he was carrying the money to be made over to the firm of Mahabir Lall. But on the 25th of October 1919 when he appeared before the complainant's master at Mansurganj, Patna City, he made over the Chitha of the Barh account and on being asked whether he had brought any money from the Ranigunj firm, he denied having done so. On Kartik Badi 2rd Chottay, complainant's master, came to know from Mahabir Dandidar that the accused had actually taken out from the firm at Ranigunj Rs. 2,000 to be brought to the complainant's master. The accused in the meantime had gone away on the plea that his daughter was to be married. The complainant deputed a man to find him out and to enquire about the aforesaid Rs. 2,000 said to have been taken by him; but he was not found at his house."

The above allegations do not necessarily involve an adjustment of accounts, and the complaint could not be thrown out on that

ground alone. It was open to the Magistrate in case of doubt to hold an enquiry under section 202 of the Code of Criminal Procedure before summoning the accused, in order to find out whether a *prima facie* case was made out or whether the accused should have been summoned or not. I am, however, not satisfied as to the jurisdiction of the Magistrate at Patna City to entertain the complaint in question. The accused is said to have received the money from the firm of Sant Lal at Ranigunj. He deposited that amount in the name of the complainant's master in the firm of Chattu Das-Kanhai Lal at Barh. He again took out that money from the firm of Chhatu Das-Kanhai Lal at Barh. Since then it is not known where the accused took the money to. Under section 403, Indian Penal Code, the offence is complete the moment the accused receives or retains the money with a dishonest motive of appropriating it or converting it to his own use. The offence was, therefore, complete at Barh, where he received the money and has not since then accounted for it. It is true that the money was to be made over to the petitioner's master, Mahabir Lal, at Mansurgunj, Patna City, within the jurisdiction of the Patna City Magistrate, but the failure to hand over the money in respect of which the offence of misappropriation was already committed is not a necessary ingredient to constitute an offence of criminal misappropriation, and is, therefore, not a consequence which has ensued by reason of anything done by the accused. Section 179 of the Code of Criminal Procedure, therefore, has no application to the present case. It is also clear from the express provisions made under section 181, clause (2), of the Code of Criminal Procedure that the Legislature never intended that the words "consequence which has ensued" occurring in section 179 should apply to criminal misappropriation or criminal breach of trust. If that were so, there was no necessity of an express provision in clause (2) of section 181. That clause provides that the offence of criminal misappropriation or of criminal breach of trust may be enquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the person by whom the offence was committed. The complaint in this case does not allege that any part of the sum of Rs. 2,000 said to have been misappropriated by the accused was received or retained by him within the jurisdiction of the Patna City Court. The view is supported by the decisions of the Calcutta and the Madras High Courts, *viz.*, the cases of *Simhachalam* v. *Rati Kanta Laha* (1) and *Rambilas, In re* (2). There has been difference of opinion in the Allahabad High Court, *vide Queen-Empress* v. *O'Brien* (3), *George Langridge* v. *Grace Atkins* (4), *Ganeshi Lal* v. *Nand Kishore* (5). The cases in Allahabad were all decided by Judges sitting singly and have been dealt with in the aforesaid Madras and Calcutta Courts cases.

For the reasons given in the decisions of the latter Courts, with which I entirely agree, I am of opinion that the present application was beyond the competency of the Magistrate of Patna City to entertain. I would, therefore, dismiss this application, and leave the complainant to take any course that he may be advised.

Application dismissed.

(1) 41 Ind. Cas. 138; 21 C. W. N. 573; 25 C. L. J. 451; 18 Cr. L. J. 762; 44 C. 912.

(2) 26 Ind. Cas. 136; 38 M. 639; 29 M. L. J. 175; 16 M. L. T. 505; (1914) M. W. N. 894; 15 Cr. L. J. 688.

(3) 19 A. 111; A. W. N. (1893) 191; 9 Ind. Dec. (N. S.) 72.

(4) 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856.

(5) 15 Ind. Cas. 812; 34 A. 457; 10 A. L. J. 45; 13 Cr. L. J. 479.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 372 OF 1919.

July 28, 1919.

Present:—Mr. Justice Abdul Raoof.

NABI BAKHSH—PETITIONER

versus

EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 437—Further inquiry, order for, when to be made—Notice to accused, whether necessary.

Before an order for further enquiry is passed to the prejudice of an accused person who has been

discharged, it is proper that he should be called upon to show cause why such order should not be passed

An order directing further enquiry should not be passed where on the face of the order of discharge it does not appear that the order is perfunctory or foolish.

Revision from the order of the District Magistrate, Sialkot, dated the 13th December 1918.

Mr. *Kharak Singh*, for the Petitioner.

JUDGMENT.—In this case the petitioner was charged under section 406, Indian Penal Code, and an order of discharge was recorded by Pandit Shambhu Nath, Magistrate, 2nd Class, on 7th September 1918. The District Magistrate, Mr. C. F. Usborne, by an order, dated the 13th December 1918, set aside the order of discharge and ordered a fresh trial by the Magistrate of the Ilaqa. The petitioner has come up on revision to this Court.

The first ground urged on the behalf of the petitioner is that the order of the Magistrate is irregular as it has been passed behind the petitioner's back without any notice being given to him. In my opinion there is force in this ground. It has always been held by this Court and other High Courts that a Court should not pass an order prejudicial to a person without giving him an opportunity of meeting the case against him. It was held in the case of *Dulla* v. *Empress* (1) that before an order for further enquiry is passed to the prejudice of an accused person, it is proper that he should be called upon to show cause why such order should not be passed. This is a very salutary rule of practice which has been acted upon in almost all the High Courts, and though it is not specifically laid down in the law that a notice must necessarily go under these circumstances, it has always been held to be a proper course to adopt. Especially in a case where on the face of the order of discharge it does not appear that the order is perfunctory or foolish, a superior Court ought not to set aside an order passed by a competent Court. If any authority is necessary for this proposition, it is to be found in a Full Bench case *Emperor* v. *Kiru* (2) in which Mr. Justice Kensington is reported to have observed at page 34* that no invariable rule can be laid down, but speaking generally further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete. None of these circumstances are to be found in the present case. In this case it appears from the judgment that the learned Magistrate has thoroughly examined the evidence given in the case and has also taken into consideration the record of the execution proceedings. Reading the judgment of the learned Magistrate, which, in my opinion, is a careful and exhaustive judgment, I think the order under revision was uncalled for.

For the reasons above set forth I set aside the order directing fresh trial. Revision allowed.

Petition accepted.

(1) 2 P. R. 1901 Cr; 32 P. L. R. 1901.

(2) 11 Ind. Cas. 132; 10 P. R. 1911 Cr. (F. B.); 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 364; 205 P. L. R. 1911.

*Page of P. R. 1911—*Ed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 52 OF 1919.

July 28, 1919.

Present :—Justice Sir John Woodroffe, KT., and Mr. Justice Walmsley.

JOSEPH PERRY—APPELLANT

versus

THE OFFICIAL ASSIGNEE OF CALCUTTA—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), ss. 36, 103 A (1), 104—Criminal charge against insolvent—Offence, whether can be committed both before and after adjudication—Books of account, concealment or removal of—Destruction, whether refers only to destruction before the Official Assignee takes possession—Charge, error or irregularity in, effect of—Notice of charge, sufficiency of—Intention—Appellate Court, whether can arrive at finding as to intention—Examination of insolvent in insolvency proceeding, whether admissible in evidence in criminal proceeding—Admission—Evidence Act (I of 1872), ss. 17, 132—Voluntary statement—Examination of insolvent under s. 36 of

PERRY *v.* OFFICIAL ASSIGNEE OF CALCUTTA.

Presidency Towns Insolvency Act, whether illegal—Practice—Evidence, weight of, admissibility of—Statement of unreliable witness corroborated by reliable witness, whether can be accepted.

An offence mentioned in section 103 of the Presidency Towns Insolvency Act may be committed by an insolvent either before or after adjudication of insolvency, and the section not only applies to cases of destruction of an insolvent's books of account before they are produced before the Official Assignee but also to cases of destruction in the Official Assignee's office after the latter has taken possession of the documents. [p. 792, col. 1.]

The rule that a charge under section 103 of the Presidency Towns Insolvency Act cannot be maintained if the charge is not framed in pursuance of the notice under section 104 of the Act, is subject to the principle that no error or irregularity in a charge will call for a reversal of an order unless it in fact has occasioned a failure of justice, and in determining whether this is the case, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage of the proceedings. [p. 792, col. 2.]

If an accused person receives notice that the prosecution may seek to prove against him either of two alternative intentions, he cannot, as he must be ready to meet a charge in respect to both, be prejudiced by a charge of having had both intentions. [p. 792, col. 2, p. 793, col. 1.]

It is generally necessary that an insolvent should have notice of the charge which it is proposed to make against him. A notice having reference to removing or causing to remove certain documents is sufficient notice of a charge of preventing the production of those documents within the meaning of section 103 of the Presidency Towns Insolvency Act, inasmuch as removing a document is a mode of preventing its production. [p. 793, col. 1.]

A Court of appeal with all the materials before it can arrive at a finding of intention if this has been omitted *per incuriam* by the trial Judge, provided it is not a jury case. [p. 793, col. 2.]

The examination of an insolvent purporting to be made under section 36 of the Presidency Towns Insolvency Act and without any objection on the part of the insolvent is voluntary and is admissible in evidence in a criminal proceeding against him under section 103 of the Act. [p. 794, col. 1.]

It is the practice to examine an insolvent under section 36 of the Presidency Towns Insolvency Act. [p. 794, col. 1.]

The Court has power to examine an insolvent even if section 36 is not applicable, for the Court must have full control over the insolvent. There is no illegal compulsion in such examination. [p. 794, col. 2.]

In a criminal proceeding against the insolvent something said by him in other proceedings in the insolvency may be relied on as admissions of fact under section 17 of the Evidence Act. Being admissions, they are relevant and admissible, unless they are excluded by sections 18 to 31 of that Act. Even if the examination of the insolvent is not authorised, the answers given on such examination without objection are nonetheless admissible. Even if there was compulsion not being of the kind which excludes a confession, then under the Evidence Act the fact of compulsion might affect the weight of the evidence but not its admissibility. [p. 794, cols 1 & 2.]

It is open to a Court to accept part of the story of one witness who is not reliable, if it be corroborated by another who is reliable. [p. 799, col. 2.]

Appeal against the following decision of Mr. Justice Rankin, dated the 6th June 1919:—

"In this case I have been trying an insolvent under special procedure applicable only to an insolvent by which a Bankruptcy Judge has to take upon himself the duties of a Magistrate and to decide what is in all material particulars a criminal case to be treated as a criminal case. The prosecution has been in the hands of the Official Assignee, and this Court has expended a great deal of time which is badly wanted with regard to other matters in trying out the accusations which are at present before me. I should like to say that I think this procedure is a very unhappy one. It would be infinitely better if the practice were that upon proper report being made by the Official Assignee, the Bankruptcy Judge should, if necessary, make an order for prosecution which should be carried out in the ordinary way and in the ordinary Courts. That is the practice in England and I hope it will be the practice in this country before long. There are many advantages in that, one being that, in the ordinary course of criminal investigation, the prosecution can get more assistance and more trained assistance. The other is that in a proper case, the accused can in a presidency town be sent before a jury. The matters which I have been trying are matters which would be infinitely better tried before a jury; the jury would hear the evidence, they would hear what is alleged by Counsel on both sides, the Judge would sum up to them; and the question whether suspicion has passed into proof, and the question of credibility between one witness and another would be left to them for their decision without giving reasons. That course would have been specially preferable in this case, because it is idle to shut one's eyes to the fact that the insolvent is not really the only person intimately concerned in the matter.

Before proceeding to give my reasons I should like to put on the record the facts

with regard to Mr. Perkins. Construing as best I could, sections 103 and 104 of the Insolvency Act with the relevant sections of the Criminal Procedure Code, I made up my mind that the course most correct and fairest to the accused was to have the prosecution put all their witnesses in the box before I framed the charges; that the accused should be entitled to reserve all cross examination until after the charges were framed, and should not even be called on to show cause against the framing of the charges until after he had heard all the evidence that was going to be given against him. Unfortunately owing to a fire having taken place in the business premises of Mr. Svamvur, Mr. Svamvur could not be brought to Calcutta for some days and in the meantime Mr. Perkins had to sail for England. I was not minded in the stress of these days to prevent, if I could prevent, Mr. Perkins from leaving by the boat which he had arranged to leave by. The result was that Mr. Perkins' evidence has had to be ruled out. So far as I am concerned I heard the evidence of Mr. Perkin's and I took it down nearly a month ago, but from the moment it appeared that he would not be cross examined, I have not looked at my note. I have done my best to forget it altogether and for all purposes Mr. Perkins' evidence is out of the case.

Now I will commence first by considering the position of this insolvent, as regards his method of business and his method of keeping accounts. The main book of accounts is a book which is partly a cash book and partly a ledger. When one comes to look at the cash part of it, one finds that there are no details as regards dates at all. It is obviously a very inartistic cash book and a very unsatisfactory cash book upon the view most favourable to the insolvent. As regards the ledger, that looks more satisfactory but the insolvent himself says that it was written up within the last two or three months. As regards the appearance of the book, from an Official Receiver's point of view, it undoubtedly looks suspicious but that matter is not directly before me, nor can I decide on it. The next thing is the insolvent says that he never kept any stock book at all. From the earliest moment of which I have any trace, both before and throughout this prosecution, the insolvent has always immediately and consistently denied that he ever kept anything corresponding to a stock book. This is in itself a somewhat curious circumstance, if it be true, as the insolvent was trading in jewellery. There is a bill book, there is an approval and an inspection book, about which no comments have been made and which I think are in order. As regards another book which appears now with the first pages torn and with a series of entries on page 26, the prosecution's case is that it was a sort of stock book: the insolvent's case is that he bought a lot of account books at one time chiefly at an auction, that he used to tear off pages from time to time and used them as he happened to require. His case is that that page 26 was a copy of 2 invoices of Benzimra; that the previous pages had been torn off for casual purposes because he did not attribute much value to the book which he bought with a lot of others. Why these invoices of Benzimra should be copied and these only I have not had explained, but so far as regards an invoice copy book or a stock book there was practically nothing in existence according to the insolvent's case. As regards his cash book the insolvent's statement is that the diary (there were two diaries undoubtedly for 1918 and 1919) was his original cash book, that from these entries in the diary, there was what he calls a rough cash book, which I gather to have been a bundle of papers; that the entries in Exhibit B, the book which was produced, come from those two sources. Another book, however, was found upon the search. It now has pages torn off at the beginning and, as has been pointed out this morning, also pages torn off at the end; and the allegation of the prosecution is that pages at the beginning were inspected at the search on the 6th and were seen to contain entries such as would appear in a cash book, as distinct from a ledger, or daybook or any other sort of book. The insolvent's case is that this was another book from which pages were torn as required, that it was not kept and entered as a book of account at all. At the search another blank book of account was discovered: this one is intact. I do not forget that the insolvent kept invoices and other papers and multifarious papers that have not been catalogued. Still looking only at the uncontested facts

as to books, from the point of view of bankruptcy so far as book-keeping is concerned, the case starts with a very considerable deal of suspicion. The matter is not improved by the fact that in an action which the insolvent brought against a certain Rajah claiming to have sold him jewellery with the exception of two bills, no documents material to the present purpose were disclosed, and in cross-examination the insolvent started off with an answer that he kept no books at all. Mr. Ghose has argued before me to-day that if one considers the issue in the case, it is not impossible that the affidavit of documents disclosed all that was relevant to the issue; that the answer about keeping no books at all may have been intended not to be taken at the foot of the letter but as referring to the particular question whether he kept a book which showed his own purchases or his sales; hence that these matters ought not to tell against the insolvent. Though my first impression was very different, I am minded to agree with Mr. Ghose upon that point but if all the explanations be true which are required to explain the insolvent's evidence in cross examination in that action, they certainly do not assist to negative what any sensible person must think obvious, that this man when he became insolvent did so with a very fishy set of books.

Now the adjudication order in this case was made on the 5th March. On the day before the adjudication order the insolvent had received a telegram from a firm or person called Babumall of Delhi from whom he had bought certain jewellery, and it appears that he had paid part only of the full price of the jewellery and had given a post dated-cheque for the balance which cheque had fallen due on the 4th March; the cheque not having been honoured, the insolvent got a telegram the effect of which was to say that unless it was met at once, the case would be taken to Court for cheating. At the same time there was pending against the insolvent a motion for arrest before judgment on the part of the creditor Benzimra and after certain adjournments on the 6th March the motion came on. By that time he had been adjudicated an insolvent and nothing more could be done. Some complaint was made before me that the adjournments were obtained by concealing from the Court the fact that he had for more than a week before contemplated making himself an insolvent. I am not inclined to pay any attention to that complaint as a matter of prejudice. However the matter may stand—and I say nothing to belittle the extreme desirability of professional gentlemen being frank with the Court when asking for an adjournment—I cannot think it was supposed that any Judge, on being told that a man was on the next day to be adjudicated an insolvent, would make an order for his arrest before judgment, in order that it might take effect before adjudication; and, therefore, I am not disposed to pay any attention at all to that particular complaint.

On the 5th March two important incidents occurred in regard to which I confess I have no doubt at all. When a person is adjudicated an insolvent, all his assets and in particular all his books of account vest in, and have to be taken charge of, by the Official Assignee. This Court has for many years waged an unequal struggle with insolvent debtors, and for the last year or more it has been the rule as regards those debtors who come to be adjudicated on their own petition that before the adjudication order is made (in India I understand bankruptcy is regarded as a privilege), the debtor should go before the Official Assignee and be examined and make over to him all his books of account, and should get a slip from the Official Assignee to that effect which he may take to the Registrar. It is the practice and duty of the Registrar also to examine into the question whether the books of account have all been given up before the adjudication order is made. Now, that rule of this Court is not an Act of Parliament, and, therefore, one has to consider from a technical point of view somewhat carefully the effect of what may be done by an insolvent upon these occasions. For the moment I will pass that legal question by and I will examine the question simply in relation to the facts of this case. The Official Assignee says that when the insolvent was before him accompanied by his solicitor, he asked him, when he produced the book which I will call Exhibit B, whether he had any other books, and he was told No, that the business was a

small business, he did not keep a clerk, and so forth.

The evidence on the other side was given by Mr. Mandal, that the Official Assignee asked the insolvent whether he had any other cash book and was told No. At that time Mr. Mandal knew the position of the insolvent as regards his books; at any rate he knew that he kept a bill book, approval book, and such like. He had had the cash book, Exhibit B, copied in his office and he says that he was intending at a later stage to make out a detailed list of books and hand them over to the Court. Now I think it is perfectly hopeless to suggest that when one book which was a cash book was produced before the Official Assignee, whose daily duty is to deal with these matters and to ask all debtors whether they have discharged all the books of account which they ought to disgorge, the Official Assignee would go and specially ask for another cash book when he has got one already and would omit to enquire for other books. It is incredible that the question, therefore, was anything save what the Official Assignee says it was, "Have you got any other books?" meaning books of account, and the insolvent with his attorney standing by his side answers that question in the negative and the Official Assignee gives the order for them to go to the Registrar stating that they had disclosed one book as having satisfied his requirements. The matter does not stop there; the parties go before the Registrar to make the adjudication order, and Mr. Remfry is the gentleman who really originated the suggestion that books of account should be obtained before a debtor is adjudicated on his own petition. There is no doubt from the evidence given by Mr. Remfry, and the evidence given by Mr. Mandal himself, that the question was put in the insolvent's presence to Mr. Mandal, "Is this the only book of account?" Mr. Mandal tells me that he answered "Yes." What is the case made in defence of this? Let me consider it. Mr. Mandal's evidence is that although he knew there were these other books, the bill book, the approval book and so on ,he regarded these books as not being the main book of account. There is a distinction he says between the main book and the subsidiary books which he calls "feeders" to the main book, and he states that he thought that at the time the adjudication order was being made only the main book was required. When a person is asked a plain question, is this the only book of account, it is idle to make a distinction and say "I divide the debtor's books of account into the main book, and subsidiary or feeder books." It is perfectly obvious that the intention of the Registrar, before he made that adjudication order, was not to allow the insolvent or his solicitor to make up their minds as to which was important and which was subsidiary, but to get all the books of account before making the adjudication order. If there was any doubt, a frank statement would have solved it. The suggestion that the answer was made in good faith I reject absolutely and altogether. It is absurd to suppose that for purposes of the Insolvency Court the main book of account is the only thing that may be required. As a matter of fact the detailed accounts, the "subsidiary" books of account, from which entries are posted into the main books of account, are as important for every purpose of bankruptcy as the main book. Mr, Mandal suggests that the debtors have 30 days in which to file their schedule and he thought in the course of those 30 days it would be time enough to produce the other books. The two things have nothing to do with one another: the main book of account is essential for the schedule just as the others are. The business of the insolvent is, (and every attorney knows it perfectly well) first of all when he is asked a plain question, to answer truly. Secondly, to give up from the start, if required, the books of account which are demanded. Throughout this case, I say it frankly, when I have been considering the conflict between the evidence of Mr. Mandal and that of the Official Assignee, I have not been able to prevent myself from remembering the way in which Mr. Mandal answered the perfectly plain, and in no sort of way ambiguous, question which was put to him by the Registrar. Anyhow on the 5th a plain and common question is untruly answered twice.

Now, on the 5th another thing of importance to notice is this: on the occasion of going before the Official Assignee, certain jewellery which the insolvent had got from

Babumull was handed over to the Official Assignee as part of the assets.

On the next day the creditor, Mr. Svamvur, a representative of Benzimra, found out that this man had been adjudicated, and he naturally enough went with his attorney to make enquiries as to the position of their debt. They go to the Official Assignee and they discover that this book has been put forward as the only book of account. They are not satisfied with this. Sometime in the middle of the day the Official Assignee orders a search to be made of the insolvent's room at the Grand Hotel to see whether he has any other books of account or assets or what not, and the Official Assignee considers that the search should take place in the presence of Mr. Mandal; so Mr. Svamvur, Mr. Arnfield, assistant to the Official Assignee, Mr. Perkins, solicitor of the creditor, and Mr. Mandal went to the insolvent's room at the Grand Hotel. They did not find him there. After waiting sometime Mr. Svamvur found him at lunch and brought him back to the room, and they were all admitted. In the course of that search undoubtedly a large number of books. and papers were found to be in the room. As to what was found to be in the room one thing is absolutely clear, *viz*, that two diaries, one for 1918 and one for 1919, were then found. These two diaries appeared in the list which was taken by Mr. Mandal. Mr. Svamvur says that the book which now has writing only on page 26 (Exhibit F) was up to that page full of entries with the exception of certain blank leaves in between different entries. He said he immediately remarked upon it to Mr. Perkins, and said that it was a stock book and the key to the position. Another book is a book, Exhibit G, which Svamvur says he looked at, and found to be a cash book, with a good many pages from the beginning filled up with entries. Mr. Mandal from the commencement of the search insisted on behalf of his client that as he had been threatened with prosecution by Babumull of Delhi certain telegrams and papers ought not to be taken away by the Official Assignee, and among these was a press copy letter book which contained copy of a telegram sent by the insolvent on the 5th March, the same day as that on which he was adjudicated, in response to a telegram of the 4th, which I have already mentioned. Now, as regards that matter the first thing that took place no doubt was a discussion about the list. Mr. Mandal says he wanted a detailed list; he wanted a detailed list which would not only show what books were taken away, but the number of pages that were entered therein. That is referred to by Mr. Svamvur as though Mr. Mandal was insisting upon taking a detailed schedule of every document. Mr. Perkins seems to have been a man of some sense because at his suggestion the proper thing was done, *viz*, a rough list was made out as best as could be done; then the documents were put into a box and taken under lock and key to the Official Assignee's office. Mr. Mandal's evidence is that he argued first of all the question of the principle of the list and when he found he would only get a rough list, he took little or no further part in the proceedings until towards the end when he desired to make a list for himself. Mr. Mandal also says (I think it rather curious) that he insisted upon the box being sealed, but that is denied by Svamvur. Now, I have considered very carefully the evidence of what took place at the search, and I have come to the conclusion, and am absolutely satisfied, that the diary of 1918 was found at the search on the 6th and was missing at 11 o'clock the next morning. I am also absolutely satisfied that the pages prior to page 26 in Exhibit F were also found at the search as Mr. Svamvur says, and that they were missing the next morning at 11 o'clock. As regards the cash book also I believe Mr. Svamvur, but I prefer to deal with this when I have discussed the other incidents of this case.

Now, the next morning Mr. Svamvur came at 11 o'clock to examine the contents of the box. The Official Assignee says that he arranged with him to do so the night before after the box had come back to the Official Assignee's office. As to what happened at 11 o'clock there is little occasion to consider matters in dispute at all. Mr. Mandal admits that later on the same day he was told about the missing diary and the missing pages in the stock book. The evidence for the prosecution is that Mr. Svamvur discovered

the diary and certain loose pages which I have not mentioned hitherto to be missing, that he told the Official Assignee and went off to get Mr. Perkins. He and Mr. Perkins came back, and Mr. Perkins, the Official Assignee and Mr. Svamvar went into the matter, and discovered what was missing. I care nothing whether the diary was discovered absolutely at 11 o'clock or a few minutes later when Mr. Perkins was present; I care nothing whether the missing stock book was discovered before Mr. Perkins arrived that morning or after Mr. Perkins came in. There is no sort of reason to suggest, if these documents in the box were tampered with, that they were tampered with more than once. It is perfectly certain that at 11 o'clock the diary and, as I think, the pages from stock book too were missing.

Now, I have to consider whether I am satisfied that on the morning of the 7th the insolvent himself was actively engaged in committing an offence under section 103 first of all with regard to these two books. According to the evidence for the accused, at 10 o'clock on the morning after the search, the insolvent arrived at the attorney's office and wanted the attorney to write a letter to the firm in Delhi which had sent him a telegram on the 4th, threatening to take him to Court for cheating. Mr. Mandal says he looked up Exhibit H, the list of documents which he had made in the Hotel the previous day, to find the date of the wire in reply to this. The telegram receipt was put down as a "telegram receipt" without a date, and they wanted for the purposes of replying to know that date, as the date, so Mr. Mandal says, was essential. He says also that he would have liked to have a look at the wording of the telegram and that he was going to be busy at 10-30 before the Registrar as well as the whole of that day, and that was why he and the insolvent left the office and called at the Official Assignee's office at about 10-5. He says they went first of all to a waiting room next to the Official Assignee's room; that Mr. Mandal went along to Mr. Arnfield's room to ask Arnfield for inspection of the copy telegram which was in the press copy letter book, and that Arnfield refused to give it to him until he got the Official Assignee's permission. He says Arnfield suggested that they should wait for the Official Assignee to come; he would not be long; and they stayed there with Mr. Arnfield for some ten minutes or so when they were notified by the peon, who had been told to do so, of the Official Assignee's arrival. He says he went in and complained to the Official Assignee that he had been unable to get what he wanted without the Official Assignee's permission; the Official Assignee said: "Very well, I will give you my permission, so you will have your inspection." He says that thereupon he said: "I can't take it now as I have got to appear before the Registrar"; in the result Perry was left to inspect this document and Mandal went to his appointment before the Registrar. That is the case for the accused.

Now the first thing one has, I think, to remember in this particular matter is this: that whatever dispute there is with regard to the stock book pages, there is absolutely no doubt with regard to the 1918 diary that it was in the box on the evening of the 6th, and that it was not there on the morning of the 7th at 11 O'clock. No doubt about that at all. Another thing there is no doubt about is that though Arnfield is not a party before me, upon the evidence which is given between the parties who are before me it is idle to suggest that Arnfield is not involved in the disappearance of that diary. It was given into his charge by way of special precaution to put into his tiffin room; he was given a key, and this book was absent the next morning. There has, therefore, been a loss of at any rate one book, and that loss must have been connived at by Arnfield.

The next thing that I have to consider is, what were Mandal and Perry doing at the Official Assignee's office at 10-5 on the morning of the 7th? This matter is complicated by a dispute as to whether there had been on the previous evening at about 5 o'clock an interview between Mandal and the Official Assignee. Mandal says that he saw the Official Assignee about this matter after the search towards 5 o'clock on the 6th; that he mentioned

certain documents having reference to the Delhi case, including the press copy letter book; that he asked the Official Assignee to let him have these documents, and that the Official Assignee had agreed provided that he would write a letter asking for them. There is a letter dated 6th March to that effect from Mandal's office, and it is prefectly clear that that letter was delivered by a peon and signed for in the peon book by one of the Official Assignee's clerks, not on the 6th, but on the 7th. The Official Assignee denies everything with regard to that interview; he says that he took no notice of the date mentioned in the letter, he did not notice that its statements were false and as a matter of fact he had forgotten all about the letter. Now the question is, what were Mandal and Perry doing at the Official Assignee's office at 10 5 the next morning, and upon that question I do not think that the dispute about the letter has any great materiality. I am inclined to think that the accused's case is distinctly worse with the letter and with the interview than without them. I am quite satisfied that for Arnfield to be at the office at the time that he was the next morning was an unusual circumstance. It was so unusual that the peon, Baman, who give evidence before me and who, I think, was a distinctly honest witness, thought it so early for Arnfield that he looked at the clock to see whether he had gone wrong as regards his notion of time. The Official Assignee says that 10-30 was the hour for Mr. Arnfield to come to office just as it was the hour for himself to come. Not unnaturally the clerks, when asked whether the Official Assignee or Arnfield came first, give different answers. The bulk of the evidence appears to be that Arnfield usually came after the Official Assignee, but I attach no importance to this general comparison of their habits. If both these gentlemen had the same time for presenting themselves at the office no doubt one would come before the other one day, and another day the position would be reversed, and clerks and peons would be apt to generalise from particular instances. I accept it from the Official Assignee, who must know that in the ordinary course of things Arnfield's hour was 10 30. It has been said, and it is prefectly true, that there is a tradition which has got into the rules of the Court that the office hours of the Official Assignee are from 10 o'clock. In previous years this hour may have been observed by all the staff. Also I do not doubt that long before 10-30 peons, chaprassis and sweepers, to dust and clear, present themselves. It is in evidence that by 10-15 one of the clerks, the cashier, is in the habit of presenting himself. For the moment what I am concerned with is this, that on the morning on which papers were missing with Arnfield's connivance, Arnfield came to the office much before his usual time.

Now the next thing is, Is the fact of Mandal and Perry being there at 10-5 a circumstance which ought to be regarded as suspicious? It is not proved before me as facts in a criminal case should be proved that Mandal knew that there was never any chance of seeing the Official Assignee at his office before 10-30. Again 10 o'clock itself is not an extraordinary or very unusual hour for a person who wants to see another, to try and find out if he is there. But I do think that the story which Mr. Mandal gives as regards the cause of that visit is distinctly absurd. There had been this search the day before and one would have thought that when Perry arrived at Mandal's office at 10 o'clock, these parties would have had something to discuss. I am told Mandal had not seen Perry overnight. I am told that Perry started at once about replying to Delhi, that Exhibit H was got out and that it was noticed that the date of the telegram which Perry had sent was not mentioned. Reading the evidence for the defence fairly, it is at any rate alleged that one essential matter for which they went to the Official Assignee's office then and there (seeing Mandal was busy at 10-30 before the Registrar) was to get the date of that telegram. I am very sorry to say so, but I have been also absolutely unable to convince myself that this story about the date of that telegram is anything except an afterthought. The position is this:—on the 5th Perry had been adjudicated and had handed over his jewellery in the presence of his solicitor to the Official Assignee; and on that day he sent a telegram to Babumull in reply to the threat

of taking action against him for cheating contained in the telegram of the previous day. The telegram is as follows:—"Wire received—Refer my letter 13th instant—Your goods delivered Court—Letter follows warn you against proceedings—Serious consequence will follow if you take proceedings." Now it was put to Mr. Mandal whether he thought that that telegram was the sort of telegram that Perry himself could draw up and he accepted the suggestion that it looked as if it was drawn up by a lawyer, and he also accepted the suggestion that if it was drawn up by a lawyer, that lawyer must be himself. Although in his answers with regard to this matter he went just short of actually saying avowedly "Yes, I know I drafted that telegram for Perry," it is impossible to read those answers carefully, as I have done, without seeing that it is perfectly clear that that telegram was drafted with Mr. Mandal's assistance. It is to be observed that the purport of the telegram was to assure the person at Delhi or at any rate to give him pause, by telling him that the goods had been delivered to Court. Mr. Mandal's evidence is that he originally intended to write the letter on the 6th, and as I understand his evidence this letter would have been posted on the 6th but for the time occupied in the search. He wanted to put in that letter that the debt had been admitted in the insolvent's schedule or list of creditors and, therefore, everything was above board; that he had meant to file on the 6th but the search prevented him. Now I am told on the morning of the 7th at 10 o'clock the insolvent came about the important matter of the letter and that the insolvent did not recollect that he had sent his reply by telegram on the same day—two days before—on which he had been adjudicated and had handed up the jewellery, that Mandal did not recollect that he had drafted a reply on the same day as the adjudication order was made. That he did not recollect that he had intended to send this letter on the previous day and had been prevented by the search. That these two persons at 10 o'clock went over to the Official Assignee's office for the purpose of getting the date. I find it impossible to accept this story. So far as Perry is concerned, he presumably is not adjudicated every day, presumably he is not threatened with criminal proceedings every day, and how Perry could possibly doubt having sent that telegram on the 6th, two days before, I say how he could have been in any doubt as to when he had sent it, passes my comprehension altogether. It is said about Mandal that he is a very busy man and undoubtedly he is. His letter book shows a great many letters written in it on the 5th. It is also true that this telegram appears to have been despatched not from Mr. Mandal's office but from the Grand Hotel. Mr. Mandal, when he gave his assistance, may very well have given it not meaning to charge Perry for it. Even so, it is quite incredible from the point of the answer "The goods have been deposited in Court"—that Mr. Mandal did not recollect that it was sent after they had been deposited, so that the telegram could only have been sent on the 5th or 6th. Perry must have known all about it and the idea that either of these two persons took the trouble to walk across the street to find out whether the telegram was sent on the 5th or 6th, is a suggestion I reject *in toto*. The Official Assignee says that when he saw Mandal on the morning of the 7th, he was told that he wanted a copy of a letter in the press copy letter book. I am not going to take it against the accused that what was asked for that morning is distinct from the copy, of the telegram in the press copy letter book. I think there is nothing in that discrepancy at all. The Official Assignee says that what was asked for was a copy and one thing that makes the matter suspicious was the fact that Mandal had come ostensibly to ask for a copy but no copy was obtained in the end. Mr. Mandal says that he will not swear whether he asked for a copy or for inspection. What happened was Mandal being pressed for time having to go to the Registrar's office, Perry was left to do what was required and according to the evidence for the defence what Perry brought back to his attorney was a slip of paper with the date of the telegram on it and Mr. Mandal says that he (Perry) told him the substance of the telegram. The

idea that either of these two parties did not know the substance of the telegram I reject altogether and, therefore, I am bound to say that even if the natural desire of a solicitor is to see a document before doing anything else in the matter, the case for the defence about getting this essential date does add a very strong element of suspicion to an already suspicious case. Moreover there was nothing, whatever essential about the exact date, nor indeed did it matter two pence to anybody for any purpose. The reply would have been just as good without it, if it had said "Reference your wire of 4th and my reply thereto." According to Mandal, on the evening of the 6th the Official Assignee promised that these documents including the press copy letter book would be sent. If true, I do not think that has any effect except to make it rather less probable that these people immediately on Perry's arrival at his solicitor's office at 10 o'clock walked over to the Official Assignee's office. But inspite of the Official Assignee's failure to pay attention to the letter dated the 6th and the rash charge made by his Counsel at an early stage of the case, I do not think it is true. If these documents were promised, the Official Assignee would not have forgotten it and the promise must have been a prominent topic in the conversation of next morning. It is difficult to see why they should not have been handed over then.

Now comes the question of other possible ways, in which on the morning of the 7th these documents could have been lost. The suggestion has been made to me as part of the case of the accused that although it is not for him to show how the documents were lost or to accuse any other person, there was fraud on the part of Mr. Svamvur himself to get Perry into trouble out of spite against him. It was put to Mr. Svamvur in cross examination that on a certain date a friend of his, Mr. Dunlop, had come to his room and there were papers and diaries on the table (meaning of course Perry's papers, which we are considering) and that Mr. Svamvur told Mr. Dunlop that Perry would give a lot of money for those papers. This was put to Mr. Svamvur and denied by him. Mr. Dunlop was called and his evidence was to the effect that Svamvur was working at papers apparently in connection with Perry's case but he did not say anything, nor even hint at anything, which led him to suppose that he was intending to do anything unworthy, simply meaning that Perry would be very interested to know the result of his investigations. That attack broke down absolutely. Now I do not feel as regards that attack on Svamvur that the accused ought to be prejudiced by it, because I think it is quite possible that that extremely fatuous suggestion is the result of the silliness of Mr. Dunlop. But another suggestion was made about which I take a very different view. The suggestion was that on an uncertain date—only given, noticeably, as being after the examination under section 36 before the Registrar, Mr. Svamvur and the accused went together for a drive in a motor car, that in that car there were certain papers, and that Mr. Svamvur offered to get Perry out of his difficulties if he paid him a certain amount of money. I cannot say whether it was by way of making this story bear the semblance of truth or whether it was for some different reason but a slip of paper was put in in the handwriting of Mr. Svamvur which is to the effect that a lady was waiting in a car for Perry, a document which Svamvur says he sent up at the request of a lady whom both knew made to him as he was passing through the hotel. I do not know whether it is supposed that that slip had anything to do with the other incident, but in any case, what an extraordinary notion from the point of view of the defence. This man had been examined in the month of March about these missing documents, he is taken in the car in which were these documents, and this proposal is put to him. What a chance for him to stop the car, get the number, call the Police or passers-by, go to his solicitor, explain to him everything and write at once to the Official Assignee. It is a curious thing for him to do, to be journeying in a car with a creditor who was bringing these serious charges against him. Not a word of this until the trial. Not even the exact date yet. Then again it is stated that Svamvur was a disappointed creditor, that Svamvur was the man who had induced the Official Assignee to have a search made, that there is an animus on the part of Svamvur against the accused; therefore, I must consider the possibility of Svamvur having done this. I see no animus on the part of Svamvur against the accused

which was not quite commensurate or in keeping with the proper attitude of a creditor who wanted the Bankruptcy Court to do its duty by him as a creditor. Svamvur was interested in getting the dividend, in tracing assets, and it would be *reis.mi exempli* if this Court were to lay down that because he was exercising his patent rights to have the books of account taken possession of, to have matters properly thrashed out and traced in a case reeking with suspicion so far as the books are concerned, it ought to be imputed to him that he was prepared himself to get the debtor into trouble by committing a crime. Apart from that there are various other considerations. As I understand, it was suggested that this might have been done immediately after the search because on the discrepancy among the witnesses as regards time, the box was rather longer than it should have been on the 6th, when it arrived at the Official Assignee's office. I can only say that Mr. Svamvur must be credited with great promptness if he suddenly and immediately made up his mind to commit this swindle when going away with the Official Assignee's assistant and Mr. Perkins, his solicitor. Arnfield as a matter of fact has, I know, been suspended, and has got into trouble and difficulty over this matter; but there is not a suggestion that Svamvur has ever been impeached by Arnfield or rounded on by Arnfield, and Arnfield did ask the Official Assignee that this box should not be opened except in the presence of Svamvur. That was on the morning of the 7th. It was a most ridiculous suggestion and a most suspicious one —one which could only be mentioned at the time to shield himself and improbable if Svamvur was in league with him. Beyond all this there comes the most extraordinary fact of all. According to the debtor there were no pages torn off which had been part of Exhibit B, no pages prior to page 26 in the stock book and no pages in the cash book torn out since the search. Apart from the diary, I really do not understand what the papers were in the view of the defence that Svamvur is supposed to have offered on this journey in the motor car. For these reasons I am of opinion that Svamvur has done everything to show that he is *bona fide*, and that there is absolutely not a tittle of reason in the suggestion that he may be the culprit.

There is yet one reason more which seems to me to put the the matter beyond argument, and that is this: Svamvur had looked into the book (Exhibit F) and noticed what entries it contained. Svamvur had not at the search, so far as the evidence goes examined that diary. The diary was a book which might or might not be of importance from a business point of view. We know now, since the private examination under section 36, how important it was, but the importance of the diary as a book of account was not disclosed on the 6th, nor on the 7th because of course it was absent On the 7th we know that the complaint before the Police Court was drawn up; the parties joining in it directly or indirectly were Perkins, Svamvur and the Official Assignee. Now that complaint mentions nothing about the diary at all, and at one part of this case it was suggested on the strength of this that the diary had never been discovered missing till after the 7th, though Mr. Mandal's evidence in the end put that matter right. Just consider the position, to steal the diary on the 6th for the purpose of getting the insolvent into trouble, and yet not to complain about it on the 7th, and not to put it into the complaint by the Official Assignee. That fact alone shows, whoever stole the diary, it was certainly not stolen by Svamvur for the purpose of getting the insolvent into trouble. The one thing which was made much of in the complaint was the absence of the pages from the stock book. There is an incidental reference to the absence of the loose pages that are said to have come from Exhibit B. But the one point on which the insolvent was to be prosecuted then was the missing pages in the stock book. Perkins is a solicitor, Svamvur the creditor who had looked into it and called Perkins' attention to it on the previous day, the Official Assignee is prosecuting on the strength of their evidence. That fact to my mind puts all doubt aside as regards Svamvur's evidence about what he had noticed, about the conversation that there was when that book was found. He says he saw his own account; he says he looked it over; he said it was a stock book; he said it was the "key of the position," but the debtor denied it was a stock book and preferred to call it an invoice copy book; that, therefore, was put down.

Now, then Svamvur being out of the way; Arnfield going before 10 o'clock to the Official

Assignee's office; the accused and Mr. Mandal going there soon after 10. I come next to the direct evidence of what happened at the office. The direct evidence that matters is the evidence of two witnesses, one Baman and the other Harish. Those two witnesses speak to two different times of this visit. Baman speaks to the beginning of it, and Harish speaks, as I think, to the closing. Baman says that Arnfield came to the office at 9-45; he says Mandal came five minutes afterwards; that he was told by Mandal to fetch Perry; that he fetched Perry from near the Official Assignee's office; that Mandal and Perry went into Arnfields's room; that upon that Arnfield opened the tiffin room door, and he saw them go inside: that in two or three minutes; Mandal came out of the tiffin rooms that he went out, *i. e.*, he went towards the left, either towards the lift or the Official Assignee's room. So far as that witness is concerned I have considered very carefully Mr. Das' arguments, not only the question whether he is an honest witness, but the question whether if what happened was as Mr. Mandal says, this witness could, by mistaking times or by being rather stupid, misrepresent the facts into something different. I can imagine no reason for rejecting Baman's evidence on the ground of honesty. He appeared to me to be a particularly straightforward witness of his particular class. He made no effort to do anything in the witness-box except honestly to recall what took place. I do not think he could possibly be accused of letting his imagination get mixed up with his memory, and so far as he is concerned, there is not any suggestion that his evidence is at all in contradiction of the evidence he gave on that very day when the Official Assignee held the enquiry.

As regards the other witness, Harish, I am bound to say that his evidence is not nearly so good. The statement that he made on that day was that he came that day at 10 20 to 10-20; that he saw Arnfield in front of the tiffin room door, and that he saw Mandal and Perry inside. It does not appear that he was asked what they were doing inside, though it is very difficult to suppose he was not asked that question, but no answer as regards that appears in his statement before the Official Assignee. In his examination-in-chief here he adds that they were handling papers, and in his cross examination he adds the statement that they were kneeling down apparently looking at something on the floor.

An attempt was being made to show that Harish and his family were on terms of enmity with Mandal about a matter which arose some 10 years ago. I do not pay any attention to that at all and think that it broke down altogether, but I do pay attention to the fact that the statement first made by this witness differs from the full statement that he makes in cross examination by the absence of certain very important statements, and so far as I am concerned I would be slow to act upon the evidence of Harish if it stood alone. On the other hand I am prepared to act upon the evidence of Baman, and I do think that the original statement of Harish made very shortly after the event was in all probability perfectly true.

Now, the case for the defence is—and indeed it must be—that Mandal and Perry never were in the tiffin room at all at that time in the morning. In addition to the fact that their case on that is untrue, if Baman's evidence is correct, there is of course no honest reason which they could possibly have for being taken into the tiffin room of Arnfield at that time of the morning, where the box lay which contained the documents which had been seized from Perry. In view of the undoubted fact that documents were missing as in the case of the diary, in view of the undoubted fact that Arnfield came to the office that morning especially early for some special purpose; in view of the fact that the story for the defence as to the occasion for going to the office on that morning breaks down altogether so far as Mandal and Perry are concerned, I find that the prosecution in this case have established beyond reasonable doubt that these documents were taken and tampered with by Perry.

I will, however, consider one further matter upon which a good deal of argument was addressed to me. In a matter of this sort the consideration is obvious, that the person interested in suppressing documents is the accused and no one else. On that Mr. Das argues and so far as I am concerned, very forcibly, in this way. He says if you are going to look at Perry with suspicion and to act upon the assumption that his was

the interest to do away with these documents, there should be some tangible ground for knowing that it was his interest to remove these documents. I quite approve of that. It is only *prima facie* in the interest of the insolvent to have his documents removed. If he is an honest insolvent it may be very much against it, if he is a dishonest insolvent even then it may not be to his interest to add a question about the disappearance of papers to other charges. Therefore, I do think that Mr. Das is right and that this Court ought to consider whether there is any tangible evidence to say that the disappearance of these documents would be to Perry's interest. Now so far as Perry is concerned there can, I think, be no doubt at all, in view of the examination under section 36, that in the absence of that diary, any investigation of his affairs, whether for the purpose of tracing assets or any other purpose, is paralysed and very nearly impossible.

As regards the stock book, the argument that was addressed to me for the defence is this. We have one page of the stock book which is really only a copy of two invoices, and if it may be assumed that the other pages contained nothing more, then until it is shown that invoices themselves, which or many of which are in the box, do not give that very information, there would not be any point in destroying those papers. Well, no doubt if the pages that are now missing are mere copies, and nothing more, of invoices, all of which are in the box, there would be not much point in taking away the document. But were the pages mere copies? An invoice copy book is a record of stock as it is bought, taken in the convenient form of the supplier's invoices. As stock comes in, it can be taken into the book in that way, and if there is nothing more than a mere copy of an invoice, one would not call it a stock book, but if that is made the basis of further memoranda it is quite possible to convert an invoice copy book into a book which is in the nature of a stock book. I am perfectly satisfied that this book, Exhibit F, was not a stock book in the least degree like the book that was put forward by one of the witnesses for the defence, when he produced a very large volume with columns for the most minute details with regard to every item of stock, a book that would rejoice the heart of an accountant to see the detail and care with which it was kept. There is no suggestion that this insolvent ever kept a book so artistic as that. A stock book may be kept in all sorts of ways, and it may not be called a stock book. From the basis of an invoice copy book if memoranda are made as to how the things coming in in that way have been dealt with, it is quite possible to trace, *e. g*, what stock would be in hand. Now, that is exactly how the book struck Svamvur when he looked at it. He says it was a stock book. Pressed he says he saw entries in it, red ink and so on. It seems to me that when a businessman like Svamvur, who looked at the book and showed it to Perkins, was immediately impressed by the use of that book, what he says at the time is almost certain to be right. Perry, like other jewellers, could not carry on his business if he was wholly and always without the kind of information that ordinarily and properly is kept in a book that is called the stock book. Probably no accountant would have been satisfied with this book as being a model or proper stock book. I think it was a compromise and contained such memoranda on the basis of the invoices as would serve him in the place of a stock book, in so far as he needed one or was minded to keep one. One thing is plain: the most painstaking examination of the invoices in the box, having nothing with which to compare them, will produce no result either as showing or as negativing the insolvent's interest to suppress these pages. On the existing materials now, no possible way of checking what stock the insolvent ought to have on hand can be or has been suggested.

There are various other matters, but I do not think any useful purpose would be served by my going into them. There is, of course, the meeting or meetings that took place with Mandal and the Official Assignee on the 7th; there is the controversy as to that, between what persons and in what sequence the different things happened. The Official Assignee says that he told Mandal and the insolvent that they came and asked for a copy of something and took no copy; he says he was told "Oh, I only wanted the date." The evidence of Mandal is different as regards that. One point is worth observing, and that is that apparently when challenged as to what had taken

place in the morning Mandal told the Official Assignee that he had been present with Perry the whole time, but on the Official Assignee saying that he had evidence to the contrary, Mandal, without withdrawing his statement, said that perhaps he might ; that it was difficult to remember, or something to that effect. I find it very difficult to realise why Mr. Mandal on the afternoon of the same day, if what had happened was what he says, should have wavered or even hesitated upon so simple a point as that. I cannot help thinking that that corroborates in a material particular the evidence that is given by the witness Baman and although these small points are not to be strained this is one which, among others, ought, I think, not to be overlooked.

So far as regards the cash book (*i. e.*, Exhibit G) I do not think that in a criminal case sufficient attention has been paid by the prosecution to get up their case with regard to that matter. It was omitted under section 36 and I am not going to hit the insolvent on any charges relating to that exhibit.

With regard to the first charge which refers to what took place on the 5th, withholding the production of the following books : the diary, the stock or invoice copy book, bill book and bank pass book, I have thought from the first that the surrounding circumstances (as regards the other charges) would on the question of intent make a difference to the result. I do not think it any defence for an insolvent to say that his solicitor took the responsibility upon himself, though I shall take it into account on the question of sentence. The intent being present, I think that section 103 applies : production withheld when demanded just before adjudication is, I think, covered by the section just as destruction before adjudication would be covered.

As regards the stock book it does not seem to me to matter which of the three charges is chosen because on the facts of this case I think all three are open, but I propose to convict on the charge 2a (wilfully preventing the production of pages 5—22 of his stock book) and also 2c, *viz.*, destroying the stock book by removing the pages.

So far as the diary is concerned I propose to convict him of wilfully preventing the production of the diary.

* * * * * * *

On the first charge, I merely make an order for ordinary imprisonment for seven days.

As regards the other charges (wilfully preventing the production of the stock book, destroying the stock book by removing the pages, and wilfully preventing the production of the diary), I sentence the accused to 12 months' imprisonment to run concurrently upon each of these three charges, *i. e.*, simple imprisonment and not rigorous."

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Messrs. *T.E.P. Gibbons* (Advocate-General), *C. R. Das*, *B. S. Ghose* and *A. S. Deb*, for the Appellant.

Messrs. *W. Gregory* and *K. N. Chaudhuri*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—The insolvent is charged under section 103A (1) of the Presidency Towns Insolvency Act (III of 1909) with four offences. I deal now only with the charges upon which he has been convicted and which are the subject of appeal. These charges are (1) that the appellant on the 5th March 1919, fraudulently and with intent to conceal the state of his affairs and to defeat the objects of the Act, purposely withheld the production of his diary for the years 1918 and 1919 and his stock or invoice book, (2) that he, fraudulently with intent to conceal the state of his affairs and to defeat the objects of the said Act on the 7th March wilfully prevented the production of pages 5—22 of his stock book by removing or causing to be removed the said pages from the said book, the said pages and book relating to such of his affairs as are subject to investigation under the said Act ; (3) that he, fraudulently and with intent to conceal the state of his affairs and to defeat the objects of the said Act, on the 7th March destroyed his said stock book by removing or causing to be removed therefrom the said pages relating to such of his affairs as are subject to investigation; and lastly (4) that he fraudulently with intent to conceal the state of his affairs and to defeat the objects of the said Act, on the 7th March 1919 wilfully prevented the

production of his diary for 1918 relating to such of his affairs as are subject to investigation under the said Act.

A number of objections have been raised as regards the form and nature of these charges and to the formal findings thereon.

It was argued that section 103 does not contain words as the Provincial Act does (section 43) shewing that the offences there mentioned may be committed before or after the adjudication. I may say at once that I think there is no substance in this point. But then it is said that the books the subject of charges (2) and (4) were produced and taken possession of by the Official Assignee on the 6th March and, therefore, it cannot be said that the insolvent prevented their production. The actual prevention is said to have been effected by removing the said pages of the stock book and, apparently, stealing the diary on the following day, the 7th March, at the Official Assignee's office after possession made over to the Official Assignee. Charge (3) is also, it is said, bad because the destruction there mentioned is a form of prevention or withholding, the words being "destroyed or otherwise wilfully prevented". It is, therefore, said that the destruction referred to in the section is destruction before the document has been produced before the Official Assignee and not the alleged destruction (as is here said to have taken place) in the Official Assignee's office after he had taken possession of the books. It is said that these acts may constitute the offences of mischief and theft under the Penal Code but are not specific insolvency offences. If the books were in fact produced having been taken possession of by the Official Assignee, it cannot, it is urged, be said that they were withheld from the Official Assignee or that their production was wilfully prevented. I am not prepared to uphold this construction of the section. In this case, it is to be observed there was an alleged withholding on the 5th March and the books were never produced by the insolvent but were seized upon on search by the Official Assignee. It would not, I think, be reasonable to hold that if books were withheld on the 5th, and were taken possession of by the Assignee on the 6th at a search and were made away with by the insolvent in the office of the Official Assignee before the latter even saw them, that no offence was committed under the Act. Moreover, objections which may have some force as regards the word "Withhold" are without them as regards the word "Destroy."

It was then argued that charges (1) and (3) were not in accordance with the notice and it has been held by Jenkins, C. J., and myself in *Lucas* v. *Official Assignee of Bengal* (1) (Appeal 20A of 1914, decided on 9th June 1914) that a charge not framed in pursuance of the notice cannot be maintained. We must, however, I think, read this statement, if not actually subject to the provisions of section 537 of the Code, then subject to the principle which is embodied in that section, namely, that no error or irregularity in a charge will call for a reversal of an order unless it in fact has occasioned a failure of justice, and in determining whether this is so the Court shall have regard to the fact whether the objection could, and should, have been raised at an earlier stage of the proceedings.

No objection was taken to any of the charges at the trial. It cannot be contended reasonably that we should not act on a principle governing the trial of cases in the criminal jurisdiction proper. Here it is objected that the notice as regards the first charge runs "Wilfully withheld" whilst the charge runs "Purposely withheld." It is obvious that a trivality of this kind does not count. 'Wilfully' and 'Purposely' have the same or approximately the same sense. This objection fails.

It was at first objected that the notice states the intention alternatively by the word "Or" and the charge cumulatively by the word "And." This objection refers to several of the charges, but there is no substance in it and it was subsequently withdrawn. If an accused receives notice that the prosecution may seek to prove against him either of two alternative intentions he cannot, as he must be ready to meet a charge in respect to both, be

(1) 56 Ind. Cas. 577; 24 C. W. N. 418; 21 Cr. L. J. 481.

prejudiced by a charge of having had both intentions. The intentions mentioned in the Act are "to conceal the state of the insolvent's affairs" or "to defeat the objects of the Act." Concealing is doubtless a form of defeating the object of the Act and, therefore, the second intention must refer to other modes of defeating the Act. There is nothing to prevent an accused having had both intentions. He might wish to conceal the state of his affairs and also have some other object within the definition of the second intention. If it were the fact that the allegation of the second intention called for particulars, we must take it there was no need for them here, as they were not asked for and no objection was taken.

The objection, therefore, that the charges are not in conformity with the notice is not substantiated.

But then a more serious objection is taken, it being said that no notice was given as regards charges (2) and (4). I think it is generally necessary that the insolvent should have notice of the charge which it is proposed to make against him. The notice does not contain anything about preventing the production of the stock book which is the subject of the 2nd charge and the reference to the diary in the notice (clause G) runs "surreptitiously and dishonestly removed or caused to be removed from the custody of the Official Assignee your diary for 1918." The terms of this offence are not those mentioned in section 103, though there is a reference to removal in section 43 of the Provincial Insolvency Act, but removing a document is a mode of preventing its production and I think, therefore, that the notice was sufficient. As regards the second charge as there was no notice at all, I should have been disposed to hold that it was bad were it not that no objection was taken to any of the charges and the accused could not have been prejudiced, for the act charged by charge 2 is practically the offence charged in charge 3 in different language, and of this latter charge the insolvent had full notice.

It was then argued on the strength of the decision in *Lucas* v. *Official Assignee of Bengal* (1) that the charges (2) and (3) are inconsistent or that at any rate the prosecution must state on which charge they ask a conviction and that there cannot be a conviction on both charges. For the case cited holds that to establish that books are purposely withheld it must be shown that they exist, for preventing presupposes existence. It is to be observed that the act charged in charge (2) is the same act as is charged in charge (3), for the prevention of production is by removing the pages 5 – 22 and the destruction is by removing the same pages and the acts charged took place at one and the same time and were one alleged event. I am somewhat doubtful, therefore, whether the accused could be convicted and sentenced under both charges (2) and (3). It is not necessary, however, to decide the point, because Mr. Gregory has said that in the event of there being any doubt in the matter he would elect to proceed under charge 3. The point, moreover, has no practical interest because if the insolvent is acquitted under charge (2) he must be convicted under the circumstances of this case under charge (3).

The result then is that the charges stand except the second which, to avoid an unnecessary discussion, is withdrawn because a conviction on charge (3) would be sufficient and an acquittal on that charge carries with it an acquittal under charge (2). It was then said that the judgment was defective because there is no finding as to the intent with which the accused committed the acts of which he has been convicted: *R.* v. *Ingham* (2). It is to be observed that that decision is a Jury case. I am not prepared to hold that this Court with all the materials before it could not, in appeal, make a finding of the intent if this had been omitted *per incuriam* by the Judge. But I am not satisfied that the judgment is so defective in this respect as that it cannot stand, though it would have been better if the finding were more specific. The learned Judge had obviously the question of intent in his mind and expressly mentioned it as regards the first charge, and I think he meant to find the intention which is involved in his convicting the accused on this and the other charges. In that conviction is implied a finding of the intention with which he has been charged. I hold that this ground fails.

The 32nd ground of appeal submits that the examination of the insolvent should not have been admitted and that, therefore, the judgment proceeds upon what is not legal

(2) (1859) 29 L. J. M. C. 18; 8 Cox C. C. 240; 24 Jur. 55; 8 W. R. 28.

evidence. The insolvent was examined apparently under section 36 of the Act. It was contended that the insolvent could not have been examined under this section, and that under English law admissions obtained under compulsion are only evidence "against a party" if the compulsion was legal, but not if it was illegal, and a number of decisions of the English Courts have been cited to us as they were also referred to in the judgment under appeal. It seems that there is a practice to examine the insolvent under section 36. It is doubtful, however, whether this is provided for by that section. Under clause (1) the Court may summon the insolvent or other person there mentioned. The words "Any person" in clause (2) appear to refer to the same words in clauses (1). Such person may be brought up for examination. But this can hardly be the insolvent, seeing that the person summoned must be tendered a reasonable sum. Clauses 3, 4, 5 refer to persons other than the insolvent. Apparently section 27 which provides for the examination of the insolvent could not be held applicable. Mr. Gregory suggests that though the examination was nominally held under section 36, it was justified under the provisions of section 33 which compel an insolvent to submit to such examination as may be required by the Official Assignee or may be directed by the Court. It is to be noted that the examination of the accused was held without objection from him and was, therefore, voluntarily made just, as it has been held as regards witnesses that section 132 of the Evidence Act makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. We are, however, in my opinion, not concerned with the English decisions cited, nor with the principle that an accused is not called on to incriminate himself. There is no question of that here. In this trial he has not been called on to say anything. What has been done is to put in evidence against him something said by him in other proceedings in the insolvency.

These statements are relied on as admissions of fact. There is no doubt that the answers given by the insolvent now accused on the former proceedings are admissions under section 17 of the Evidence Act. Being so, they are relevant and admissible unless they are excluded by sections 18—31 of the same Act. None of these sections exclude the evidence. On the contrary section 29 states that even a confession (and not merely an admission as here) otherwise relevant does not become irrelevant merely because it was made in answer to questions which the party need not have answered. Even, therefore, assuming (which I do not decide) that the examination of the insolvent was not authorised, the answers given on such examination without objection are nonetheless admissible. Even if there were compulsion not being of the kind which excludes a confession (such as the illegal compulsion suggested), then under the Evidence Act the fact of compulsion might affect the weight of the evidence but not its admissibility. Apart, however, from this I am not satisfied that the Court had not power to examine the insolvent even if section 33 were not applicable and that there were any illegal compulsion. It is obvious that the Court must have full control of the insolvent. Nextly there being no objection to the examination there was no compulsion in fact but voluntary answers, and lastly even if there were illegal compulsion, this would not under Indian law affect the relevancy and admissibility of evidence, though it might in particular cases affect the weight of the evidence. I, therefore, overrule the objection and hold that the examination of the insolvent which was purported to be taken under section 36 is admissible, and we have accordingly referred to it. It is chiefly relevant as shewing that the accused kept an account of his dealings in his diary, that it was used in such a way as to be a book of account and for the admissions which it contains that if the missing diary were available, it would afford evidence of transactions which might not otherwise be had.

I now proceed to the case upon the merits. At the beginning I may point out that it is admitted that if the other and more serious charges fail, it is not contended that there can be a conviction on charge ( ). The learned Judge has said that the acts and conduct on the 5th March that might in an ordinary case have an innocent appearance take on a very different appearance if the other charges are established.

It has been contended that *mens rea* as regards the events of the 5th March cannot be inferred from the subsequent facts. On the other hand it may be replied that if in cases this be so, all the acts charged may be taken to be part of one common design, which is again contested. But as I have said, even upon the view taken by the learned Judge the first charge fails if the others fail and it is, therefore, to them that we must first look. Moreover I think that if the evidence shews that the insolvent was *bona fide* acting under the advice of his solicitor as to what books were necessary to be produced, the fraudulent intent mentioned in the notice is negatived.

I will deal then with charges (3) and (4).

The case for the prosecution is that Mr. Mandal, the insolvent's solicitor, was aiding and abetting his client in the commission of these offences and that three persons were in conspiracy, *viz.*, the insolvent, one Arnfield, the Official Assignee's assistant, now dismissed, and Mr. Mandal. It might have been possible to have so put forward the case that Mr. Mandal was not necessarily involved, for it might have been argued that the insolvent had an interest to make away with the diary and possibly also to tamper with Exhibit F and that he had an opportunity to do so first when he was with Arnfield before the Assignee came to office, and after Mr. Mandal had, according to the witness Bamdeo, left the room of Arnfield and secondly when he was with Arnfield after the arrival of the Assignee when Mr. Mandal was admittedly absent. But reliance has not been placed on the second opportunity (if it was one) nor evidence given directly with reference thereto, and as regards the first opportunity the witness Harish Dey, going beyond his written statement to the Assignee, gives evidence that Mr. Mandal was seen by him handing the papers. Though this does not necessarily carry with it an inference of guilt, for such inspection might have been (so far as the prosecution case was concerned) with the leave of Arnfield, it was in fact relied on as an incident showing complicity.

I think, therefore, that the Advocate-General was right when he said that the case of Perry and his solicitor must stand or fall together and, therefore, that anything which renders the case as against Mr. Mandal improbable, weakens the case against the insolvent. Mr. Gregory admits that the case made and the evidence given was that the offences charged were so charged to have taken place before the arrival of the Official Assignee, when according to the prosecution evidence Mr. Mandal and his client were in Mr. Arnfield's tiffin room. The case, therefore, against the insolvent will be weakened by anything which is shown which indicates that Mr. Mandal was not involved. Not only this, for to the extent that Mr. Mandal is freed from suspicion, to that extent he becomes a reliable witness as to what actually occurred unless on the face of the evidence it is unacceptable.

At the outset it is to be observed, that whilst it is easy to speculate as to the motives of the insolvent and Arnfield, I am unable to imagine why Mr. Mandal should have, as alleged, implicated himself in this affair. He is a solicitor. He must know that to do what is here charged might result in his being struck off the rolls and convicted of a grave offence. And for what was he undertaking this risk? After all people who take such grave risks must do so in the hope of some good to themselves. Mr. Gregory was unable to say what this good might be. This is not a case in which so far as I can see there is any money. On the contrary the complaint is that there is so little. The insolvent is a man of no substance who has been hawking about for sale the jewellery of others —some of it obtained on credit. Until a short time before his insolvency he was an entire stranger to Mr. Mandal. All that Mr. Gregory could suggest was that the solicitor was too zealous on his client's behalf and had been thus led away to tamper and make away with documents and perjure himself—an explanation I cannot accept as sufficient. I am wholly unable to accept such an explanation in this case, where (so far as the record is concerned) there is no suggestion which shews that the solicitor in question has any but a good reputation, where until the insolvency proceedings he was a stranger to the insolvent, and where no advantage to him, pecuniary or otherwise, is suggested in return for the risk incurred by him in aiding and abetting offences of a criminal character under the

Insolvency Act and in return for his bolstering up such conduct by perjury on the trial of such alleged offences.

Whilst, however, there is nothing to shew why the insolvent's solicitor should make himself a party to the commission of these offences, we must see whether the evidence offered is sufficient to prove that he did so. Not of course that the solicitor is on his trial; for the issue is as to the insolvent's guilt, but as part of the case which is made against the latter. It has not been made at all clear when the conspiracy was entered into, and a criminal intention first entertained by Mr. Mandal. Some of the evidence and argument would go to shew that the two—the solicitor and client—were both in it from the first. On the other hand Mr. Gregory, when pressed to explain certain incidents, put forward the theory that Mr. Mandal had no criminal design until after the search when he wrote the letter of the 6th March to the Official Assignee. If this be so, then there are certain objections to the earlier part of the case which are unanswered.

It is thus said that on the 5th March they—the insolvent and his solicitor—saw the Official Assignee together. Mr. Falkner says that he asked "Have you brought your books" when a book (Exhibit B) was produced which is said to be both cash and ledger. In examination before the Registrar the latter asked the insolvent whether he (the former) did not say "Is this your only book." In his evidence, however, taken later, Mr. Remfry says he asked whether this book was the only book of account and he understood from Mr. Mandal that that was so. (Mr. Mandal) also says (and in this he agrees with Mr. Remfry) that the latter seeing the receipt for Exhibit B asked him "Is that the only account book." On which he Mr. Mandal said "Yes." As regards the interview he says the Official Assignee asked (and in this he disagrees with the latter) "Is this the only cash book" on which the insolvent said "Cash and ledger combined." Mr. Mandal says that he could not have said that Exhibit B was the only book because he knew that there were others, though he had not seen them. Rightly or wrongly he believed that it was only necessary to put in the main book and not the other books, which it is contended are not strictly books of account though ancillary thereto. There is no doubt that only one book Exhibit B was at first produced. The dispute turns on the question whether the insolvent or Mr. Mandal (it matters not which, for they were present together) said it was the only book the insolvent had or the only book of account. No one, of course, suggests that either Mr. Falkner or Mr. Remfry were telling other than what they believed to be true. The question is one of recollection and seeing that at the trial Mr. Remfry says the question was as to the book of account and Mr. Mandal says so also, and as Mr. Falkner is not certain of the exact words used or who said them, I do not think that this part of the case standing by itself has been made out.

But whatever the words used, whether book, or book of account, the Official Assignee directed a search at the instance of the creditor Mr. Svamvur and his solicitor Mr. Perkins. Then at the Grand Hotel where the insolvent was staying other books were certainly found, which related to his business, whether they can be technically called books of account or not, and whether Mr. Mandal was right or wrong in supposing that they need not be handed in at the first instance but later on. Of course the point is made that if the insolvent had been minded to destroy any of the books he would have done so whilst they were in his possession before the search. It is suggested in reply that he might not have known that there was going to be a search. In that case if his solicitor was aiding and abetting him as alleged, he might have warned his client, either before the search was ordered or possibly afterwards, to get rid of what was against him in his books. According to the evidence of Mr. Savamvur he found Mr. Mandal and Mr. Arnfield in earnest private conversation before the search, suggesting that something was being got up there. It would have been possible then to have delayed the search and communicated with the insolvent. But it is not suggested that this was done. The search took place without objection. Mr. Mandal wanted a list to be made and in fact

prepared one himself. It would on the hypothesis of fraud have been more useful if the books had been bundled into a box without any list whatever. Mr. Mandal's list is in fact correct and would on any abstraction of the documents shew what had been taken. In fact he sent a copy of his true list to the Official Assignee after the time when he is alleged to have been a party to the abstraction of the diary for 1913. This is not the conduct of a guilty man. There is no doubt that two diaries were found on the search as also that one diary is now missing. According to Mr. Svamvur Exhibit F, the alleged stock book, but which was said to be an invoice book, had pages in it with writing which have since been torn out. It is a curious fact that if this be so, the only page which was left was a page shewing goods supplied by Mr. Svamvur's firm. Why this was not also torn out is not clear, unless it be that it was an oversight. It is suggested that this was because the word "sold" appeared on other pages. But why, it may be asked, leave anything at all seeing that the evidence of Mr. Svamvur, the creditor, as to what was said about the book at the search is denied. It must be noted also that the book contains 425 pages. Of these pages 1—4 are in existence and blank. Pages 5—22 are missing, 23, 24, 25 are in existence and blank and 26 only has some writing on it which happens to relate to Mr. Svamvur's goods. The remaining pages are blank.

According to Mr. Svamvur when Exhibit F was found he said "This is one of the principal things we want. It is the key to the situation. It is just the book we want, shewing the stuff which he should have on hand." When asked whether it was written up, he replied "Absolutely full" at least up to a certain page and at page 26 there was his own firm's stock purchased by the insolvent on the 1st October. He says he shewed that page to Mr. Perkins. The latter's examination is not before us as he left before cross-examination, but as regards this particular page there is no dispute because it is still curiously enough in the book. According to Mr. Svamvur other invoices were copied in Exhibit F. It is to be noted here that there are a number of invoices and if these were those copied in F, then if F were destroyed, the materials from which F was supposed to have been made are available. When asked whether he examined the diary for 1918, the witness Mr. Svamvur said "We had no time to examine the books. I just looked through it. I took charge of it." Mr. Mandal on the other hand denies that there was any discussion about Exhibit F. When asked whether any observation was made by any one when that book was found, he replied "None whatever." It is said that Mandal did contradict Mr. Svamvur as to the latter's statement as to the contents of Exhibit F and that he knew himself from before what they were. But his evidence, which I accept, is that he had not previously seen the book and at the search he did not examine it.

On the other hand it is a circumstance in favour of Mr. Svamvur's evidence that he told the Official Assignee that he had brought the stock book (which properly speaking it was not, judging from present contents), for it may be said he would not have done this if it contained one page only. The evidence, therefore, as to the supposed contents of the book other than the page now existing is contradictory. Whether Exhibit F contained the pages which have been it is said torn out, depends on Mr. Svamvur's evidence alone. Without impeaching the truth of that evidence it would not, therefore, be safe to convict the accused in a matter of oath against oath unless it were shewn that there was good reason to believe that Mr. Mandal was a party to the alleged offences and that his evidence was on this or other grounds untrustworthy.

As regards, however, the diary the case stands on a different footing, for it is common ground that two diaries were in fact found at the search, that they were taken in a locked box to the Official Assignee's office and that the box was in Arnfield's keeping, and there is no doubt that one diary is now missing. The case, therefore, now resolves itself into this—has it been shewn that the insolvent abstracted or was a party to the abstraction of this diary from the box of the Official Assignee which was in the keeping of his assistant Arnfield?

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There is no question but that Arnfield is *prima facie* responsible. For the diary was in a box in his keeping, the key was with him and the box was kept in his tiffin room. No one, therefore, could have made away with that document except Arnfield aided and abetted that act. At least that is the conclusion on the evidence before us, though of course Arnfield's guilt is not directly in question. It is only relevant so far as it bears on the charge against Perry. It may also, I think, be said on the evidence that the insolvent may have had an interest in getting rid of the diary. But the question is did he in fact give reality to that interest by actually abstracting the book? Has that been proved clearly and beyond all doubt? The first suggestion made is that Mr. Mandal put forward a pretence for the purpose of getting access to the box. Mr. Mandal says he saw the Official Assignee at about 4 45 on the 6th March after the search, when he explained to him that certain documents found on the search were relevant for the insolvent's defence against a criminal charge, which one of his creditors was making from Delhi, but that the documents were not required for the administration of the insolvent's estate. He says that the Official Assignee agreed to make over the documents on Mr. Mandal writing to him on the subject, on which he (Mr. Mandal) went back and wrote the Official Assignee a letter on the 6th March. This is Exhibit I. The letter commences "With reference to my interview with you this afternoon." Mr. Falkner denies having had any such interview, and in fact Mr. Avetoon appearing for the Official Assignee on the trial actually charged that the letter was a fabrication but subsequently withdrew this charge, as he stated that he was instructed that the letter of the 6th March had been received, and in fact it bears Mr. Falkner's initials. The suggestion, however, now is that the letter was written for the purpose of making evidence that is for the purpose of explaining Mr. Mandal's presence with the insolvent at the office of the Assignee on the 7th March. Mr. Mandal says he did not get the documents. On the 7th, therefore, he went to the Official Assignee's office a few minutes after 10 A. M. As Mr. Falkner had not arrived he went into Arnfield's office and asked for inspection of the press copy letter book, but Arnfield refused this without the permission of the Official Assignee. Mr. Arnfield, however, said that the Assignee would come shortly, and Mr. Mandal and his client sat in Arnfield's office until news was given of the arrival of Mr. Falkner about a quarter of an hour later. Mr. Mandal and his client then saw the Assignee, when the former explained his business and the Assignee gave directions that Arnfield should give inspection to Perry. Mr. Mandal, however, himself went away as he had business in Court. Apparently Mr. Perry then went and saw Arnfield. Mr. Falkner says that though the insolvent and his solicitor, when they saw him on the 7th asked for a copy of a letter from press copy letter book for the purpose of the criminal charge, yet that no copy was taken that day or any other day, and that when he pointed out that to Mr. Mandal he explained that he only wanted the date. After the insolvent had seen Arnfield, the creditor Mr. Svamvur arrived and on inspecting the documents discovered the loss and alleged tampering. So far as Mr. Mandal is concerned, it is to be noted that it was, therefore, possible on the evidence that the abstraction and tampering, if it took place, was done when admittedly he was absent at the High Court and when Arnfield and the insolvent were together.

As an answer to this case about the letter of the 6th March it is pointed out that it is an admitted fact that there was some discussion at the search as to some of the documents being necessary because of the possibility of a prosecution by the Delhi merchant Babumull. According to one hyhothesis put before us, Mr. Mandal had not at the time of the search determined that any document should be tampered or made away with. If this be so, the reference to these documents at the search could not have been a mere pretence. If so, there is nothing in the point that the information sought has been (*sic*) and was not obtained at the search, whether this was possible or not. It is suggested, however, that after the search when the documents were taken away the

criminal intention may have been formed and in pursuance of it a demand was made on the 6th for documents relevant to the criminal charge, in order that there might be an excuse for the presence of the insolvent and his solicitor at the Assignee's office on the 7th. The two hypotheses do not work together. I think that the admitted fact that the need for the documents was mentioned at the search is a circumstance against the case made against Mr. Mandal that the letter of the 6th March and the demand for the documents was a mere pretence. As regards the reasons given by Mr. Mandal for wanting the documents it was not a date only which was required but the press copy book in which the telegram was copied, in order that the words used might be before him in dealing with the threatened criminal charge.

Reliance is placed on the fact that the statement in the letter of the 6th March is not challenged in the correspondence by Mr. Falkner, who in his evidence states that on the 7th the insolvent and his solicitor came to him for a copy of a letter in the press copy book "as (to use his words) it was necessary in view of the criminal charge that they had spoken to me about the previous day." Either this is an admission that the Assignee did see them the previous day or possibly Mr. Falkner meant to say that Mr. Mandal told him on the 7th that he had been spoken to on the previous day. If the latter, this supports the defence that Mr. Mandal did see Mr. Falkner. For it is then shewn not only that he wrote to that effect but re-stated the fact at the interview on the 7th. It is possible that Mr. Falkner's memory may not be accurate on this point. We have it that Mr. Avetoom (I presume on instructions) stated that the letter of the 6th March was a fabrication, but subsequently had to withdrew it as it was found the letter had been in fact received.

I am unable, therefore, to hold that it has been established that Mr. Mandal was putting forward a pretended interest in the documents relating to the threatened criminal charge in order to account for his presence at the office on the day of the alleged tampering and theft.

If this be so, I cannot say that there was no reason for Mr. Mandal visiting the office of the Assignee with his client the next day. It is said that he went early, though it is to be observed as to this that the adjudicating orders shew that the office hours were from 10 to 4. But apart from this Mr. Mandal wished to get away to Court and he in fact left immediately after the arrival of the Official Assignee. If in fact, as the evidence generally states, Arnfield used to come late after the Assignee, this is a circumstance unexplained and to that extent a circumstance of suspicion but does not by itself go far. This is a matter for Arnfield himself to explain but he is not called, though I think that the Official Assignee was justified under the circumstances in not calling him as his witness as he could not put him forward as a witness of truth.

I now pass to the evidence of what occurred at the office when the insolvent and his solicitor were there. This depends entirely on the evidence of the witness Bamdeo whom the learned Judge thought to be a trustworthy witness and I accept his impressions on this point. I say "entirely," because the witness Harish Dey the learned Judge thought to be not satisfactory and accepted only his evidence so far as it was corroborated by Bamdeo. It is of course open to the Court to accept part of the story of one witness who is not reliable if it be corroborated by another who is reliable. But to accept the story is not necessarily to say that the evidence is stronger because of its being spoken to by two witnesses; since the acceptance of one witness's statement is not on his credit but on that of the other reliable witness who supports him. There is some ground for believing that this witness Harish was inimical to Mr. Mandal and he in fact introduces features in the evidence not spoken to by Bamdeo or mentioned in the statement to Mr. Falkner or Harish himself, namely, the important alleged incident of Mr. Mandal handling the documents in the tiffin room of Arnfield, which is in contradiction to Bamdeo's evidence who says nothing about handling papers and that Mr. Mandal left the room leaving Perry and Arnfield there. Bamdeo's evidence is that Arnfield arrived at 9.45 and Mandal at 9.50. The witness was told to fetch Perry who was outside. Then Arnfield opened the tiffin room where the box with the documents

was and all three went inside. After two or three minutes Mr. Mandal went out leaving Perry and Arnfield together for 10 minutes. Then Perry went out, Harish Dey's account is discrepant with this, but both agree that Mandal and Perry were in the tiffin room, and this seems to have been reported to the Official Assignee. It is noteworthy that Perry and Arnfield were together on the two occasions, before and after the arrival of the Official Assignee, and Mr. Mandal was there on the first occasion, and it is possible that there may be some confusion in Bamdeo's mind in mixing up these two occasions. However this be, I am not prepared to hold that the evidence of Bamdeo is sufficient unless it were shewn (as in my opinion it is not) that both the events leading up to and following the fact spoken to by him sufficiently support the respondent's case. It is certainly noteworthy that if these persons had the intention before the Official Assignee came to tamper and abstract the documents, that they should have left the door open for others to see what they were doing and that the peon was not sent away on some business or other. Then we find both, after the supposed incident, going to the Official Assignee. It is noteworthy also that it was at one time proposed to bring criminal proceedings against Perry and Arnfiled alone, no mention being made of Mr. Mandal.

It was suggested that Mr. Svamvur and Arnfield may have been in complicity. This I do not believe. The insolvent's charges on this head have been disbelieved by the learned Judge and his case has not been advanced thereby, nor by his absurd allegation that the Official Assignee himself was withholding books. It could not have been to Svamvur's interest to get rid of either any pages of Exhibit F or the diary. But though the making of such unfounded charges may detract from the insolvent's explanations, they cannot by themselves establish the Assignee's case.

It is possible that Arnfield, who on the evidence before us is *prima facie* responsible and an unreliable man, might have had some interest in embarrassing the creditor's case as regards Exhibit F, but this cannot, I think, be suggested as regards the diary the value of which was not apparent till the insolvent's examination later on. That the insolvent may have had an interest to make away with and tamper with the books is, I think, indisputable. But the question is, has it been made out that he did so? The case against him would have been stronger had it not been asserted that Mr. Mandal was aiding and abetting him. This on the evidence I cannot believe and as the charge against Mandal is mixed up with that against Perry it is not possible, I think, in this case in the view I take of the matter, so far as Mr. Mandal is concerned, to hold that the charges have been established against the insolvent though there are circumstances of suspicion against him.

In the result, therefore, I must hold that the charges against the insolvent have not been made out. I do not believe upon the evidence that Mr. Mandal was aiding and abetting as alleged. I accept his evidence that when he was in Arnfield's room there was no handling of the papers, and no case has been made that in his absence on either the first or second occasion of Perry's visit to Arnfield the insolvent committed the alleged offences. On the contrary the case throughout has been that the two were jointly concerned in committing the offences alleged —an allegation which in my opinion fails.

The appeal, therefore, succeeds and the order of the 25th May 1919 sentencing the insolvent to imprisonment is, as regards all the charges, reversed. The surety for the appearance of the insolvent during the hearing of this appeal is discharged.

WALMSLEY, J.—I agree in the judgment delivered by Mr. Justice Woodroffe.

Appeal accepted.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 18 OF 1919-20.

March 8, 1920.

Present :—Mr. Hopkins, S. M., and Mr. Harrison, J. M.

Musammat BADAMI—APPELLANT

versus

KARORI—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 177 (e)—"Question of proprietary title"—Defendant holding as proprietor—Appeal, forum of.

The question whether a defendant is holding as a sub-tenant or is cultivating the land as *khudkasht* with no obligations to pay rent to anybody is a real question of proprietary title within the meaning of section 177 *e)* of the Agra Tenancy Act, and in such a case an appeal lies to the District Judge and not to the Commissioner.

Second appeal from the order of the Commissioner of Agra Division, dated the 21st of August 1919, in the case of ejectment.

JUDGMENT.

HARRISON, J. M.—[*February* 19, 1920]. —This is a second appeal in an ejectment suit, in which the appellant has been held by the Commissioner to be a sub-tenant of the respondent and liable to ejectment. The first ground argued before me is No. 2 in the grounds of appeal, which challenges the jurisdiction of the Commissioner to entertain the appeal.

The defendant in his pleadings set up the case that he was not a sub-tenant of the plaintiff but was in possession of the land as proprietor. The Assistant Collector found that the relation of landlord and tenant did subsist between the parties and accepted the entries in the Patwari's papers, but apparently by mistake he dismissed the plaintiff's suit. Although no formal objection was made by the defendant when the plaintiff appealed to the Commissioner, apparently this point of jurisdiction was argued before him. He came to the conclusion that there was no real question of proprietary title involved, for that title had not been challenged. The only question in his view was whether the defendant was holding as a sub-tenant or was cultivating the land as *khudkasht* with no obligation to pay rent to anybody. Personally I agree in the view of the Commissioner that there was no real question of proprietary title in issue, but in Selected

Decision No. 14 of 1915 the Board decided to be bound by the latest ruling of the High Court, namely, *Bindeshwari* v. *Gokul* (1).

This was a decision of a Full Bench on a reference by the Commissioner of the Gorakhpur Division, in which the question referred was precisely that arising in this case. The decision was given in 1914. As it is desirable to have a settled practice and the Board has already decided to follow the ruling quoted of the High Court, I think this appeal must succeed and the order I would pass is that the memorandum of appeal in this Court should be returned to the appellant by the Commissioner for presentation to the District Judge. In these circumstances the parties may bear their own costs in both Appellate Courts. I may add that the matter has been again decided by the Board in the sense I propose in a decision shortly to be published as Selected Decision No. 18 of 1919.

HOPKINS, S. M. —I agree.

Appeal allowed.

(1) 22 Ind. Cas. 964; 12 A. L. J. 251; 36 A. 183.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 147 1918.

August 21, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT, and Mr. Justice Panton.

ILIM MOLLA AND ANOTHER—DEFENDANTS —APPELLANTS

versus

MANINDRA MOHAN PODDAR AND OTHERS—RESPONDENTS.

Execution of decree—Order made without notice to party—Party whether bound by order—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage decree—Balance remaining unpaid on sale—Judgment-debtor, liability of, decision of—Notice to judgment-debtor, whether necessary.

A party to an execution proceeding who has had no opportunity to take exception to a proposed order of the Court is not bound in the same way as if an adverse order were made in his presence. [p. 802, col. 2.]

Where the only matter before an execution Court is whether execution can proceed without a supplemental decree under Order XXXIV, rule 6, of the

ILLIMMOLLA v. MANINDRA MOHAN PODDAR.

Civil Procedure Code, an order made without notice to the judgment-debtor directing execution to issue against him in respect of costs cannot be supported. [p. 802, col. 2.]

Appeal against the order of the District Judge, Dacca, dated the 12th February 1918, affirming that of the Munsif, 3rd Court, Munshiganj, dated the 1st December 1917.

Babu *Bimal Chandra Das Gupta*, for the Appellants.

Babu *Pares Chandra Sen*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Dacca made in affirmance of an order of the Court of first instance to the effect that the appellants are liable to satisfy a decree for costs made in favour of the respondent in a suit to enforce a mortgage security. The respondent joined the appellants as defendants in the mortgage suit on the allegation that they were transferees of the equity of redemption. He obtained the usual mortgage decree specifying the amount due on the mortgage and the costs of the suit. The decree directed that if this sum was not paid within the period of grace by the defendants to the plaintiff, the mortgaged property or a sufficient part thereof would be sold and the sale proceeds applied in satisfaction of the decree. Execution was taken out in due course and the decree was satisfied in part. But although the mortgaged properties had been exhausted, a considerable sum still remained due to the decree holder. The decree-holder thereupon applied for execution. The office raised a question as to whether execution could be had before the decree-holder had obtained a supplemental decree in accordance with Order XXXIV, rule 6, of the Code of Civil Procedure. The Court thereupon directed that the record should be sent for and that the matter should be put up for consideration in the presence of the decree-holder. No notice of the application was served upon the present appellants or upon any of the other judgment debtors. The Court subsequently came to the conclusion (and this was an *ex parte* decision) that a supplemental decree was not necessary and that execution could issue on account of costs as against the present appellants. Execution was issued with the result that the present appellants forthwith appeared before the Court and objected that they were not liable under the decree. The Court held that the matter had been previously decided and that they were bound by that order. They appealed, but to no purpose and the order of the first Court was confirmed. This view cannot be supported. As explained by Mr. Justice West in *Sheik Budan* v. *Ramchandra* (1), there is no room in such circumstances for the application of the principle laid down by the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2). That decision is based on the ground that if a party to an execution proceeding who had an opportunity to take exception to a proposed order of the Court has omitted to object, he is bound in the same way as if an adverse order had been made in his presence. In the case before us, the appellants had no notice of the application by the decree-holder. Indeed, the only matter for consideration before the Court at that stage was whether execution could proceed without a supplemental decree under Order XXXIV, rule 6. The Court could not have intended to decide, in the absence of the judgment-debtors, and without notice to them, the question of their liability under the decree. We must consequently hold that the order of the Courts below cannot be supported. The question now arises whether the matter should be remitted to the Court of first instance for consideration. Fortunately it is not necessary to do so. The decree has been produced before us and shows, on the face of it, that the defendants are not personally liable for the costs.

The result is that this appeal is allowed, the order of the Court below set aside and the application dismissed with costs, both in this Court and in the Court below. We assess the hearing-fee in this Court at one gold *mohur*.

Appeal allowed.

(1) 11 B. 537; 6 Ind. Dec. (N. S.) 354.
(2) 8 C. 51; 8 I. A. 123; 11 C. L. R. 113; 4 Sar. P C. J. 249; 4 Ind. Dec. (N. S) 32.

RAJLAKHI DEBYA *v.* SAROLA SUNDARI DEBYA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 1749 OF 1917.

February 23, 1920.

Present:—Justice Sir N. R Chatterjea, KT., and Mr. Justice Panton.

RAJLAKHI DEBYA, WIDOW OF HARESWAR SANYAL—PLAINTIFF—APPELLANT

versus

SAROLA SUNDARI DEBYA CHOWDHURANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Maintenance grant—Mashahara bandegi patra, *construction of*—"Douhitransha," *meaning of*—*Succession Act (X of* 1865), *s.* 160, *applicability of.*

A *mashahara bandegi patra* (maintenance grant), executed in favour of his daughter by a *zemindar* of considerable means having no son, recited that the daughter had been receiving a certain sum of money from his *zemindari* for her maintenance and other expenses, and that unless some deed was executed objection might be raised in future to her getting the "settled amount of maintenance" which was, therefore, made "*kaim*" (permanent) by the deed and it was, further, provided by the deed that the daughter would get the same in "*douhitransha*":

Held, (1) that the grant was intended to be perpetual and was not limited to the life of the daughter's sons; [p. 804, col. 2.]

(2) that the word "*douhitransha*" was intended to mean "in the line of the daughter's sons." [p. 804, col. 1.]

The principle enunciated in section 160 of the Succession Act cannot apply when a contrary intention appears in the document. [p. 804, col. 2.]

Appeal against the decree of the Additional District Judge, Mymensingh, dated the 22nd of June 1917, reversing that of the Subordinate Judge, 1st Court of that District, dated the 11th of January 1917.

FACTS appear from the judgment.

Babu *Shib Chandra Palit* (with him Babu *Kshirode Narain Bhuiyan*), for the Appellant.—The only point for your Lordships' consideration is the construction of a document which has been described as a "Mashahara bandegi patra." The document was executed about seventy years ago by the maternal grandfather of the plaintiff's husband. It was a maintenance grant executed by the father in favour of his daughter, and the question is whether the grant was a perpetual one. I submit that having regard to the terms of the document, the grant is perpetual. The qualifying word used is "Douhitransha," which means "in the line of daughter's sons." If the grant was meant to be limited to the life only of the daughter's sons, appropriate words might have been used for that purpose. The document further provided that the amount of maintenance which the daughter had been receiving was thereby made "kaimi." The word 'kaimi' means permanent and implies that the grant is perpetual. Having regard to its real meaning, the document should be liberally construed. To find out the true intention of the executant your Lordships will also take into consideration the other circumstances of the case. Here is a Zeminder of considerable means having no son. He makes a maintenance grant of a comparatively small amount in favour of his daughter. Even, therefore, if the words used in the document are capable of being interpreted in two ways, your Lordships should give effect to the contention of the plaintiff.

Babu *Brojolal Chakraverty* (with him Babu *Birendra Kumar Dey*), for the Respondents.—The word "Angsha" means a share and therefore "Douhitransha" "means as the share of the daughter's sons." It cannot, therefore, go beyond the daughter's sons. If an estate of inheritance was meant to be created, appropriate words as "Putrapoutradi Krame" might have been used. In the absence of an express intention to grant an absolute estate, the grant must be taken to be limited to the life only of the daughter's sons and the principle enunciated in section 160 of the Indian Succession Act would apply.

Babu *Shib Chandra Palit* briefly replied.

JUDGMENT.—This appeal arises out of a suit to recover arrears of maintenance under a Masahara Bandegi Patra, dated the 12th Sraban 1255.

The deed was executed by one Jugal Kishore Acharji Choudhuri in favour of his daughter Janoki Debi. It recites that she had been receiving Rs. 317 for her maintenance and other expenses from his Zemindary, and that unless some deed was executed, objection might be raised in future to her getting the "settled amount of maintenance." The deed then (according to the translation furnished to the Court on behalf of the appellant) runs as follows:—"So I make the said amount of

your maintenance permanent. Out of the said amcunt deducting Rs. 79 which is the annual profits from the 25 Paras of Brahmattar lands within my Zamindary, you shall get year after year the balance of Rs. 238 in Company's coin from my Zemindary in the line of my daughter's sons born of your womb."

The word in the original is Douhitransha and has been rendered as "in the line of my daughter's sons" in the above translation. The decision of the question involved in the case turns largely upon the meaning of that expression. The Subordinate Judge was of opinion that the word Angsha means heirs, and having regard to the circumstances mentioned in his judgment held that the grant was perpetual. On appeal the learned District Judge, Mr. Seaton, held that the grant was limited to the daughter's sons only. The plaintiff has appealed.

Janoki, it appears, had two sons, one of whom died childless. The other received the full amount of maintenance until his death. The plaintiff is his widow and she claims the right to the maintenance under a Will executed by her husband.

The word 'Angsha' means a share and sometimes it has been used in the books in connection with "heritage." We have, however, not come across the expression Douhitransha in any document, and there is some force in the observation of the learned District Judge about the absence of "some expression in common use and acknowledged meaning such as Putrapoutradi Krame." But the expression 'Douhitransha' must have been used to mean some persons besides the daughter's sons and we think it was intended to mean "in the line of the daughter's sons." The expression is also to be considered along with the fact that the settled amount of maintenance was made Kaim, which we think means, having regard to the context, permanent. The document was executed about 70 years ago (in 1848). It was drafted evidently not by a lawyer, and should be liberally construed having regard to its real meaning. The grantor was the owner of substantial Zemindary, the income whereof is admittedly about Rs. 20,000 a year. He had no son and had only two daughters, of whom Janoki was one. The amount of maintenance was a very small one, but as suggested on behalf of the appellant it might be due to the reluctance to impair the value of the estate which the male heir (the adopted son) was to receive.

It is unlikely, however, that the Zemindar should have intended that such a small grant, which might place the family of the daughter's sons at any rate above actual want, should cease after the daughter's sons, and if that was the intention, it could have been clearly expressed by saying that the daughter's sons (Douhitragan) would get it.

Having regard to the expression used and the fact that the settled amount of maintenance was made Kaim (permanent) and that the grant was made to the daughter by a Zemindar of considerable means who had no son, we think that the grant was intended to be perpetual.

Some reliance was placed upon the principle enunciated in section 160 of the Indian Succession Act in support of the contention that the grant was limited to the life of the daughter's sons. But apart from other considerations, the principle contended for cannot apply when a contrary intention appears in the document.

It is unnecessary to consider the question whether the amount of maintenance is a charge upon the defendants' estate, as the plaintiff has not in her plaint claimed any charge nor asked for declaration of any charge, and the suit is not framed for enforcing a claim for money charged upon immoveable property.

We think, therefore, that the decree of the lower Appellate Court should be set aside and that of the Court of first instance restored with costs here and below.

Decree set aside.

MATHURA RAI *v.* MANDIL DAS.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 925 OF 1918.
May 11, 1920.
Present:—Mr. Justice Coutts and
Mr. Justice Sultan Ahmed.
MATHURA RAI AND OTHERS—
DEFENDANTS—APPELLANTS
versus
Babu MANDAL DAS—PLAINTIFF AND
Babu MUKHAN LAL—DEFENDANT
—RESPONDENTS.

Mortgage—Mortgagor in possession—Rent settled by mortgagor, whether binding on mortgagee—Burden of proof.

Where a person gets a contractual benefit from a mortgagor in possession after the date of the mortgage, the onus is upon such person to prove that it was a benefit which he might derive and retain in the usual course of the management of the property. [p. 806, col. 1]

Where a mortgagor in possession made a collusive settlement of rent with the tenants:

Held, that the settlement was not binding on the mortgagee. [p. 806, col. 1.]

Appeal from a decision of the District Judge, Shahabad.

Messrs. *Parmeshwar Dayal* and *Radhes Narain Sinha*, for the Appellants.

Messrs. *Sushil Madhab Mullick*, *Jalgobind Prasad Sinha* and *Raghunath Sinha*, for the Respondents.

JUDGMENT.

COUTTS, J.—The facts of this case are shortly as follows:—Mukhan Lal, defendant No. 6 in the suit, was the sole proprietor of Mauza Patalma, Touzi No. 2966 of the Shahabad Collectorate. Defendants Nos. 1 to 5 were Bhaoli tenants of a portion of this Mauza. Somewhere about the year 1901 the defendant No. 6, Mukhan Lal, mortgaged Mauza Patalma to the plaintiff, Mukhan Lal remaining in possession. The plaintiff subsequently brought a suit on the basis of this mortgage and in 1907 he obtained a decree. In 1911 settlement proceedings started in Mauza Patalma. A dispute arose about rent between the defendant No. 6 and the defendants Nos. 1 to 5, the defendant No. 6 claiming that the rent was Bhaoli rent and the defendants Nos. 1 to 5 claiming that it was Nagdi rent. The parties, however, came to an agreement that the defendants should pay Nagdi rent and this rate was settled under section 109 (*c*) of the Bengal Tenancy Act. On the 8th of October 1912 the plaintiff purchased the property in execution of his mortgage decree and got possession, and on the 24th of November 1912 the Record of Rights was published with the rent of defendants Nos. 1 to 5 entered as settled under section 109 (*c*). The plaintiff has, therefore, brought this suit for a declaration that he is not bound by the entry in the Record of Rights. He also sued for arrears of Bhaoli rent. The suit was decreed in the trial Court and this decree having been upheld by the District Judge, the defendants Nos. 1 to 5 have appealed to this Court.

Both the lower Courts have found that before attestation the tenant defendants paid produce rent and that the rate settled on compromise under section 109 (*c*) of the Bengal Tenancy Act is considerably lower than the average rate settled on commutation of produce rent in the vicinity. There is also a finding of the Munsif, which has not been displaced by the learned District Judge, that the defendant No. 6, Mukhan Lal, colluded with the tenants and after taking a large Nazarana he agreed to an unjustifiably low rate because he saw no chance of saving the property from sale.

The first point which has been urged in appeal before us is that the rent having been commuted from Bhaoli into Nagdi rent under section 40, the Civil Court has no jurisdiction. This, however, is not a case of commutation at all and has not been treated as such in either of the lower Courts. Accordingly the question of the jurisdiction of the Civil Court does not arise. The real question is whether the mortgagee is bound by the agreement under section 109 (*c*) of the Bengal Tenancy Act which was made between the tenants and the mortgagor in possession. Both the lower Courts have found that he was not, and with this view I agree. The question under what circumstances a mortgagee is bound by the acts of the mortgagor in possession was fully discussed in *Anand Ram Marwari* v. *Dhanpat Singh* (1). After considering the cases of *Madan Mohan Singh* v. *Raj Kishori Kumari* (2) and *Reynolds* v.

(1) 38 Ind. Cas. 37; 1 P. L. J. 563; 2 P. L. W. 341.
(2) 17 Ind. Cas. 1; 17 C. L. J. 384.

MUNAWARALI v. TAIYABALI.

Ashby & Sons, Limited (3) Atkinson, J., remarked: "It is thus laid down and recognised that where a person gets a contractual benefit from a mortgagor in possession after the date of the mortgage, the onus is upon such person to prove that it was a benefit which he might derive and retain in the usual course of the management of the property." In the present case it is perfectly obvious that the benefits which the defendants Nos. 1 to 5 derived from the agreement were not such as they might retain in the usual course of the management of the property. Up till the time of the agreement they paid produce rents. The rate settled on compromise was considerably lower than the fair rent which would have been settled on commutation, and it has been found by the learned Munsif that this abnormally low rate was entered into because the mortgagor saw no means of saving his property. He accordingly colluded with the tenants and on condition of a heavy Nazarana he entered into an agreement which no manager would in the usual course of management have entered into.

I would accordingly dismiss this appeal with costs.

Appeal dismissed.

(3) (1903) 1 K. B. 87; 72 L. J. K. B. 51; 87 L. T. 640; 51 W. R. 405; 19 T. L. R. 70.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 261 OF 1919.

March 3, 1920.

Present:—Mr. Mittra, Offg. J. C.

MUNAWARALI—PLAINTIFF—APPELLANT

versus

TAIYABALI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. III—Decree for joint possession—Revenue paying estate—Allotment of share and delivery of possession—Collector, duty of—Reference to Civil] Court,[validity] of—Rights of parties after partition.

Where a decree for joint possession of an estate assessed to revenue is passed by a Civil Court, it is for the Collector not only to make allotment but to complete the partition by delivery of possession, and where he refers the parties to the Civil Court for this purpose he fails to exercise a jurisdiction vested in him by law. [p. 807, col. 1.]

After the allotment has been made, the parties cannot claim to be joint owners of the property even though the partition proceedings have not been completed according to law. [p. 807, col. 1.]

Appeal against the decree of the District Judge, Nimar, in Civil Appeal No. 198 of 1918, decided on the 15th February 1919.

Mr. *K. K. Gandhe*, for the Appellant.

Mr. *S. R. Pandit*, for the Respondent.

JUDGMENT.—The plaintiff-appellant Munawarali and the defendant-respondent Tyabali are brothers. In Suit No. 79 of 1909 instituted by Tyabali a decree for partition was passed by the District Judge, Nimar, on the 2nd September 1912 declaring that their shares are equal halves and in accordance with section 54 and Order XX, rule 18, Civil Procedure Code, the decree directed that partition, so far as it related to the estate assessed to the payment of revenue to the Government, be made by the Collector. The Collector made two shares A and B. The share A was allotted to Tyabali and B to Munawarali by the Collector on the 10th March 1913. Munawarali thereupon appealed to the Commissioner who set aside the order. The Collector then passed a fresh order on the 29th September 1915, according to which share A was given to Munawarali and share B to Tyabali. Tyabali then applied to the Court of the District Judge for separate possession of his share, but the District Judge held that possession could not be given until a final decree had been drawn up on a non-judicial stamp and ordered Tyabali to furnish the requisite stamp. Tyabali failed to furnish the stamp and so no decree was drawn up, nor was possession delivered.

It seems, however, clear that upon the passing of the first order of the Collector Tyabali obtained possession of the share A and the settlement papers in 1913 show him in possession of this share. From Exhibit P-2 it appears that Munawarali

applied on the 2nd August 1917 for being put in possession of the fields as finally partitioned. On this the Deputy Commissioner ordered that the applicant may be directed to go to the Civil Court for getting possession of the fields. Instead of applying to the Civil Court he has filed a suit for possession of share A.

The Munsif passed a decree for joint possession disallowing the plaintiff's claim for separate possession. The District Judge on appeal has dismissed the suit, and this second appeal has been filed by the plaintiff Munawarali.

The sole argument advanced is that the Munsif properly decreed joint possession of the share, though such a relief was not asked for in the plaint. I agree with the learned District Judge, following *Parbhudas Lakhmidas* v. *Shankarbhai* (1), that it is for the Collector not only to make allotment of the shares but to complete the partition by delivery of possession. The Collector in referring the applicant to the Civil Court made a mistake and failed to exercise a jurisdiction vested in him by law. But I am unable to see how that enables the plaintiff to ignore the partition proceedings and claim to be joint owner of the property after the allotment has been finally made by the Collector, though the partition proceedings have not yet been completed in accordance with law. To decree joint possession in such a case would be to interfere with the order for delivery of possession which, as the law contemplate, should be passed by the Collector.

Even if the Civil Court were competent to interfere with the allotment made by the Collector, it has been well pointed out that the order of the first Court was inequitable. Munawarali is admittedly in possession of share B and cannot claim to be awarded a decree for joint possession of share A as well. This argument of the learned District Judge appears to be unanswerable.

It has not been argued before me that the plaintiff should be given a decree for exclusive possession of share A. That is a matter which is apparently conceded to be solely within the jurisdiction of the Collector.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 11 B. 662; 6 Ind. Dec. (N.S.) 435.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1088 OF 1918.

May 4, 1920.

Present:—Mr. Justice Das.

BALDEO SINGH—APPELLANT

versus

SHEORAJ KUERI—RESPONDENT.

Procedure—Trial of suit—Findings to be recorded on evidence adduced—Findings based on inadmissible evidence, effect of—Evidence Act (I of 1872), s. 35—Confidential inquiry as to possession, whether admissible.

In deciding a suit for the possession of a holding, the Court must record a finding on the evidence adduced before it and is not entitled to base its judgment upon matters which are not properly admissible in evidence. [p. 808, col. 1.]

Plaintiff sued for possession of a holding. The suit was dismissed, the Judge relying upon a confidential inquiry conducted by an Assistant Settlement Officer at the time of the Revised Settlement for the purpose of ascertaining to whom the holding belonged:

Held, that the judgment could not be maintained as the proceedings of the confidential inquiry contained an opinion on an *ex parte* investigation which was not admissible in evidence under section 35 of the Evidence Act, and that it was the duty of the Judge to record a finding on the evidence adduced before him. [p. 809, cols. 1 & 2.]

Appeal against the judgment of the Additional Subordinate Judge, Saran.

Mr. *Rajendra Prasad*, for the Appellant.

Mr. *N. N. Sinha*, for the Respondent.

JUDGMENT.—This appeal is directed against the judgment of the Additional Subordinate Judge of Saran. The plaintiff, who is the appellant before me, instituted the suit for declaration of his title to, and for confirmation of possession, or in the alternative for recovery of possession, of a holding bearing Survey No. 280/980. His case is that one Bhakole was in possession of this holding and that he continued

the holding at a sale in execution of a decree for rent. The Court of first instance decreed the plaintiff's suit but the Court of Appeal below, disagreeing with the Court of first instance, has dismissed the plaintiff's suit.

The final entry in the Record of Rights is in favour of the plaintiff. The learned Judge recognises that presumption is in favour of the plaintiff, but relying very greatly upon a confidential inquiry conducted by the Assistant Settlement Officer at the time of the Revisional Settlement, the learned Judge has come to the conclusion that the holding in dispute never formed part of the holding of Bhakole. He says that the Assistant Settlement Officer writes that he made a confidential inquiry and ascertained that the holding belonged to the defendant. Being of opinion that the confidential inquiry made by the Assistant Settlement Officer deserves much consideration and also considering that the evidence of possession advanced by defendant was better than that adduced by the plaintiff, he dismissed the plaintiff's suit. In my view, the judgment of the learned Judge is wrong. If he had found on a consideration of the evidence that was adduced before him that the evidence adduced on behalf of the defendant was better than that adduced on behalf of the plaintiff, he would have been within his rights in dismissing the plaintiff's case. But he, no doubt, took into consideration certain matters which, in my opinion, were not properly admissible in evidence. He ought not to have relied upon the confidential inquiry conducted by the Assistant Settlement Officer.

Mr. Nirsu Narain Sinha on behalf of the respondent urges that the confidential inquiry conducted by the Assistant Settlement Officer was admissible in evidence under section 35 of the Evidence Act. In my view, this is not correct. Section 35 of the Evidence Act provides that "an entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact." But in my view the opinion of the public officers formed on an *ex parte* investigation is not made admissible under section 35 or under any other section of the Evidence Act.

Mr. Nirsu Narain Sinha next urges that the lower Appellate Court considered the oral evidence of both the parties and thought that the evidence adduced on behalf of the defendant was better than the evidence adduced on behalf of the plaintiff. That is so, and if the lower Appellate Court had merely relied on his finding of the oral evidence in the case, I would be powerless to interfere with his decision in appeal. But since he relied, and very strongly relied, upon a document which, in my view, was not properly admissible in evidence, it is impossible to say to what conclusion he would have come had he excluded from his consideration the result of the confidential inquiry conducted by the Assistant Settlement Officer. It may be that he would have come to the opposite conclusion. In any case, the matter must be reconsidered by the learned Judge. I would allow this appeal and remand the case to the Court below for decision according to law.

There is another point which ought to be mentioned. The learned Judge has disposed of the case on his finding as to possession. This is not quite correct. The plaintiff as the auction purchaser has brought his suit within 12 years from the date of purchase. Even if he is out of possession, he is entitled to recover if otherwise he proves his title to the land in dispute. The appellant is entitled to the costs of this appeal. The costs incurred in the Courts below will abide the result and will be disposed of by the lower Appellate Court.

Case remanded.

KASHI RAO *v.* MOHAMAD ALLI.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 276 B OF 1916.

August 25, 1917.

Present :—Mr. Prideaux, A. J. C.

KASHI RAO, MINOR, GUARDIAN *ad litem* LALAJI—APPLICANT—APPELLANT

versus

MOHAMAD ALLI—PLAINTIFF—NON-APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Property attached in execution—Purchaser from discharged defendant, whether party.

A person who, prior to the passing of a simple money decree, purchases from a discharged defendant property against which the decree is sought to be executed but which is not affected by the decree itself, is not a representative of that defendant within the meaning of section 47 of the Civil Procedure Code.

Appeal against the decree in Civil Appeal No. 301 of 1915, in the Court of the District Judge, East Berar, Amraoti, decided on the 14th February 1916, arising out of the decision in Miscellaneous Case No. 18 of 1915 in the Court of the Sub-Judge, Morsi, decided on the 10th September 1915.

Mr. *N. M. Bedarkar*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—In Suit No. 192 of 1912 on the file of the Sub-Judge, Morsi, one Mohamad Ali and Daudbhai sued Vinayakrao and Baliram claiming Rs. 2,800 on *khata* accounts. They obtained a decree for that sum and costs from the second defendant Baliram alone. In execution of that decree field Survey No. 20 of Mouza Tarora and Survey No. 44 of Mouza Khanapur were attached. Baliram's son Kashirao filed an objection to the attachment, contending that he had purchased the fields in suit from Vinayakrao and that they were attached from his possession. The sale took place during the pendency of the civil suit and before the passing of the decree. The first Court found that the application fell within Order XXI, rule 58 of the Civil Procedure Code. It was disallowed. It was contended in appeal before the learned District Judge, Amraoti that the application comes under section 47, Civil Procedure Code, and not under Order XXI, rules 58 59. The Judge holds that Kashirao is not the respresentative of Vinayakrao and that his application was rightly dealt with under Order XXI, rule 58, and that such being the case no appeal lies. The appeal was dismissed.

The short point argued here is that Kashirao is the representative of Vinayakrao who was admittedly a party to the civil suit, and as such his application to release the land from attachment was one to be dealt with under section 47, Civil Procedure Code and that an appeal, therefore, lay against the first Court's order to the lower Appellate Court. I am referred to *Balaram Kunbi* v. *Sadeba Mali* (1), *Gulzari Lal* v. *Madho Ram* (2) and the dissenting judgment of Sir John Stanley in *Bhagwati* v. *Banwari Lal* (3), in support of the contention that the present appellant is Vinayakrao's representative-in interest. Now the decree did not bind the fields. It was a money decree. Vinayakrao, if still the owner of the fields, could doubtless have his claim to them determined in execution proceedings; but the appellant, who says he purchased from Vinayakrao prior to the date of the money-decree, is not in my opinion a representative of Vinayakrao within the meaning of section 47, Civil Procedure Code. Appellant according to his own story did not succeed to the rights of Vinayakrao after the decree was passed; *Kameshwar Pershad* v. *Run Bahadur Singh* (4). In my opinion it would be stretching section 47 too far to hold that that section included in an application for execution of a simple money-decree a person who had purchased from a discharged defendant property against which the decree was sought to be executed but which was not affected by the decree itself. I think the case has been rightly decided in the lower Appellate Court and, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 17 C. P. L. R. 178.
(2) 26 A. 447; A. W. N. (1904) 61; 1 A. L. J. 65.
(3) 1 Ind. Cas. 416; 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185.
(4) 12 C. 458; 6 Ind. Dec. (N. S.) 311.

RAM CHARITAR RAM v. HASHIM KHAN.

PATNA HIGH COURT.

CIVIL REVISION No. 15 OF 1920.

May 11, 1920.

Present:—Mr. Justice Das.

RAM CHARITAR RAM—

PETITIONER

versus

HASHIM KHAN—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Ex parte decree—Application to set aside decree unaccompanied by decretal amount or security—Time, whether can be granted for furnishing security—Civil Procedure Code (Act V of 1908), s. 148, applicability of, to Provincial Small Cause Court.

Where an application, under section 17 of the Provincial Small Cause Courts Act, is made to set aside an *ex parte* decree, the applicant must at the time of making the application either deposit in Court the decretal amount or furnish security for the performance of the decree. The provisions of the section are mandatory, and the Court has no power to grant time for furnishing security. [p. 810, col. 2.]

The provisions of section 148 of the Civil Procedure Code cannot be applied to extend the time for doing an act prescribed by the Provincial Small Cause Courts Act. [p. 811, col. 1.]

Application from a decision of the Small Cause Court Judge, Purneah.

Mr. *Shiveswar Dayal*, for the Petitioner.

Mr. *Lal Mohan Ganguly*, for the Opposite Party.

JUDGMENT.—This application is directed against an order of the learned Judge of the Small Cause Court refusing to restore a Small Cause Court suit under Order IX, rule 13 of the Code of Civil Procedure. It appears that the suit was decreed *ex parte* in favour of the plaintiffs on the 16th September last. On the 19th September the defendant applied under Order IX, rule 13, for setting aside the *ex parte* decree and for re-hearing of the original suit, but the applicant did not deposit into Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree which was passed against him. The Court, however, gave him time to furnish the security bond on or before the 13th of November and the applicant did furnish a security bond within the time allowed to him by the Court. When the application ultimately came on for hearing, the plaintiffs who had succeeded before the learned Judge argued that inasmuch as at the time of presenting his application the applicant did not deposit into Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree, the application could not be heard. The learned Judge agreeing with this contention has rejected the appellant's application. In my view, the learned Judge has taken an entirely correct view of the law on the subject. Section 17 gives a right to apply for an order to set aside a decree passed *ex parte*, but it imposes certain conditions on the defendant. Those conditions will be found in section 17 of the Provincial Small Cause Courts Act which runs as follows:—"Provided that an applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct." It seems to me that this section is mandatory. It is impossible to read this section in any other way. Obviously the Legislature intended to discourage, so far as was possible, applications for setting aside *ex parte* decrees in respect of Small Cause Court suits. The Calcutta High Court has consistently taken the view that this section is mandatory, but it appears that under the latest case the Calcutta High Court has taken the view that it is not necessary that the security bond should be filed along with the application. It is sufficient according to this decision if the security bond is furnished within the time limited for making an application under Order IX, rule 13 It is, in my view, unnecessary to decide whether the security bond should be filed along with the application or not, because in any view of the case the security bond was in fact furnished long beyond the time allowed under the law for making an application under Order IX, rule 13.

The learned Vakil, however, argues that the Code of Civil Procedure now gives an express power to the Court for extending time and that consequently the Court had power to extend the time and did in fact exercise that power and that consequently

the Court ought not to have rejected the application. In my view, this argument is not sound. Section 148 provides that "where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired." It is obvious that section 148 has no application to the facts of this case, because the doing of the act, namely, furnishing the security bond, is prescribed not by the Code of Civil Procedure but by the Provincial Small Cause Courts Act. I would accordingly reject this application with costs. Hearing fee one gold *mohur*.

Application rejected.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1573 OF 1919.

February 10, 1920.

Present :—Mr. Justice Beachcroft.

MANULLA KOLU AND OTHERS—DEFENDANTS—APPELLANTS

versus

PRASANNA KUMAR SARKAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Occupancy holding, non-transferable, transfer of—Khas *possession, suit for, by landlord—Limitation, commencement of—Adverse possession of transferee, requisites of—Abandonment—Bengal Tenancy Act (VIII of 1885), s.* 87—*Limitation Act (IX of* 1908), *s.* 18.

Where there is a transfer of a non-transferable occupancy holding, it is only on the theory of abandonment within the meaning of section 87 of the Bengal Tenancy Act that the landlord can re-enter and where such abandonment took place 12 years before the landlord's suit to recover *khas* possession, the only way of overcoming the bar of limitation to the suit would be by establishing a case within section 18 of the Limitation Act. [p. 812, col. 2; p. 813, col 1.]

To establish a case of adverse possession against the landlord by the transferee of a non-transferable occupancy holding it must be shown that the possession was adequate in continuity, publicity and extent. The element of publicity would be wanting if the landlord was not aware of the transfer, and where the element of publicity is wanting the element of extent would also be wanting. [p. 813, col. 2.]

Ram Chandra Sil v. *Ramanmani Dasi*, 36 Ind. Cas. 890; 20 C. W. N. 773, followed.

Appeal against the decree of the Subordinate Judge, Jessore, dated the 30th of April 1919, affirming the decree of the Munsif, 2nd Court at Jhenidah, dated the 26th of February 1918.

FACTS appear from the judgment.

Babu *Indu Bhusan Roy*, for the Appellants.—The defendants are the appellants. The plaintiffs are the landlords of a non-transferable occupancy holding and brought this suit for recovery of *khas* possession of the holding on the ground that their tenant had abandoned the holding. One Isa Sheikh was the original tenant. In 1311 B. S. he sold the holding to the wife of defendant No. 1 and since then we are in possession of the holding as her heirs. Thus by continuing in possession for more than twelve years we have acquired the limited interest of tenants. The landlord's right to get *khas* possession is barred by limitation. The landlord's right to recover *khas* possession accrued as soon as the original tenant transferred the holding. The question of the landlord's knowledge of the transfer is immaterial unless, of course, it is shown that the landlord was kept out of the knowledge of the right to sue by fraud so as to bring the case within section 18 of the Limitation Act. See *Probhabati Dasi* v. *Taibaturineesi Chaudhurani* (1) and *Parchkari Chattapadhya* v. *Maharaj Bahadur Singh* (2).

Babu *Amarendra Nath Bose* for Babu *Upendra Narain Bagchi*, for the Respondents.—I was in possession through the original tenant till 1316 B S. I was receiving rent through the defendants only as *marfatdars* of the original tenant. Rent was being paid through the original tenant within 12 years of the suit. In the case of the transfer of a non-transferable occupancy holding the right of the landlord to re-enter depends on the question as to whether there has been abandonment or not, *i. e.*, abandonment within the meaning of section 87 of the Bengal Tenancy Act. Unless that abandonment took place 12 years before suit, the principle of the two cases cited by my learned friend would not apply. The case in *Probhabati Dasi* v.

(1) 20 Ind. Cas. 664; 17 C. W. N. 1088; 19 C. L. J. 62.

(2) 28 Ind. Cas. 708; 19 C. W. N. 456.

Taibaturinessa Chaudhurani (1) was distinguished by this Court in Second Appeal No. 803 of 1914. The landlord's knowledge of the transfer is essential. Until the landlord comes to know of the transfer, the tenancy subsists in the original tenant. Finally, if my learned friend wants to establish title by adverse possession, it must be shown that his adverse possession was adequate in continuity, publicity and extent. Refers to *Ram Chandra Sil* v. *Ramanmani Dasi* (3) and *Radhamoni Debi* v. *Collector of Khulna* (4). The element of publicity would be wanting if the landlord was not aware of the defendant's possession.

Babu *Indu Bhusan Roy* briefly replied.

JUDGMENT.—This appeal is by the defendants. The suit was one for *khas* possession. The plaintiff, who is the landlord, alleged that one Isa Sheikh, an occupancy *raiyat*, was the original tenant until 1319, that he then abandoned the holding and when the plaintiff went in 1320 to take *khas* possession, he was resisted by the defendant who alleged that he was a purchaser from Isa Sheikh. The holding in question was not a transferable one. The defence was that Isa had left the holding more than 12 years before the institution of the suit, the first defendant's wife having purchased the holding from him in 1311, and after her death the defendants, her heirs, possessed the land and paid rent to the landlord in the name of the old tenant, therefore, they were not liable to be ejected, and the suit was barred by limitation. Both Courts decreed the suit.

The facts found are that Isa sold this holding 12 years and 3 weeks before the institution of the suit, the defendants and their predecessor have been in fact in possession since then, but the plaintiff was not aware of this till at most 5 years before the institution of the suit. The defendants alleged a tender of rent to the plaintiff in 1318, and though the Appellate Court has not definitely come to a finding whether that story is true or not, at any rate this much is found that before that the plaintiff was not aware of the transfer and of the defendants' possession. There is also a finding by the first Court, which is not touched by the Appellate Court, that for the years 1313 to 1316 the plaintiff got a decree for rent against the original tenant Isa. The rent decreed was deposited in Court and on that occasion the defendants did not "attempt to prove that the deposit was made in his name" (which I take to mean that the defendants did not try to prove that they made the deposit) or that at that time any plea of the transfer of Isa's interest was made. The first Court also found that the defendants never tried to get recognition from the plaintiff, a finding with which the Appellate Court did not interfere. On these findings the Courts have held that the suit was not barred by limitation.

The question of limitation is again raised before me. Though it is called a question of limitation, it is presented as a plea of adverse possession, that is that by continuing in possession for over 12 years the defendants have acquired the limited interest of tenants. The learned Vakil for the appellants has referred to two cases to show that the question of the landlord's knowledge of the transfer is immaterial and that to succeed he has to make out facts sufficient to establish a case within section 18 of the Limitation Act, that is, that he has been kept out of the knowledge of the right to sue by fraud till within the period of 12 years before suit.

The first of the two cases referred to is that of *Probhabati Dasi* v. *Taibaturinessa Chaudhurani* (1) In that case it appears that rent was actually paid by the transferee, though it was paid in the name of the original tenant, while receipts known as *marfatdari* receipts were given in which the name of the transferee appeared as the person actually paying the money. In that case it was remarked that "the right to recover must be by reason of forfeiture or abandonment; whichever it be, this event occurred very many years more than 12 prior to the commencement of the suit and the only way of overcoming this bar would be by establishing a case within section 18 of the Limitation Act." The other case is that of *Panchkari Chattapadhya* v. *Maharaj Bahadur Singh* (2). The case was decided on the authority of the earlier cited case. The statement of facts shows that the case was based on the theory

(3) 26 Ind. Cas. 890; 20 C. W. N. 773.

(4) 27 C. 943; 27 I. A. 136; 4 C. W. N. 597; 2 Bom. L. R. 594; 7 Sar. P. C. J. 714; 14 Ind. Dec. (N. S.) 617.

of abandonment and it was found that the transferee had been openly in possession of the land ever since the purchase and had been paying rent to the landlord's officers who had given him receipts describing him as *guzratdar*.

The learned Vakil for the respondent distinguishes these cases from the present case in this way. He argues that the right of the landlord to re-enter depends on the question whether there has been abandonment or not and that means abandoment within the meaning of section 87 of the Bengal Tenancy Act, also that in the present case there has been no abandonment until within the period of limitation. Of course it is only on the theory of there being abandonment that the landlord can re-enter and unless that abandonment took place 12 years before suit, the principle of the two cases cited would not apply. In the present case there is no finding as to the abandonment having taken place more than 12 years before suit. On the contrary, as I have already stated with reference to the facts found, it appears that the money decreed in the rent suit was deposited in the name of the original tenant and there is nothing to show that it was deposited by the defendants, even though in fact they were in possession. Consequently it has not been shown that the abandonment within the meaning of section 87 of the Bengal Tenancy Act took place more than 12 years before suit.

This is enough to dispose of the matter, but I may point out that in another case of this Court, the case of *Probhabati Dasi* v. *Taibaturinessa Chaudhrani* (1) was distinguished, that is, Second Appeal No. 803 of 1914. That was an appeal from a judgment in which the learned District Judge had referred to that case and to the cases of *Deb Narain Dutt* v. *Baidya Nath* (5), *Tarak Das Pal Chowdhury* v. *Harish Chandra Banerjee* (6). When the matter came before this Court, the learned Judges remarked that the Additional District Judge had omitted an important item which appears in those decisions, namely, that the landlord must know of the transfer to the purchaser.

It is hardly necessary to refer to a further argument that has been advanced, which has considerable force, and that is that to establish a case of adverse possession, the adverse possession must be adequate in continuity, publicity and extent. Obviously the element of publicity is wanting if the landlord was not aware of it, and if the element of publicity is wanting the element of extent is also wanting [*Ram Chandra Sial* v. *Ramanmani Dasi* (3)].

I think the learned Subordinate Judge puts the matter quite correctly when he says the period of limitation runs from the date when the tenancy of the plaintiff's tenant, that is, the vendor of the wife of defendant No. 1, came to an end and the adverse possession of the defendants commenced, and he finds that the adverse possession commenced in 1319. That being so, the case of adverse possession is not made out.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(5) 2 Ind. Cas 148; 14 C. W. N. 68.

(6) 16 Ind. Cas. 977; 16 C. L. J. 548; 17 C. W. N. 163.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1252 AND 1253 OF 1918.

May 10, 1920.

Present:—Mr. Justice Sultan Ahmed.

IN S. A. No. 1252 OF 1918

ONKAR MAL MARWARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

IN S. A. No. 1253 OF 1918

Shaikh JOHAR ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Cantonment, land in—Permanent tenancy, whether can be acquired—Burden of proof—Considerations which do not create presumption of permanency—Denial of title—Estoppel—Landlord and tenant—Tenant building on land—Ejectment—Compensation, whether can be awarded.

ONKAR MAL MARWARI *v.* SECRETARY OF STATE FOR INDIA.

Where in a case of eviction from lands which formed a Cantonment the defendants allege that they have acquired a permanent tenancy, the burden of proving such tenancy lies upon them; the facts that they and their predecessors held the lands without a lease for a very long time, that the rent was never altered, that succession to the lands by transfer and inheritance has been established, and that buildings have been erected on the lands, do not by themselves establish a permanent tenancy, nor do such circumstances raise any presumption of ownership in favour of the defendants or their predecessors-in-title. [p. 814, col. 2.]

The fact that permanent structures are constructed on such lands to the knowledge of the plaintiff would not estop him from denying the permanent character of the tenancy of the defendants. [p. 815, col. 1.]

Where a person with full knowledge of the limited interest which he possesses in land constructs permanent structures upon the same, he is not entitled upon eviction to any compensation. [p. 815, col. 2.]

Appeals from a decision of the District Judge, Manbhum.

Messrs. *P. K. Sen* and *Abani Bhusan Mukherji*, for the Appellants.

Mr. *S. A.A. Asghur* (Government Advocate), for the Respondent.

JUDGMENT.—These appeals arise out of two suits which were instituted by the Secretary of State for India in Council against the defendants for *khas* possession of the lands in suit by evicting the defendants. The plaintiff's case is that village Doranda with other villages constituted a Cantonment which was created in 1833 or 1834. That towards the end of 1905 the troops were withdrawn from the station but it continued to be managed by Cantonment Regulations up to 1908. At the end of 1908 the Cantonment Regulations were withdrawn and the station has since then been managed by the Khas Mahal Department. It was further alleged that during the period when Cantonment Regulations were in force, no permanent settlement of any kind was made but that people used to live there under the permission of the military authorities and that the permission to the predecessors of the defendants to remain within the Cantonment was simply a license and did not give them any permanent right whatsoever. The defendants contested the suits on the allegation that they had a permanent interest in the lands in dispute. They further alleged that they had built permanent structures and costly buildings with the knowledge of the authorities and contended that the plaintiff was estopped from denying their permanent right to the lands. There were other pleas also taken, but it is not necessary to deal with them as they were not touched in the course of the arguments before me. Both the Courts below came to the conclusion that the possession of the lands in suit by the predecessors-in-interest of the defendants was on sufferance or at the highest it was a tenancy from year to year and that the defendants had absolutely no permanent interest in the lands in suit, and, therefore, held that the plaintiff was entitled to evict them. These second appeals have been filed against the decrees of the lower Appellate Court. The learned Counsel for the appellants firstly contended that on the evidence in the case the permanent tenancy of the defendants had been established. There can be no doubt that, on a question whether the tenure is permanent or precarious, the burden of proof must lie upon the defendant who sets up the permanent tenancy. It is not alleged that there was any written lease under which the predecessors of the defendants were inducted on the land. But it is argued that as they held these lands for a very long time and the rent had never been altered, that as succession to the lands by transfer and inheritance had been established and that as buildings have been erected on them, the permanent tenancy of the defendants must be inferred. I will presently show that these circumstances by themselves do not and cannot establish permanent tenancy, but considering that permanent tenancy is claimed in lands which formed part of a Cantonment governed by Cantonment Regulations these circumstances are almost valueless to prove permanent tenancy. The whole scheme of the regulations under which Cantonments have been established in India seems to be based on the principle that the Cantonment Authorities or the Government should not in any circumstances contract themselves out of the powers to resume lands lying within a Cantonment. It is unnecessary to refer to the various Regulations and Acts governing Cantonments, as this point has not been challenged by the learned Counsel appearing on behalf of the appellants. In the case of *Kaikhusru Aderji* v. *Secretary of State for India in*

Council (1) their Lordships of the Judicial Committee held that "Such circumstances raise no presumption that the appellants or their predecessors in-title were owners, and that the appellants were mere licensees and the land in question was lawfully resumable by Government." It has been found that the defendants and their predecessors came on this land after the year 1834 when the Cantonment was established, and, therefore, it must be taken that the right of the Government to resume the land, even when buildings have been erected thereon, was fully known by the defendants and their predecessors. Great reliance has been placed by Mr. Sen on the fact that permanent structures had been constructed on these lands, and, therefore, it is submitted that the plaintiff is estopped from denying the permanent character of the tenancy of the defendants. The leading authority on the law upon this point is *Ramsden* v. *Dyson* (2), where the Lord Chancellor at page 141 of the report observed: "It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end." Their Lordships of the Privy Council in the case of *Beni Ram* v. *Kundan Lal* (3) at page 502 observed as follows: "If there be one point settled in the Equity Law of England, it is, that in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below." There is absolutely no evidence that the defendants were induced to expend their money by reason of something amounting to an agreement or license on the part of the landlord. Under these circumstances the plaintiff in my opinion has established an irresistible case for the eviction of the defendants. Mr. Sen, however, has pressed upon me the question of compensation. He has submitted that at any rate he is entitled to compensation with respect to the structures. In this connection it may be observed that the maxim "*quicquid in ædificatum solo, solo cedit*" has no application to the present case and as was pointed out by the Judicial Committee in the case of *Beni Ram* v. *Kundan Lal* (3) referred to above, the rule established in India is that of section 108 of the Transfer of Property Act, which provides that "the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth: provided he leaves the property in the state in which he received it." If the defendants with full knowledge of the limited interest which they possessed in the land constructed permanent structures upon the same, they are not entitled to any compensation as in the words of the Lord Chancellor "it was their folly to expend money upon a title which they knew would or might soon come to an end." That the Government allowed compensation to some other persons who were similarly evicted is irrelevant to the determination of the legal rights of the parties. Nor has condition IX of the Annexure to Form A of the Cantonment Code of 1899, which is the form of lease for lands situate in Bazars, etc., any bearing upon these cases where no lease is ever said to have been executed. The result is that these appeals are dismissed with costs.

Appeals dismissed.

(1) 12 Ind. Cas. 117; 15 C. W. N. 909; 10 M. L. T. 97; (1911) 2 M. W. N. 23; 14 C. L. J. 268; 13 Bom. L. R. 788; 8 A. L. J. 1219; 21 M. L. J. 1100; 36 B. 1; 38 I. A. 204 (P. C.).

(2) (1865) 1 H. L. 129; 12 Jur. (N. S.) 506; 15 W. R. 926.

(3) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 81 OF 1919.

August 15, 1919.

Present :—Justice Sir John Woodroffe, KT., and Mr. Justice N. R. Chatterjea.

RAJ MOHON DHUPI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

HARENDRA CHANDRA MUKHOPADHYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, second—Document, admissibility of—Objection, whether can be taken in second appeal—Finding by trial Court—Appellate Court, difference by—Reasons for finding.

An objection to the admissibility of a document cannot be taken for the first time in second appeal where an answer to the objection involves an enquiry into facts. [p. 817, col. 1]

An Appellate Court, in arriving at a conclusion different from that of the Court of first instance, should state its reasons for the same in order to enable a Court of second appeal to see whether the conclusion has been legally drawn. [p. 817, col. 2; p. 818, col. 1.]

Appeal against the decree of Mr. Justice Greaves, dated the 24th of February 1919, reported as 50 Ind. Cas. 468, affirming that of the Additional Subordinate Judge, Faridpore, dated the 31st January 1917, in Appeal from Appellate Decree No. 903 of 1917.

Babu *Samatul Chandra Dutt*, for the Appellants.—The appeal arises out of a suit for ejectment. The first Court found that the defendants were occupancy ryots. The lower Appellate Court reversed the first Court's judgment without assigning any reason on this question of the status of the defendants and decreed the suit. On appeal to this Hon'ble Court which was heard by the Hon'ble Mr. Justice Greaves, the decision of the lower Appellate Court was confirmed. My submission is that the Courts ought to have rejected Exhibit H as being inadmissible in evidence. If that had been done, then I would have succeeded. The documents relied on by the Courts are quite irrelevant to the present suit as they do not relate to identical lands. The defendants being occupancy ryots are not liable to be ejected. The question of the status of the defendants depends upon that of the plaintiffs' landlords. If the plaintiffs are tenure holders the defendants are ryots. If the plaintiffs are ryots the defendants are under-ryots. The first Court found that the defendants are occupancy ryots. The learned Subordinate Judge held that they are trespassers and decreed the suit, although he did not state the reasons for reversing the finding of the learned Munsif. The question of the status of the defendants is very material and it cannot be lightly disposed of. Refers to *Rajani Kanta Ghose* v. *Secretary of State for India* (1), *Debendra Nath Das* v. *Bibudhendra Mansingh* (2). I would, therefore, ask for a remand for the trial of the question.

Babu *Gunada Charan Sen* (with him Babu *Kshitish Chandra Chakravarty*), for the Respondents.—With regard to the first point urged by the other side, I submit the documents were relevant to the present case as they related to lands held under a common title. Hence they were admissible in evidence. Further the documents went in without any objection and it is now too late in the day to put forward that objection which ought not to be entertained at all. As regards the status of the defendants the finding of the learned Subordinate Judge is conclusive on the point. It cannot be questioned in this Court. The learned Judge has not assigned reasons because they are obvious on the record. The appeal should, therefore, be dismissed.

JUDGMENT.—Two questions are raised in this appeal. The first is whether the plaintiffs have made out any title and the second is whether assuming that title had been so made out, the defendants are entitled to remain on the land and are protected from ejectment by reason of the fact that they are, as they allege, *raiyats* with rights of occupancy. Upon the question of title the judgment of this Court is impugned on the ground that the learned Judge, whilst holding that certain documents were inadmissible, has yet thought that the judgment of the lower Appallate Court might be affirmed on the ground that besides such documents there was sufficient evidence on the record to justify the conclusions at which the lower Appellate Court had arrived.

(1) 51 Ind. Cas. 226; 46 C. 90; 23 C. W. N. 643; 45 I. A. 190 (P. C.).

(2) 45 Ind. Cas. 411; 45 C. 805; 5 P. L. W. 1; 35 M. L. J. 214; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 45 I. A. 67 (P. C.).

As regards this Mr. Justice Greaves has assumed for the purposes of his judgment that Exhibit H was inadmissible. It does not appear, therefore, whether he was of opinion that the document was admissible or inadmissible. But he has assumed that it was inadmissible in favour of the appellants now before us. As regards the decree it is not quite clear whether or not he considered that document to be inadmissible. There are words in the judgment which seem to support that conclusion, for he says: "there is no evidence on the record to show that the land in that suit was held under the same title as the land in the present suit."

It has, however, been urged that if these documents were inadmissible or were assumed to be such for the purposes of the judgment, this Court which does not deal with facts could not say what the Subordinate Judge's decision would have been, had he been concerned with the *dakhilas* alone. I am not prepared to uphold the decision of the Subordinate Judge upon the grounds upon which Mr. Justice Greaves has rested his decision in this respect. I refer to his decision on the question of title. I think, however, that the appeal fails on this issue of title and on the ground, namely, that no objection was taken to the reception of the documents, the admissibility of which is now called in question.

The case made out as regards their admissibility by the respondents is this. They say that the previous transaction evidenced by Exhibit H and the decree to which I have referred, related no doubt to lands other than those in suit, but that nevertheless those documents were relevant on the ground that the lands to which they refer and the lands in suit were held on the same title. The documents were assertions, therefore, of the title which the plaintiffs made in the present suit. I am not prepared to hold that, in second appeal, this contention of the respondents could be made good, because the question whether or not the lands referred to in those documents and the lands in suit were, as alleged, held under a common title is one which involves an enquiry into facts. I, therefore, base my judgment as regards this question of title on the ground that these documents were admitted without objection. An objection was in this case all the more necessary, because the objection which is raised was that the document had no relevancy, having no connection with the matters in issue in the suit. Had that point been taken, it might have been open to the defendants-respondents to show that they were relevant in the manner which has been alleged before us here. I am of opinion, therefore, that the grounds upon which the decision of the learned Judge as to title is impugned fail.

There remains, however, the consideration of the second question, namely, whether the defendants were *raiyats* or under-*raiyats*. If they are, as alleged, *raiyats* with a right of occupancy, they cannot be ejected. This is a question which depends upon whether the plaintiffs are tenure-holders or *raiyats* and which requires a careful consideration of the evidence. I may refer in this connection to the decision (amongst others) in the case of *Rajani Kanta Ghose* v. *Secretary of State for India* (1) and to the decision in the case of *Debendra Nath Das* v. *Bibudhendra Mansingh Bhramarbar Roy* (2).

Now, the first Court which went into this matter dealt with the evidence, stated its reasons and came to the conclusion that the defendants were *raiyats* with rights of occupancy. On appeal that decision is reversed in the following terms:—

"Considering the evidence in the record I find that the plaintiff's interest is that of a *raiyat* at fixed rate. It is never a tenure as alleged by the defendants. The defendants' father was then an under-*raiyat*. The interest of an under-*raiyat* is not heritable, so the defendants are merely trespassers in the land. The fact that they are in possession for a very long time would not help their position a bit. Under section 49 of the Bengal Tenancy Act, an under-*raiyat* can be ejected after service of notice. The defendants are not entitled to such notice, still they are served with one. I, therefore, find they are liable to be ejected from the land." Though the learned Subordinate Judge reverses the decison of the first Court upon this issue, he has given no reasons for

(1) 51 Ind. Cas. 226; 46 C. 90; 23 C. W. N. 649; 45 I. A. 190 (P. C.).

(2) 45 Ind. Cas. 411; 45 C. 805; 5 P. L. W. J; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 I. A. 67 (P. C.).

the conclusions at which he has come. We should have known the grounds upon which the decision of the Subordinate Judge in this matter was based so as to see whether the conclusions had been legally drawn. I think, therefore, that, on this point the case should be re heard in appeal by a Judge other than the Judge who previously heard the appeal, and in arriving at a conclusion as to the status of the defendants the reasons for that conclusion should be stated.

The result, therefore, is that we set aside the judgment and decree of the Subordinate Judge in so far as it is thereby held that the defendants are mere trespassers and, therefore, liable to be ejected. The finding and decree on the question of title will stand. The appeal, therefore, will be re-heard upon the question only whether the defendants are, as they allege, *raiyats* with rights of occupancy on the land which is in suit and, therefore, protected from ejectment which the plaintiffs seek in this suit.

As regards costs, the order we make is this. In so far as the appellants have partly succeeded and partly failed, each party will bear his own costs of the appeal in this Court, but all the other costs in this litigation will abide the result of the re-hearing of the appeal in the lower Appellate Court, which we hereby direct.

Appeal partly allowed;
Case remanded.

PATNA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 164 OF 1918.
May 11, 1920.
Present:—Mr. Justice Sultan Ahmed.
Sheikh ABDUL BAQI AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
KUNJA BEHARI PANDEY AND OTHERS
—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 50, 115—Enhancement of rent, suit for, after publication of Record of Rights—Tenant, whether entitled to presumption under s. 50—S. 115, effect of, on s. 50.

Where after the publication of a Record of Rights a landlord brings a suit for enhancement of rent against an occupancy *raiyat*, the latter is precluded from relying upon the presumption raised in section 50 of the Bengal Tenancy Act, because the provisions of that section are controlled by section 115 of the Act. [p. 819, col. 1.]

Appeal from a decision of the Special Judge, Mozafferpore.

Mr. *Kailaspati*, for the Appellants.

Messrs. *Rai Guru Saran Prasad* and *Nawal Kishore*, for the Respondents.

JUDGMENT.—This appeal arises out of an application under section 105 of the Bengal Tenancy Act, by which the landlords applied for a fair rent to be settled for the excess lands in possession of the defendants under sections 52 and 30 of the Bengal Tenancy Act. The application was disposed of in the first instance by the Settlement Officer. Then there was an appeal to the Special Judge who, by his judgment dated the 20th September 1917, disposed of the application.

As regards the holdings under the defendants Nos. 1, 2, 6 and 7, the Special Judge held that there could be no enhancement because they were holding the lands under *kabuliyats* executed by the defendants in favour of the landlords. As regards the holding of defendant No. 3 he held in favour of the applicant landlord and came to the conclusion that the landlord had made out a good case for enhancement under section 30 of the Bengal Tenancy Act. As regards the holding of defendant No. 4 the Special Judge held that a case for enhancement under section 52 of the Bengal Tenancy Act had been made out against him but that the application for enhancement under section 30 had failed. As regards the holding of defendant No. 5 the learned Judge held that he was entitled to the benefit of section 50 of the Bengal Tenancy Act.

The landlord has filed this appeal against the decision of the Special Judge. He firstly contends that the learned Judge's decision with respect to the holding of defendant No. 5 is clearly wrong inasmuch as, while attempting to follow the decision of the Full Bench case of *Pirthi Chand Lal Choudhury* v. *Sheikh Basarat Ali* (1), he has held directly against that decision. That case was followed in this Court by my learned brother Mr. Justice Coutts and myself in the case of *Jagdeo Narain Singh* v. *Bhagwan Mahto* (2), where

(1) 3 Ind. Cas. 449; 13 C. W. N. 1149; 10 C. L. J. 343; 37 C. 30.
(2) 54 Ind. Cas. 672; 1 P. L. T. 27.

it was held that section 115 of the Bengal Tenancy Act controls section 50, clause (2), under which an occupancy *raiyat* is precluded from relying upon the presumption raised in section 50 after the publication of the Record of Rights when the landlord brings a suit for the enhancement of the rent. Therefore, it is clear that the defendant No. 5 was not entitled to the benefit of section 50 of the Bengal Tenancy Act and the appeal as against him must, therefore, succeed.

It was urged on behalf of the appellant that as against the defendant No. 4 his application for enhancement ought to have been considered on the ground of general rise in prices. The Special Judge seems to have considered the register of the Collector prepared under section 39 of the Bengal Tenancy Act in the case of the defendant No. 3, and there seems to be no reason why the same benefit should not be given to the landlord as against the defendant No. 4 as was given to him as against the defendant No. 3. In my opinion the landlord is entitled to an enhancement against the defendant No. 4 on the ground of rise in prices, which admittedly had existed because the learned Judge himself gave him the benefit of that rise as against the defendant No. 3.

As regards the defendants Nos. 1, 2, 6 and 7, the learned Vakil for the appellant has submitted that the *kabuliyats* alleged to have been executed by them in favour of the landlord are not binding upon the landlord inasmuch as there is no evidence to show that the *kabuliyats* were, as a matter of fact, accepted by the landlord. The first Court found that these *kabuliyats* were executed by the defendants Nos. 1 2, 6 and 7 in the presence of the landlord, and judging from certain circumstances he came to the conclusion that these *kabuliyats* were accepted by the landlord. The learned Judge in appeal has not disturbed that finding and, therefore, I think, I would be justified in holding that the *kabuliyats* were not only executed by the defendants Nos. 1, 2, 6 and 7 but were also accepted by the landlord. This is a finding of fact arrived at by the first Court and which has not been disturbed by the lower Appellate Court.

The result is that this appeal succeeds as against the defendants Nos. 4 and 5, and I declare that the landlord is entitled to the enhancement he claimed as against these two defendants. He has already been declared to be entitled to enhancement under section 30 as against the defendant No. 3 and under section 52 as against the defendants Nos. 2 and 4. His application for enhancement, however, fails as against the defendants Nos. 1, 2, 6 and 7 under section 30. As against defendants Nos. 1, 6 and 7 it also fails under section 52. The result is that the appellant is entitled to his costs in this Court as well as in the two Courts below from the defendants Nos. 4 and 5, but he must pay the costs in this Court to defendants Nos. 1, 2, 6 and 7.

I direct that the case be sent back to the lower Appellate Court for a determination of the excess rent payable by the defendants Nos. 4 and 5 in addition to that by the defendant No. 3.

Appeal partly allowed;
Case sent back.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION No. 97 OF 1918-19.
March 20, 1920.
Present:—Mr. Hopkins, S. M.

GAJADHAR AND OTHERS—APPLICANTS
versus
BENI PRASAD AND OTHERS—RESPONDENTS.

Mortgage of grove land—Mortgagee, right of, to let for cultivation—Lease, whether binding upon mortgagor.

It is within the rights of a mortgagee of grove land to let the land for agricultural purposes, and such letting is binding on the mortgagor. Where grove land is so let, the mortgagor cannot set up the fiction that it was not held for these purposes. [p. 820, col. 2]

Application for revision of the order of the Commissioner, Allahabad Division, dated the 19th of May 1919, in the case of ejectment.

GAJADHAR v. BENI PRASAD.

JUDGMENT.—The facts of this case are correctly set out in the following portion of the Assisant Collector's judgment:—

"The plots in suit were originally groves and are recorded as uncultivated groves *bila lagan* in the names of Shankar, etc., the predecessors-in-title of the plaintiffs, in *khatauni* of Settlement 1284 F. In 1293 F. the groves were mortgaged with possession by Shankar to Hira Lal who was the proprietor of the land on which the groves existed. The plots in question ceased to be grove long ago and became ordinary cultivated land. They were first cultivated by the proprietary of the land for 3 years and subsequently let to tenants. No. 505 was let to Beni's father in 1299 F. and No. 535 to Mata Badal in 1306 F. Revenue was assessed on No. 505 in 1891 and on No. 535 about 1899. There are only two *pipal* trees left. They are at a distance of 3 *bighas* from each other on the boundary line. It is consequently quite clear that both the plots ceased to be grove prior to 1899 and have been all along used for agricultural purposes since they were denuded of trees.

A suit for redemption was brought in the Court of the Munsif in 1912 by the plaintiffs. The decision went through several modifications and ultimately in 1915 the redemption of the mortgage was allowed by the High Court subject to the tenancy of the defendant. The money has been deposited in the Civil Court and the redemption has been made."

The applicant has now sued to eject the respondents, describing himself as an occupancy tenant and the respondents as his sub-tenants. The Commissioner has held that whether the respondents are tenants of the applicant or tenants of the Zamindar, they have acquired occupancy rights and the applicant has no right to eject them.

The applicant has made no attempt to show that he is an occupancy tenant. The application for revision is made to this Court on the ground that the Commissioner's finding is contrary to the decision of the High Court, that the finding of the Civil Court that the land is a grove cannot be questioned, that the applicant as a grove holder is a tenant within the meaning of the Tenancy Act, and that the respondents are his sub-tenants and liable to ejectment.

The portion of the High Court's final judgment which is relevant to these matters is the following :—

"The mortgagees were in possession ever since the year 1886. They were entitled to deal with the property as a prudent owner would have done. This would almost necessarily involve the right to make usual tenancies. We think that upon redemption of the mortgage the persons who were *bona fide* in occupation of the land or some parts of it as tenants ceased to be the tenants of the mortgagee and became the tenants of the redeeming mortgagors. This we think was the true position of the respondents in the present appeal. Actual possession should not be granted against them. The decree ought to have been for redemption of the mortgage as against all the defendants but subject to the rights (whatever they were) of the present respondents as tenants. It was no part of the duty of the Civil Court, nor was it within its jurisdiction, to ascertain what was the real nature of the rights of these tenants; that is a matter which will be properly tried by the Revenue Court and we desire to make it quite clear in our judgment that we express no opinion as to whether these persons have acquired occupancy rights or not."

The High Court clearly recognizes the position of the respondents as tenants.

It is argued that on the finding of the Civil Courts that the land is a grove which is the basis of the order for redemption, it is not land let or held for agricultural purposes and that no occupancy rights can be acquired in it. But the land was let for cultivation, and the High Court have held that this letting was within the rights of the mortgagee. It is, therefore, binding upon the mortgagor, the applicant. Having through his representative let the land for agricultural purposes, he cannot now set up the fiction that it was not held for these purposes.

It is then contended that the applicant as a grove-holder is a tenant and the respondents are, therefore, his sub-tenants and debarred from acquiring occupancy rights. Reliance is placed upon the Board's rulings in

Pandit Badri Prasad v. *Bhim Sen* (1) and *Megh Singh* v. *Musammat Nazar Fatma* (2). But the effect of these rulings is that a grove-holder is a tenant if he pays rent in cash or kind for the grove. In the present case the grove is held without payment of rent and the applicant is, therefore, not a tenant.

In my opinion there are no grounds for interfering in revision with the Commissioner's order. The application is dismissed with costs.

Application dismissed.

(1) Sel. Dec. No. 2 of 1892.
(2) Sel. Dec. No. 4 of 1911.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1455 OF 1918.

April 29, 1920.

Present:—Mr. Justice Sultan Ahmed.

Khaja Saiyid MUHAMMAD ALI NAWAB —APPELLANT

versus

THE CHAIRMAN, MUNICIPALITY OF BEHAR—RESPONDENT.

Bengal Municipal Act (III of 1884), s. 85—Tax—Assessment, liability to—Criterion for determining liability—"Within", meaning of.

In order to enforce the liability of a person to be assessed with tax under section 85 of the Bengal Municipal Act, the Municipality must show that he not only has a holding within the limits of the Municipality, but that he has circumstances or property within those limits. The fact that he is in receipt of an income from property situate outside the limits of the Municipality and spends that income within those limits would not satisfy the requirements of the section. The word "within" in section 85 of the Bengal Municipal Act refers not only to property but also to circumstances. [p. 821, col. 2]

Appeal against the decision of the District Judge, Patna.

Messrs. *Purnendu Narain Sinha* and *Netai Chandra Ghose*, for the Appellant.

Mr. *Siveswar Dayal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit which was instituted by the appellant Saiyid Muhammad Ali Nawab for a declaration that he had been unlawfully assessed with tax under section 85 of the Bengal Municipal Act, because he was not an occupier of any holding and had no circumstances or property within the meaning of that section within the Behar Municipality.

It has been found by both the Courts that the plaintiff had no property within the Municipality except a house in respect of which tax had been assessed. Section 85 requires, however, that he should not only be an occupier of a holding but also must have "circumstances or property within the Municipality" before he can be assessed and, therefore, the whole question is whether he had any circumstances or property within the Municipality.

It appears from the judgment of the District Judge that the plaintiff has an income of about Rs 15,000 from his property, which is not within the Municipality of Behar. The learned Judge, however, understood section 85 to mean that even if the plaintiff had circumstances or property outside the Municipality yet if the income derived therefrom was received and spent within the Municipality the requirements of section 85 of the Bengal Municipal Act would be satisfied. In my opinion this is clearly an erroneous view of law. In order to make the assessee liable for assessment the Municipality will have to satisfy the Court that he has got not only a holding within the Municipality but that he has circumstances or property within the Municipality. The word "within" refers not only to property but also to circumstances.

Therefore, unless he had circumstances or property within the Municipality he will not be liable to assessment. The view of the law that I take in this case is fully concluded by authorities. The cases reported as *Deb Narain Dutt* v. *Chairman of the Barnipur Municipality* (1), *Deb Narain Dutt* v. *Chairman of the Barnipur Municipality* (2), *Kameshwar Pershad* v. *Chairman of the Bhabua Municipality* (3) and *Chairman of the Municipal Commissioners of the Municipality of Bihar* v. *Mahant Ramdeo Das* (4), are conclusive on the point. In this view of the law it is impossible to maintain the judgment and decree of the lower Appel-

(1) 20 Ind. Cas. 264; 17 C. W. N. 1230; 19 C. L. J. 205; 41 C. 168.
(2) 12 Ind. Cas. 32; 39 C. 141.
(3) 27 C. 849; 14 Ind Dec. (N. S.) 556.
(4) 54 Ind. Cas 227; 4 P. L. J. 673; (1920) Pat. 140.

late Court. The result is that the decree of the lower Appellate Court is set aside and that of the Munsif dated the 25th February 1918 is restored. This appeal is allowed with costs.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 87 OF 1916.

October 22, 1917.

Present:—Mr. Batten, A. J. C., and Sir Henry Stanyon, KT., A. J. C.

JAINARAIN DHUSAR—DEFENDANT No. 1 —APPELLANT

versus

RAM KISHORE AND OTHERS—PLAINTIFFS NOS. 1 TO 4 AND DEFENDANT No. 3— RESPONDENTS.

Custom—Adoption—Dhusars *of Gurgaon settled in Central Provinces, whether governed by Punjab Customary Law—Orphan, adoption of, whether valid.*

In matters of adoption Dhusars of Gurgaon, a non-agriculturist tribe, who settled in the Central Provinces are governed by the Customary Law of the Punjab and there is nothing to prevent the adoption of an orphan among them. [p. 825, cols. 1 & 2]

Appeal against the decree in Civil Suit No. 28 of 1907, in the Court of the District Judge, Wardha, dated the 7th August 1916.

JUDGMENT.—This appeal is a sequel to the case *Ramkishore* v. *Jainarayan* (1) in which their Lordships of the Privy Council remanded the suit for further trial. The learned District Judge, in a very careful judgment, has now decided the suit on the merits, and has held that the plaintiffs are entitled to recover from the defendant Jainarain their own share and that Jainarain is entitled to retain Kedarnath's share. The plaintiffs have been given a decree for possession of 3/5 of the property in suit excluding the tenancy lands.

(1) 20 Ind. Cas. 958; 40 C. 566; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.)

The relationship of the parties is set out in the tree appearing at the beginning of the judgment of the learned District Judge. The only parties now on the record are the plaintiffs, defendants Nos. 1 and 3 and defendants Nos. 2 and 4, who claim under defendant No. 1. The parties are Dhusars by caste and the family belongs to Kutubpur, Tehsil Rewari, District Gurgaon, in the Punjab. It has been found by the District Judge that Harbhajan came to this part of the country some years before the first settlement and himself acquired the whole of the estate. At that time his uncle Balaram and his branch were not joint with Harbhajan. On Harbhajan's death in 1859 his sons Ramnath and Rambilas inherited the estate in equal shares. During the lifetime of Ramnath he adopted Kedarnath. Rambilas died first, in 1881, and on his death the name of his widow Jaidevi Bai was shown as an eight anna sharer in the family business as well as in the family villages in place of her husband. Ramnath died in 1883. About the year 1886-87 Jaidevi adopted the first defendant Jainarain and brought him to Ashti from the Punjab, and shortly afterwards his name was substituted for hers. The first plaintiff was born previously to this, but the other plaintiffs were born subsequently. In 1898 there was a partition of the family estate between Kedarnath and Jainarain in two equal shares, and Jainarain got his share, the property now claimed by the plaintiffs.

The principal question before us is whether Jainarain was validly adopted. If he was, the suit must fail. Two questions of law arise, the *first* being whether Jaidevi Bai inherited her husband's share and interest in the property held by him and Ramnath jointly, while the *second* is whether her adoption of Jainarain was valid. The first question is of subsidiary importance. The real question is whether Jainarain was adopted, and this depends on the further question whether the parties are governed by the Mitakshara Law, or whether in matters of adoption they follow Punjab Customary Law and whether in the latter case the adoption was valid according to that custom. Under the Customary Law of the Punjab it would appear that adoption is more accurately

known as "The appointment of an heir." We naturally approach a question of Punjab Law with some diffidense, more specially since there are conflicting rulings by the Chief Court of the Punjab; but we derive great assistance from recent rulings of their Lordships of the Privy Council. The learned District Judge, it appears, held that if the *riwaj-i am* applied to Dhusars, the adoption would be valid but that since Dhusars are not agriculturists he holds that the *riwaj-i-am* does not apply to them. He finds that the parties are governed by the Mitakshara, and that the appellant, the first defendant, has failed to prove a valid custom of adoption of orphans.

The learned Counsel for the appellant starts his argument with the proposition that *prima facie* the parties, who came from the Punjab, and who are governed in the Central Provinces by the same law as if they were still residents of the Punjab, are governed by custom and not by the orthodox Hindu Law. He cites the opening passage of Rattigan's Digest of the Customary Law of the Punjab. The opening passage of this work runs as follows:—

"Custom in this Province is the first rule of decision in all questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, Wills, legacies, gift, partition, any religious usage or institution, or alluvion and diluvion."

This appears to be the accepted interpretation of section 5 of the Punjab Laws Act IV of 1872.

The *riwaj-i am* of the Gurgaon District is to be found in Exhibits 1-D 32 to 1-D 36. What is practically a reproduction of it is to be found in the Code of Tribal Custom forming an appendix to the Settlement Report of the Gurgaon District 1872-1883. Some of the special customs relating to adoption set out in the *riwaj-i am* are specifically stated to apply to Dhusars, and this appears to us, if the *riwaj-i-am* is binding on the parties, to establish the proposition that Dhusars are governed in matters of adoption not by the orthodox Hindu Law but by Customary Law. According to Hindu Law adoption is a religious ceremony and giving and taking forms a necessary portion of it. Under Punjab Customary Law there is no religious significance attached to the appointment of an heir, and there is no reason, therefore, why an orphan who cannot be given in adoption by his parents should not be adopted, in the Punjab sense. The learned District Judge says that several of the customs mentioned in the above-mentioned Code as being prevalent in the Gurgaon District are directly opposed to the well-known and established principles of Hindu Law. He goes on to say: "A widow can without permission, written or verbal, of her deceased husband adopt anyone she pleases of her husband's male relatives related through males, and for such an adoption consent of her husband's relatives is not at all necessary; for Dhusars specially the recorded custom is that the husband's male relatives are bound to supply her with a son and that failing this she is at liberty to adopt her daughter's son or other relatives through females. There is no limit about the adoptee's age and even a married man having children can be adopted. An only son of the eldest son can be given in adoption. From the fact that there is no limit about the age and that one is also empowered to give away in adoption his brother, it may be implied that the adoption of an orphan is not open to any objection." It may be taken as proved that Dhusars are non-agriculturists. This appears to us the only inference to be drawn from the evidence of defendants' witnesses Nos. 10, 11, 8, 9, 22 and 23. A very large number of rulings of the Chief Court of the Punjab have been cited before us by the learned Advocate for the respondents-plaintiffs to show that Punjab Customary Law does not apply to non-agriculturists or to the higher castes. We would mention specially the following cases cited by the lower Court: *Mula Bakhsh* v *Muhammad Bakhsh* (2), *Mehtab-ud-din* v. *Abdullah* (3), *Muhammad Hussain* v. *Sultan Ali* (4), *Hiranam Singh* v. *Hardevi* (5), *Sardar Singh* v. *Maharaj Das* (6). We

(2) 54 P. R. 1903; 74 P. L. R. 1907; 87 P. W. R. 1903.
(3) 140 P. R. 1908; 98 P. W. R. 1907.
(4) 54 P. R. 1903.
(5) 10 Ind. Cas. 335; 43 P. R. 1911; 137 P. L. R. 1911; 83 P. W. R. 1911.
(6) 3 Ind. Cas. 633; 73 P. R. 1909; 123 P. L. R. 1909; 127 P. W. R. 1909.

would also mention *Gokal Chand* v. *Milkhi* (7), *Diwan Singh* v. *Paro* (8), *Tulsi Ram* v. *Nathu* (9). On the other hand in *Kanhya Lal* v. *Krishna* (10) the *riwaj-i-am* of the Gurgaon District was followed and it was held that Agarwal Banias of the District do not follow strict Hindu Law. The Gurgaon *riwaj-i am* was also followed in *Zaka-ud-din* v. *Saraj-ud-din* (11). The following three cases are cited to show that a particular custom set up must be proved especially in the absence of any specific mention of that particular custom in the *riwaj-i-am*, *Lelu* v. *Ram Chand* (12), *Raj Kaur* v. *Talok Singh* (13), *Santu* v. *Musammat Jok* (14). Jainarain was an orphan when he was adopted and it is urged that there is nothing in the *riwaj-i-am* of Gurgaon specially authorising the adoption of an orphan, but as already suggested, once the element of religion is eliminated the burden of proving that an orphan cannot be adopted appears to us to lie upon the persons asserting it. In *Chiman Lal* v. *Hari Chand* (15) their Lordships of the Privy Council upheld the finding that Agarwal Banias of Zira in the Punjab were governed by Customary Law in matters of adoption, and that by the custom applicable to that class an unequivocal declaration by the adopting father that a boy had been adopted and the subsequent treatment of that boy as the adopted son were sufficient to constitute a valid adoption. In the present case Jainarain has always been treated as duly adopted. In paragraph 24 of his judgment the learned District Judge seems to hold, following the authorities cited by him, that the *riwaj i-am* cannot be accepted as a correct exposition of custom unless it is supported by independent evidence. We are of opinion that the District Judge has not given sufficient weight to the *riwaj-i-am*. In *Beg* v. *Allah Ditta* (16) their Lordships of the Privy Council held that the *riwaj-i am* is a public record, prepared by a public officer in the discharge of his duties and under Government rules and is clearly admissible in evidence to prove the facts therein entered, subject to rebuttal. We do not find that the evidence afforded by the *riwaj-i am* has been rebutted in this case. Reliance is placed for the respondents on the evidence of D. W. No. 9 Bhawani Prashad and D. W. No. 23 to show that actual giving and taking is necessary for an adoption. We do not think anything more can be inferred from this evidence than that where there is somebody to give the boy in adoption, the ceremony of giving and taking is usually performed. Reliance is placed on page 55 of the Code of Tribal Custom, referred to above. The following is an extract:

"QUESTION 1.—Are any formalities necessary to constitute a valid adoption? If so, describe them. State expressly whether the omission of any customary ceremonies will vitiate the adoption?

ANSWER 1.—The only important ceremony common to all is the handing over of the adopted son by his father or guardian to the adopter before the assembled kindred, with some words implying that henceforth the adopter and adopted are to consider each other as father (or mother) and son. The kindred are generally feasted; and rejoicings are made as when a son is born. If the son is a small child, he is placed in the lap (*god*) of the adopter. (Hence *god lena*—to adopt—to take into the lap). (All tribes which adopt).

NOTE.—No doubt even in the absence of proof of any ceremony, adoption would be presumed from a long continued relation between the parties implying adoption."

We think that here, too, all that is meant is that where there is a father or

(7) 35 Ind. Cas 543; 65 P. R. 1916; 157 P. W. R. 1916; 1 P L. R. 1917.

(8) 33 Ind. Cas. 529; 89 P. R. 1916; 70 P. W. R. 1916.

(9) 39 Ind. Cas. 93; 5 P. R. 1917.

(10) 39 P. R. 1884.

(11) 16 Ind. Cas. 772; 79 P. R. 1912; 217 P. W. R. 1912; 221 P. L. R. 1912.

(12) 31 Ind Cas. 294; 23 P. R. 1916; 174 P. W. R. 1915.

(13) 33 Ind. Cas. 992; 38 P. R. 1916; 99 P. W. R. 1916.

(14) 36 Ind. Cas. 625; 44 P. R. 1916; 84 P. L. R. 1917; 213 P. W. R. 1916.

(15) 19 Ind. Cas. 669; 40 C. 879; 17 C. W. N. 885; 126 P. W. R. 1913; 187 P. L. R. 1913; (1913) M. W. N. 509; 18 C. L. J. 70; 15 Bom. L. R. 646; 14 M. L. T. 83; 102 P. R. 1913; 40 I. A. 156 (P. C.).

(16) 38 Ind. Cas. 354; 44 C. 749; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 45 P. R. 1917; 15 A. L. J. 525; 21 C. W. N. 842; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

guardian it is usual to hand over the boy, but the note to our mind shows that such a ceremony is not essential and we do not consider that the extract precludes the adoption of an orphan.

We agree with the District Judge's remarks in paragraph 23 of his judgment to this extent, that if the oral evidence were the only evidence to prove a custom of adopting orphans, it would not be sufficient to prove such a custom if the parties were orthodox Hindus. The instances given of adoption of orphans do, however, support the view that the adoption of an orphan is not considered contrary to proper usage and the adoption of at least one orphan besides Jainarain, namely, Ramchandra, is satisfactorily proved. It is hardly possible to suppose that even one instance would be possible if the Dhusars consider themselves governed by the Mitakshara Law as to adoption.

It has been argued for the respondents that the people of Gurgaon District cannot be governed by Punjab Customary Law because Gurgaon until 1858 formed a portion of the North West Provinces. The argument is that Harbhajan came to these Provinces in 1836 and could not have brought with him Punjab Customary Law, since at that time Gurgaon was not in the Punjab. We are unable to accept this argument for two reasons. The first is that in face of the Privy Council ruling we must accept the *riwaj-i-am* as an authoritative statement of the Customary Law of Gurgaon, and we cannot go behind it, and the second is that the parties are governed not by the Gurgaon Law of 1836 but by the present Gurgaon Law. Reliance is placed for the respondents on *Ali Asghar* v. *Collector of Bulandshahr* (17). The case relates to emigrants from Gurgaon, but the case is to be distinguished as there was nothing in the *riwaj i am* to support the custom set up. We may add that the *riwaj-i-am* was prepared in 1879 and the officer who prepared it was well aware that the district had been added to the Punjab in 1858. We are of opinion, therefore, that the *riwaj-i-am* affords very strong evidence which has not been rebutted that in matters of adoption Dhusars of Gurgaon, though non-agriculturists, are governed by Punjab Customary Law, and that this being the case there is nothing to prevent the adoption of an orphan. It is not contended for the respondents that they can succeed in their suit if the adoption is valid.

In this view of the case it is hardly necessary to deal with the other grounds of appeal, but we will do so briefly. It is contended for the appellant that the property was given to him as a settlement of a family dispute. He alleges that he claimed a 12-annas share as his share of the ancestral property, namely, his own father's share as well as half of the share of Harbhajan's branch. We agree with the findings of the District Judge containd in paragraph 31 of his judgment. There may have been some dispute as to the details of the partition but we do not believe that Jainarain claimed a 12 annas share. This plea was put forward after the remand as a result of the suggestion in the judgments of Skinner, A. J. C., and of the Privy Council. We are unable to accept the evidence of Jainarain as his own 2nd witness, nor do we consider satisfactory the evidence of D. Ws. Nos. 3, 4, 5, 6 and 7. But Kedarnath as P. W. No. 12 says that Jainarain did not claim a 12-annas share and that Jainarain was given an eight-annas share as an adopted son.

The next ground of appeal urged is that the defendant has been in adverse possession since 1858. We do not consider it necessary to discuss this ground. It is lastly urged that if the plaintiffs are entitled to any decree at all, they are entitled only to 4/5 and that the appellant should get Kedarnath's 1/5, whereas he has actually only been allowed 1/10 share of the total property, that is to say, the appellant is entitled to the whole of Kedarnath's share and to his half of the other half share. It is admitted for the respondents that the lower Court has made a mistake in the calculation. We do not, however, find any miscalculation, since the 1st defendant has been allowed to retain 2/5 of half which is 1/5 of the whole. The matter is not of importance as we are dismissing the suit.

There is a cross-objection by the plaintiff. It is first urged that though on the view of the lower Court Jainarain is entitled to 1/5 of the whole property, the plaintiffs should get a decree for possession

(17) 40 Ind. Cas. 753; 15 A. L. J. 527; 39 A. 574.

of the whole with a declaration that Jainarain is entitled to a fifth share on partition. Reliance is placed on *Mohanlal* v. *Tekchand* (18). We are of opinion that there is no force in this contention, the circumstances of the present case being different. The next ground urged is that the lower Court should have included the tenancy lands in the decree. This contention is admittedly contrary to the law as laid down for these Provinces in *Ghanya* v. *Ukund Rao* (19) and cannot be pressed here. The plea is made in case the suit should go up on appeal to the Privy Council. The ground refers to paragraph 37 of the lower Court's judgment. For these reasons and on the view we take of the whole case we dismiss the cross-objections with costs.

As a result of our finding that the adoption of Jainarain was valid we allow the appeal and dismiss the suit with costs.

Appeal allowed.

(18) 18 Ind. Cas. 826; 9 N. L. R. 18.
(19) 4 N. L. R. 9.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO 90 OF 1917.
April 7, 1920.

Present :—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

JAI NARAIN—DEFENDANT—APPELLANT
versus
Rai BAJRANG BAHADUR SINGH AND ANOTHER—PLAINTIFFS, SURAJ DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation—Necessity, proof of—Enquiry by alienee—Presumption.

If an alienee from the father of a joint Hindu family makes enquiries as to the necessities of the loan and if he satisfies himself that the necessities represented exist, he is sufficiently protected. [p. 826, col. 2.]

If the necessity for the loan cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain that such circumstances existed and that the transferee acted in good faith. [p. 827, col. 2.]

Anant Ram v. *Collector of Etah*, 44 Ind. Cas. 290; 16 A. L. J. 245; 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 226; 23 M. L. T. 228; 22 C. W. N. 484; 27 C. L. J. 363; 20 Bom. L. R. 524; 40 A. 171; (1918) M. W. N. 446 (P. C.), followed.

Appeal against the decree of the Sub-Judge, Rae Bareli, dated the 27th April 1917.

Mr. *Ali Mohammad*, for the Appellant.

The Hon'ble Mr. *Gokaran Nath* and the Hon'ble Mr. *Wazir Hasan*, for Respondents Nos. 1 and 2.

JUDGMENT.—The facts of this case have been stated by us in our order of remand of the 13th September 1918.* The plaintiffs sued for the recovery of money due on a mortgage effected by Surajdin on the 9th January 1913 (Exhibit 1), a deed of further charge executed by him on the 4th December 1914 (Exhibit 2) and another deed of further charge executed by him on the 23rd April 1915 (Exhibit 3). Surajdin has a son, Jai Narain, who, at the time of the institution of the suit, was 18 years old. The property mortgaged is the ancestral property of Surajdin and Jai Narain.

The mortgage of the 9th January 1913 was made in lieu of Rs. 36,000 out of which Rs. 31,478-10-6 were credited towards the money due on certain prior mortgages held by the plaintiffs, Rs. 4,321-5-6 were paid in cash before the Sub-Registrar and the balance was applied to the purchase of stamp for the execution of the mortgage. The deed of mortgage stated that the mortgagor required a sum of Rs. 4,000 to meet the demand of revenue due to the Government and for domestic expenses. The deed of further charge of the 4th December 1914 was executed in lieu of Rs. 15,000, out of which Rs. 4,295-2-6 were credited towards the interest due on the deed of mortgage first mentioned, Rs. 6,690 10 6 were credited towards certain prior deeds of further charge and certain promissory notes due to the plaintiffs, and Rs. 4,014 were paid in cash before the Sub-Registrar. The allegation of the plaintiffs is that the sum last mentioned was borrowed by Surajdin to pay arrears of revenue due by him and for the purchase of cloth and grain for the business he was then carrying on, but no such necessity is recited in the deed. The deed of further charge of the 23rd April 1915 was executed in lieu of Rs. 2,450, out of which Rs. 304 8 0 were credited towards a promissory note executed by Surajdin in favour of the plaintiffs on the 28th January 1915, Rs. 144-0 9 were stated to have been taken for the

*See *Jai Narain* v. *Rai Bajrang Bahadur Singh*, 43 Ind. Cas. 914; 5 O. L. J. 691.—*Ed.*

payment of arrears of revenue due to the plaintiffs for 1322 Fasli and the balance was taken in cash before the Sub-Registrar. The plaintiffs allege that the amount last mentioned was taken by Surajdin for the expenses of the marriage of his youngest daughter, but no such necessity is mentioned in the deed.

The Court below decreed the claim. It held that the consideration of each of these deeds was taken either to pay antecedent debts or for family necessity. But as Surajdin is alive and the question of making a son liable for the debts of his father on the ground of a pious obligation does not arise in the lifetime of the father except where the debts are payable to a third person, certain issues were remitted by this Court to ascertain whether the antecedent debts in question had been taken for family necessity or family purposes or for the discharge of a common obligation, and the moneys said to have been taken in cash were taken for similar purposes, and whether the creditors advanced the loans in good faith on the strength of the representations, if any, made to them as to the alleged needs of the estate and the family: and, if so, to what extent. The finding of the Court below is in favour of the plaintiffs.

We see no reason to dissent from that finding. There is sufficient evidence to show that at the time when the earlier loans in question were advanced and also when the deeds of mortgage and further charge now in suit were executed, the plaintiffs had through their agents and servants made due enquiries as to the necessities represented by Surajdin and satisfied themselves that the loans in question were required for the purpose of the estate and the business which the family was then carrying on and for the discharge of other family obligations. The plaintiff, Rai Bajrang Bahadur Singh, is a Talukdar, paying an annual revenue of Rs. 22,500 and an income tax of Rs. 200 per annum. He states that Surajdin commenced dealings with him about 12 years ago and borrowed money from time to time and that on each occasion when he approached him with a request for a loan, he enquired through his servants as to the existence of the necessity stated by him and never advanced him any money without satisfying himself that the money was required either to pay previous debts due by the family or for the purposes of marriage or other ceremonies. He further states that Surajdin borrowed moneys from him to pay the debts due by him to Gulab Rai and Lebidin and for the expenses of the marriage of his children and the purchase of grain and cloth for his business and also for paying the arrears of revenue due by him. His statement is corroborated by the evidence of other witnesses, who have been examined in regard to each of the different loan transactions entered into by Surajdin.

The mortgage of the 26th January 1904 (Exhibit 10) was executed to pay certain debts due to Gulab Rai, Dabidin and Murtaza Hutain and for domestic expenses. The mortgage of the 27th January 1905 (Exhibit 11) was executed to pay certain decrees for arrears of under proprietary rent and *theka* money due by Surajdin and to meet the expenses of the marriage of his eldest son. A portion of the consideration of that deed was also devoted to the payment of certain other debts. The plaintiffs cannot reasonably be expected to prove that these earlier debts had also been taken for family necessities or that Surajdin could not have paid the arrears of under-proprietary rent or *theka* money from the profits of the family property. The plaintiffs made enquiries as to the necessities for the loans then taken and if they satisfied themselves that the necessities represented existed, they were sufficiently protected. Surajdin carried on cloth and grain business, the profits of which went to the support of the family. He also held the *theka* of a village called Miran Sawaiya, the profits of which went to the family. He required money from time to time to carry on the cloth and grain business and considering the distance of time which has elapsed since the loans were first taken, it is not unreasonable to presume that the loans in question were taken for the purposes mentioned.

The mortgage-deeds of the 26th January 1904 and the 27th January 1905 were subsequently paid up by the execution of another mortgage on the 10th January 1908 (Exhibit 4), the consideration of which was partly applied to the satisfaction of these debts

and partly to the satisfaction of certain other debts incurred to obtain property by pre-emption. A deed of further charge was executed by Surajdin on the 16th March 1908 to pay a decree for arrears of rent and to meet the expenses connected with the death of one of his sons (Exhibit 5). Another deed of simple mortgage was executed on the 19th June 1909 (Exhibit 6) to pay the interest due on the two deeds previously mentioned and some arrears of *theka* money due by the family and to meet the expenses connected with the death anniversary of the wife of Surajdin (Exhibit 6). A deed of simple mortgage was also executed on the 29th March 1912 to pay some arrears of rent and to meet certain other family necessities then represented to exist (Exhibit 7).

These four deeds were consolidated when the mortgage deed of the 9th January 1913 now in suit was executed. At the time of the execution of this deed Rs. 200 were taken for the expenses of execution and Rs. 4,321-5-6 to meet the expenses of the marriage of one of the daughters of Surajdin, to pay arrears of revenue and for other household expenses.

On the 11th December 1913 Surajdin executed a deed of further charge to pay certain prior debts and to meet domestic necessities. On the 16th January 1914 he executed another deed of further charge to meet domestic and private necessities including grain and cloth business he was carrying on. He also executed a deed of further charge on the 4th July 1914 to pay arrears of *theka* money and some money due on a promissory note and to meet other family necessities. These three deeds were consolidated on the 4th December 1914, when the deed of further charge for Rs. 15,000 now in suit was executed. At the time of the execution of this deed Rs. 4,014 were taken in cash for carrying on cloth and grain business and to pay arrears of revenue. The last deed of further charge was executed on the 23rd April 1915 partly to pay certain prior debts including the arrears of revenue and partly for the expenses of the marriage of another daughter of Surajdin. The evidence produced with regard to each of these deeds has been discussed at length by the learned Subordinate Judge, and it would be unreasonable to expect stringent proof of each of the items mentioned in these deeds. Such evidence as has been produced is, in our opinion, credible and relieves the creditors from the necessity of showing how the moneys taken were actually applied. As observed by their Lordships of the Privy Council in *Anant Ram* v. *Collector of Etah* (1), if the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain that such circumstances existed and the transferee acted in good faith. We are satisfied that on the occasion of each of these transactions proper enquiries were made by the plaintiffs as to the necessities asserted by Surajdin and that they acted in good faith in lending the money after they had satisfied themselves as to the existence of those necessities. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 44 Ind. Cas. 290; 16 A. L. J. 245; 34 M. L. J. 291; 7 L. W. 323; 4 P. L. W. 226; 23 M. L. T. 228; 22 C. W. N. 484; 27 C. L. J. 363; 20 Bom. L. R. 524; 40 A. 171; (1918) M. W. N. 446 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 6 OF 1919.

January 14, 1920.

Present:—Justice Sir Asutosh Mookerjee, KT., and Justice Sir Ernest Fletcher, KT.

BALMUKUND RINA—PLAINTIFF—APPELLANT

versus

GOPIRAM BHOTICA—DEFENDANT—RESPONDENT.

Arbitration clause, construction of—Disputes, several—Awards, successive, whether permissible.

Where in a commercial contract there is a clause with the words "*any dispute whatsoever* arising on or out of this contract shall be referred to arbitration," it means that *each and every dispute* as it arises, on or out of the contract, shall be referred to arbitration. The fact that one of the parties to the contract has obtained an award as regards a portion of his claim does not prevent him from proceeding with arbitration in respect of matters arising out of subsequent breaches of the contract. [p. 834, cols. 1 & 2.]

Where there are several and separate contracts, the right conferred by the arbitration clause is not fully exhausted as soon as a complete award is made upon the first reference. [p. 834, col. 2.]

BALMUKUND RINA v. GOPIRAM BROTICA.

There may be successive awards even in the same matter. [p. 834, col. 2.]

Appeal against the following decree of Mr. Justice Rankin, dated the 21st January 1919:—

"By a contract of 1st December 1917 made on the ordinary form of the Indian Jute Manufacturers' Association the plaintiff agreed to sell to the defendant three lacs of yards of Hessian cloth. The only express terms which require notice are three:—

Delivery of the said goods to be given and taken as follows:—December 1917.

Each month's delivery to be treated as a distinct and separate contract.

Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision, and such decision shall be accepted as final and binding on both parties to this contract. The award may at the instance of either party, and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William.

These three terms are all part of the printed form with the exception of the words "December 1917" at the end of the first.

The seller by his Counsel has been careful to make clear that it is not disputed that the contract is by the usage of this market an instalment contract, in so far that it is open to the buyer to require delivery in separate quantities, at all events if each be not less than 50,000 yards; and in this further sense also that the buyer may, if he likes, require performance as to any such quantity taken separately either by giving due shipping instructions to the seller or by demanding mill's Pucca delivery orders.

Of the three lacs of yards contracted for, one half lac was duly delivered and may now be ignored. No delivery was in fact made of any part of the remainder, which divides itself into three separate lots.

The first lot is of 50,000 yards, for which a formal shipping instruction for the "City of Calcutta" was given on the 15th of December. Vessel was not ready to load. On 7th January buyer offers to take at once a delivery order. Delivery having been made in neither form, buyer on 18th January sends his difference bill by registered post claiming Rs. 8,159. Seller refuses to pay. On 28th February an arbitration by the Chamber of Commerce is demanded by the buyer, and proceedings strictly confined to this claim took their course under this demand, resulting on 24th July in an award of the sum claimed to the buyer with certain interest and costs. This is the first arbitration case.

The second arbitration case had reference to 1,00,000 yards for which another shipping instruction was given on 15th December —this time for the "Chile." The seller, finding that the vessel would not begin loading till the 2nd of January, disclaimed responsibility. Buyer insisted. On the 7th January buyer asked for immediate shipment or else delivery order. On the 18th buyer sends another difference bill—this time for Rs. 17,750—on the footing of the price at which the goods had been bought against him by his buyer. On the 19th the seller tendered delivery orders which were refused. On the 21st the seller returned the difference bill and claimed to cancel the contract because of that refusal. On some date before the 9th of April, Kanoria and Co., who had bought from the buyer, claimed arbitration between themselves and him. This had resulted in an award in their favour before the 24th of June. On the 9th of April the buyer's second case against the seller was commenced, claim being made in the alternative either for the amount of the difference bill or for such sum as might be awarded to Kanoria and Co.

The third arbitration case was not commenced till the 21st of June. It concerned two quantities of 50,000 yards each, one for the Chile and one for the Talabat. As to this I have only the buyer's case: the seller's case never having been lodged. The buyer claimed that shipping instructions were given on 14th and 21st December for these boats respectively; that on 2nd January 1918 he received two letters dated 29th December, in which seller said the 'Chile' was not yet in port and that the 'Talabat' had left long before due date; that on the 3rd January buyer wrote that the goods for Talabat should be put on the City of Manchester and on the 4th that he would take mill's Pucca delivery order for the other lot;

that in the end the seller did neither; that on 15th January the buyer gave notice that his buyers had bought against him as regards the City of Manchester consignment; that on 16th he demanded a delivery order for the other lot by the next day, and that next day his buyers had bought against him for this lot also; that the seller refused to recognize this liability; that afterwards the buyer settled with one of his buyers on 25th February for Rs. 7,250 with seller's consent and on seller's promise to pay; that in May he settled with his other buyer for the same sum on the basis of an award obtained against that buyer by a firm to whom he had in turn re-sold.

Now all that the seller did in the third arbitration case was, that on 18th July he applied to the Tribunal for time to file his case, and on 25th July for more time, and in the end was given till 3rd August by a letter, dated 27th July.

On the 25th July, as I have said, an award in favour of the buyer was made in the first arbitration case between these parties, and by letters of 1st and 3rd August from seller's Solicitors to the Tribunal the seller set up his present claim that the Tribunal had no jurisdiction to proceed with the second and third cases, since in the matter of the contract of 1st December there had been an award, which award, they say with complicated incorrectness, "has resulted in a decree." It is given as an additional ground that the claim in these cases had arisen completely at the time of the Tribunal's decision. In this action brought by the seller I have to see whether his contention is correct, and whether he is entitled to any relief accordingly.

It was argued for the seller that while the contract was for delivery by instalments, it was one single contract in the sense that there was one promise, one covenant to which all the breaches have reference—that once one award is made under the arbitration clause in a complete form capable of enforcement at law, the Tribunal is *functus officio* and there can be no jurisdiction to make a second—that in this case all the alleged breaches were complete sometime before the 25th February 1918 when the first arbitration case was started—that there was only one cause of action, *viz*, failure to fulfil the promise to deliver 3 lacs of yards—that the buyer has split up his cause of action and made three cases out of one—and that this course is so unjust and unreasonable that at all events the principle which underlies Order II, rule 2, of the Civil Procedure Code, if not that rule itself, should be applied by me as a ground for holding that the Tribunal has no jurisdiction to entertain the second and third proceedings now.

The buyer's Counsel in reply founded upon a custom, alleged in his written statement to obtain in this market, to the effect that when orders for delivery in different lots are given, the original contract becomes divided into as many contracts as there are separate lots.

He further raised an issue of fact that whether such custom exists or not, the seller has by his conduct assented to this contract being treated as several separate contracts.

Apart from these questions of fact, he took certain objections logically prior to these issues. He contended that the Tribunal has jurisdiction to decide both these issues and that they are not triable by me.

He contested the proposition that apart from such a custom the first award precluded the Tribunal from entertaining the other cases.

As regards the principle of Order II, rule 2, he said that this objection applied at the initiation of the other cases and that either it does not go to the jurisdiction of the Tribunal, or, if it does, the seller consented to such jurisdiction by filing his written answer in the second case on 11th June 1918 and by his applications to the Tribunal on 18th and 25th July for time to file his answer in the third.

Lastly, and as an answer good in all events, he said that where an arbitrator has not any jurisdiction in law, no injunction or other relief is obtainable to stay his hand, and the only course is to take objection when the nullity is sought to be enforced as valid.

To the contentions of the buyer as to custom the seller's Counsel intimated that he would contest the existence of the custom. He argued further that the custom was contrary to the express words, "Each

month's delivery to be treated as a distinct and separate contract," and was invalid as unreasonable.

I agreed that evidence as to the existence of the custom pleaded by the buyer should be reserved until after my decision on the prior points. The documents in the three arbitration cases were produced, and it was agreed that I should decide the preliminary points on these.

Now I will take the contract in the sense admitted by the seller, as stated at the commencement of this judgment, and I will examine as to whether or not he has established that the Tribunal is now without jurisdiction to decide the second and third arbitration cases.

I. First, is it true of a submission, such as was in this contract, that under it there can be only one award, meaning thereby a final and complete award enforceable in law? In my opinion there may be an indefinite number of such awards, as many awards as there are disputes arising out of the contract. The submission, if it be in the terms which are present in this contract, is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it. The arbitrators are not *functus officio*: one item of their duty done, their duty remains their duty.

The completeness of the first award, so far as regards its own subject-matter, has no relevance to the present point.- An award which is incomplete as regards a claim may yet be good if complete as regards those matters in dispute with reference to the claim, which were submitted to the arbitrators. In such a case it is possible to have two awards over the same claim because it is possible to have further disputes over the same claim—disputes not covered by the first award. An award final and complete as regards a claim precludes another as to that claim only: this not because the number of awards would be getting high, but because there is nothing further to dispute without disputing the award itself.

This is my view of the effect of the unreported case of *Chandanmull* v. *Donald Campbell and Co.* (1), decided in the House of Lords on 4th December 1916. (The judgment in the Court of Appeal and the speeches of the Lords of Appeal will be found in the paper book in Appeal No. 42 of 1917 in this Court Suit No. 1094 of 1916). The terms of the submission are for this purpose indistinguishable from those I have to deal with and will be found at page 170 in the judgment of the present Master of the Rolls. Rule 26 of the Bengal Chamber of Commerce Rules does not, in my opinion, cut down the jurisdiction of the arbitrators to make awards from time to time in disputes arising out of the contract as such disputes arise.

II. In the second place on the footing that the breaches alleged in the later cases are all breaches of the same promise as grounded the first award, I have to decide whether the arbitrators are without jurisdiction to award upon them now. This contention of the seller must be put upon one or more of the following principles:—*res judicata*, bar by suit, principles of common law or equity analogous to these, or such a construction of the submission as would exclude from its ambit any right to entertain proceedings which, if before a Court of Justice, would be held an abuse of the process of the Court.

I think it will repay the trouble to make the hypothesis that on 28th February, 9th April and 21st June the buyer had commenced three several suits in a competent Court subordinate to this Court for breaches, all prior to the 28th of February, and had recovered judgment in the first suit on 25th July. In any case for the sake of clearness I will do so. I think the position then would have been as follows:—

(1). The lower Court would have had jurisdiction to decide whether the later cases come within Explanation IV in section 11 of the Code. I think it would be bound to hold that they do not: but if they do, and such Court wrongly held that they do not, the only remedy would be appeal. No question of jurisdiction would arise, and no remedy under section 115 of the Code would be appropriate. Such questions could only arise in a limiting case, *e. g.*, if on the footing that section 11 did apply, the Court had refused to give effect to the law, or if it held wrongly on a point quite unarguable.

(2). The same observations apply to a plea under Order II, rule 2, but with this

(1) 54 Ind. Cas. 289; 23 C. W. N. 707 *foot-note.*

difference. I think (assuming no such custom as the buyers allege), that such lower Court, to decide rightly, would have to hold that the later cases were hit by the rule. But again no question of jurisdiction would arise if its decision was merely wrong; if, *e.g.*, it purported to dispense the plaintiff from the provisions of the rule, that would be another matter. It is to be observed that the presence or absence of a judgment in the first suit would be wholly irrelevant in dealing with this plea.

(3) If, putting aside the Code, the plea to the later suits fell to be considered at common law, I think myself that to reject it would be right. Such an objection must be matter of substance and I think has to fulfil certain technical conditions even then. In *Brunsden* v. *Humphrey* (2) Bowen, L. J., said: "The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever." In the present case and on my hypothesis, would these actions be "for the same thing" in substance? I think there can be but one answer, and the only way to attempt another is to insist upon the unity of the promise as making the cause of action technically the same. On this I will quote further from the same great authority: "The principle is frequently stated in the form of another legal proverb, *nemo debet bis vexari pro eadem causa*. It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. 'The principal consideration,' says De Grey, C. J., in *Kitchen* v. *Campbell* (3), 'is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case'. 'And one great criterion,' he adds, 'of this identity is that the same evidence will maintain both actions'..... 'The question,' says Grose, J., in *Seddon* v. *Tutop* (4), 'is not whether the sum demanded *might have been* recovered in the former action, the only inquiry is, whether the same cause of action *has been* litigated and *considered* in the former action'.... It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance."

This passage, if only in view of the last words, covers and disposes of the objection which I am now considering in this case. I take the principles there laid down to be first principles not mere *axismota media* true only of the special range of facts then before the Court.

(4) Before parting with my hypothesis of these cases being brought as actions, I have only to say that if before the first had been decided, application had been made to strike out the others as oppressive, or as an abuse of the process of the Court, it would have been wrong and unreasonable to do more than to consolidate the actions and to make the buyer pay costs thrown away. If such application had been made after judgment in the first case, in view of the lateness of the application, it would probably have been wrong to accede to it at all so far as regards the second case. As to both second and third, an order to strike out would have been improper. Some terms as to costs would at the utmost meet the case.

When I come to consider the seller's contentions as applicable to proceedings by arbitration, none of his points as to want of jurisdiction become any stronger. If into this submission I am to import any conditions against multiplicity of arbitrations for the same thing, I know no better principle than I have stated from Lord Bowen and I should not be any stricter than the language of section 11 of the Code which many Judges have thought too strict. But that is for the arbitrators and not for me. In *Donald Campbell's case* (1) Lord Sumner said this: "Incidentally the effect of a prior award might come into question in an arbitration upon a dispute arising out of a contract if the defendants alleged and the

(2) (1884) 14 Q. B. D. 141 at p. 146; 53 L. J. Q. B. 476; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4.

(3) (1772) 3 Wils. 304; 2 Bl. Rep. 827; Lofft. 20[illegible]; 95 E. R. 1069.

(4) (1796) 6 T. R. 607; 1 Esp. 401; 3 R. R. 274; 101 E. R. 729.

claimant denied that the award already made had decided the matter in dispute."

If further I import into this submission an implied term which would exclude oppression or abuse of process, the facts here do not come within it.

Lastly, even if I stretch the principle of bar by mere suit to arbitration cases, I cannot make it go to jurisdiction, and, as the seller has taken steps in both of the later cases, my difficulty would be increased. Besides, I have no right or inclination to stretch it at all. Order II, rule 2, is a special provision doubtless of the completest wisdom, but unknown to the common law—one, moreover, which attaches an indiscriminate and indeed incalculable penalty to a condition difficult to define. There is, I think, a cardinal error involved in any attempt to appeal even to the principle on which the rule is founded, for the jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. And his right to entertain a second case depends not on the identity of the cause of action, but on the identity of the matters in dispute. Where there has been an award not set aside, everything decided by it will be deemed conclusively to have been disputed. The first award, if valid, covers the whole of the issues raised and covers nothing else: any issue not raised is, if disputed, another dispute. In the case referred to already, the House of Lords applied this principle to affirm the validity of a second award on what was really the same claim. Of such a case it is important to say, and I think the House of Lords has implied, that the second dispute must arise subsequently to the first. But in other cases such a requirement would be either meaningless or wrong. If a dispute exists now, if neither party treated the issue as in dispute upon the previous arbitration, if it is not in substance a dispute about the same thing or covered by the first award, then the most positive proof that the parties were in difference about it before the first case was launched, will not affect the arbitrators' jurisdiction.

In the present case, whether the contract was one or several, there is no room for doubt that the three cases were distinct disputes about separate instalments. The shipping instructions are separate; the correspondence throughout is kept entirely separate on both sides; separate difference rates are claimed, separate difference bills delivered. Though under the same contract they are in no way mixed up, the course of business requires that they should not be, buyer and seller as to each consignment being links in a chain which stretches between mill and shipper—for all they know—links in a different chain as to each different consignment.

Having gone through the parties' statements in writing before the Tribunal, and the Exhibits submitted, I think the cases were very different in many ways. Each is a story with complications of its own: though the general nature and some important facts are the same in all. Whether on a true view of the parties' rights, the cases stripped of all irrelevance would become more similar or more divergent, is a question. It may even be that one short answer would decide them all. But the parties' own views are what constitute the dispute, and have in this case constituted three disputes.

For these reasons, apart altogether from any custom not admitted by the seller, I think he fails upon the merits, and I prefer to decide upon that ground. I think he has no equity and no grievance and that his effort to impugn the arbitrators' jurisdiction comes to nothing. I find against him on the third issue, and his other difficulties need not be discussed.

I sustain the objection taken by Sir Benode Mitter at the conclusion of the plaintiff's case. I hold that there is no case to answer, and I dismiss the action with costs."

Messrs. *Pugh*, *S. N. Banerjee* and *N. Sircar*, for the Appellant.

Sir *B. C. Mitter*, Messrs *A. N. Chowdhuri*, *S. N. Bose* and *K. C. Bose*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit to restrain two arbitration proceedings pending before the Tribunal of Arbitration of the Bengal Chamber of Commerce. By a contract, dated the 1st December 1917, made on the ordinary form of the Indian Jute Manufactures'

Association, the plaintiff agreed to sell to the defendant three lacs of yards of Hessian cloth. The terms which require consideration in this appeal were three:—

"Delivery of the said goods to be given and taken as follows : December, 1917.

Each month's delivery to be treated as a distinct and separate contract.

Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce, applicable for the time being, for decision, and such decision shall be accepted as final and binding on both parties to this contract. The award may, at the instance of either party and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William."

These three terms are all part of the printed form with the exception of the words "December, 1917," at the end of the first. Of the three lacs of yards contracted for, one-half lac was duly delivered and may now be ignored. No delivery was in fact made of any part of the remainder, which divides itself into three separate lots. As regards the first lot of 50,000 yards which was not delivered, on the 23th February 1918 the defendant demanded arbitration by the Bengal Chamber of Commerce and proceedings were confined to this particular claim. On the 25th July 1918 on this portion of the claim an award was made by the Board in favour of the plaintiff with costs and interest. Subsequently, on the 9th April 1918 and the 21st June 1918 two other arbitration proceedings were started by the buyer and the object of the present suit is to stay these proceedings before the Chamber of Commerce. Mr. Justice Rankin has held that there is no foundation for the claim. In our opinion, this conclusion is so manifestly right, on the terms of the contract itself, that it is not necessary to elaborate the matter.

The clause which opens with the words '*any dispute whatsoever* arising on or out of this contract shall be referred to arbitration,' obviously means that *each and every dispute* as it arises, on or out of this contract, shall be referred to the arbitration of the Bengal Chamber of Commerce. As each month's delivery was to be treated as a distinct and separate contract, the defendant properly obtained an award as regards the first portion of his claim; this clearly does not prevent him from proceeding with arbitration in respect of matters arising out of subsequent breaches of contract. We agree with Mr. Justice Rankin that as in the present case there were several and separate contracts, there is no foundation for the contention that the right conferred by the arbitration clause was fully exhausted as soon as a complete award was made upon the first reference. We may add that the decision of the House of Lords in the case of *Chandanmull* v. *Donald Campbell and Co.* (1) shows that there may be successive awards even in the same matter. There, a dispute arose as to the effect of the award on the first arbitration; for the settlement of this dispute, a second reference to arbitration was made; it was ruled that such second arbitration was valid.

There is thus no substance in the appeal, which must be dismissed with costs.

FLETCHER, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE ORDERS NOS. 204 AND 296 OF 1919.

May 17, 1920.

Present:—Mr. Justice Das.

Rai BISHUN DUTT—PLAINTIFF—APPELLANT

versus

RAMJI PROSAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Inherent power of Court, when to be exercised—Appeal—Remand, order of, when to be made.

An order under section 151 of the Civil Procedure Code must show on the face of it that

it is necessary for the ends of justice or to prevent abuse of the process of the Court. [p. 837, col. 2.]

An Appellate Court has inherent power to remand a case, but it is a power which can only be exercised for the ends of justice. [p. 837, col. 2.]

The mere fact that there has not been a proper trial of the case, apart from other circumstances in the case, is not sufficient to vest the Appellate Court with jurisdiction to remand the case in the exercise of its inherent power. [p. 838, col 1.]

The rule is that if the trial has not been proper owing to some neglect on the part of the Court, the Appellate Court has power to remand the case, but where the neglect or default is on the part of a party to the litigation, the Appellate Court has no such power. [p. 838, col. 1.]

Appeals against the orders of the District Judge, Muzaffarpore.

Messrs. *Jalgobind Prasad Sinha* and *Ganesh Dutt Singh*, for the Appellants.

Mr. *Lachmi Narayan Singh*, for the Respondents.

JUDGMENT.—This appeal is directed against the order of the learned District Judge of Muzaffarpore, remanding the case for rehearing to the Court of first instance. There is also a revision petition under section 115 of the Code of Civil Procedure complaining against the order passed by the learned District Judge.

A preliminary objection has been taken on behalf of the respondents to the effect that no second appeal lies to this Court. In order to determine this point it is necessary to see whether in remanding the case to the Court of first instance the learned District Judge exercised his inherent power recognised and preserved in section 151 of the Code of Civil Procedure, or whether he acted under the provisions of Order XLI, rule 23. If his order is an order under Order XLI, rule 23, then clearly an appeal lies to this Court under Order XLIII, rule 1 (*u*) of the Code. If his order, on the other hand, purports to be an order in the exercise of his inherent power then equally clearly no appeal lies to this Court, although in a proper case this Court would have ample jurisdiction to revise that order.

Now in order to understand the judgment of the Court below it is necessary to see what the rival cases of the parties were in the Court of first instance. The plaintiff's suit was a suit for declaration of his title to and for confirmation of possession of certain shares in an Ijmali estate of which particulars are given in the plaint. The plaintiff did ask for an alternative relief for possession, but the Courts below have concurrently found that the plaintiff was in possession of the shares claimed by him, so that we must regard his suit as a suit for declaration of title and for confirmation of possession. Shortly stated, the plaintiff claimed 2 annas 16 *gandas* odd as his ancestral and reversionary share in the estate and also 8 annas as a share purchased by him in execution of a mortgage decree against the previous holder of the share. He claimed this share in an Ijmali estate as a result of a partition held in the year 1895. It is conceded that this Ijmali estate belonged to the plaintiff and defendant No. 1 and defendants fourth parties. The plaintiff's case was that previous to the partition of 1896 he had 2 annas 16 *gandas* odd share in the Ijmali estate and that he was in possession of that share and that subsequently to the partition he acquired 8 annas share in the estate by purchase at a sale held in execution of a mortgage decree of which share also he was in possession. He complained that the refusal of the Land Registration Department to register his name in respect of the entirety of the shares claimed by him threw a cloud on his title and that accordingly he was compelled to come to Court to seek declaration of his title in respect thereto.

On the pleadings of the parties issues were framed by the Court of first instance, of which the fourth issue ran as follows: "What is the extent of plaintiff's share in the disputed property? Can he recover any share of the disputed property in this suit?" The learned Additional Subordinate Judge, having carefully considered the evidence adduced before him, came to the conclusion that the plaintiff's ancestral and reversionary share in the estate was not two annas 16 *gandas* as claimed by him but was one-anna 3 *gandas* and 1 *kouri*. So far as his purchased share is concerned, he found that the plaintiff had proved his title to the whole of it. In the result the learned Additional Subordinate Judge made a declaration in the plaintiff's favour as to his title to 1-anna 3-*gandas* and 1 *kouri* and eight-annas share in the new estate. It will be noticed that there was no decree for pos-

session. Obviously the learned District Judge accepted the case of the plaintiff that he was in possession of his share.

From this decree there were no less than three appeals and one cross-appeal to the Court of the learned District Judge. The defendant No. 1 appealed from so much of the decree as was against his interest. This appeal was No. 75 of 1917. The plaintiff himself, being aggrieved by the refusal of the learned Additional Subordinate Judge to declare his title to the entirety of 2 annas 16 *gandas* claimed by him, preferred a cross-appeal to that Court. It appears that defendant No. 2 and defendants Nos. 3—9 preferred separate appeals to the Court of the District Judge, the appeal of defendant No. 2 being No. 90 of 1917 and the appeal of defendants Nos. 3—9 being numbered Appeal No. 65 of 1917. Appeal No. 65 of 1917 was, however, dismissed for default by the learned District Judge, so that on the day when the learned District Judge took up the case he had two appeals and a cross-appeal before him; Appeal No. 75 of 1917, No. 90 of 1917 and a cross appeal preferred by the plaintiff.

Mr. Sheepshanks, who heard the appeals in the first instance, being of opinion that the learned Additional Subordinate Judge should have ascertained the shares of the defendants in order to determine in what proportion the shares awarded to the plaintiff were to be taken from the defendants, framed an additional issue and remanded that issue for re trial by the Additional Subordinate Judge. That additional issue was "What are the respective shares of the several defendants?' Mr. Sheepshanks obviously acted under Order XLI, rule 25, and the plaintiff could not challenge that order by an appeal to this Court. Nor was it necessary for him to challenge that order because it prejudiced nothing which had already been adjudged in his favour by the Additional Subordinate Judge. In my view, the order of Mr. Sheepshanks was wrong and if it had not been a consent order it could not be supported. On the pleadings of the parties the question of the extent of shares of the defendants did not directly arise. It was not a suit for partition nor was it a suit for possession. I can quite understand that if the Court had to pass a decree for possession in favour of the plaintiff against several defendants having distinct interests in the estate, it might be necessary to determine the shares of the defendants in order to enable the Court to say in what proportion the shares awarded to the plaintiff were to be taken from the defendants. But the suit of the plaintiff was, in my judgment, not a suit for possession, nor did the Court of first instance give him a decree for possession. Therefore, in my view, the issue framed by Mr. Sheepshanks did not arise at all. Mr. Sheepshanks should not have framed an additional issue which did not arise at all in the case and remanded that issue for trial by the Court of first instance. But it is abundantly clear that Mr. Sheepshanks did not intend that the question of plaintiff's share should be re opened on remand. He obviously thought that in order to give complete relief to the plaintiff it was necessary for him to know what were the respective shares of the defendants in the estate.

The Additional Subordinate Judge in his judgment on remand said that it was impossible for him to determine the shares of the defendants unless it was open to him to reconsider the question of the plaintiff's share in the estate. Rightly or wrongly he pointed out that if the shares of the plaintiff were to remain as initially determined by him, it might be that on his adjudication of the respective shares of the defendants the total might exceed sixteen annas. With this expression of opinion he sent the case back to the Court of the learned District Judge. When the matter came before the learned District Judge, Mr. Boyce this time, that learned Judge took the view that the whole case should be remanded to the Court of first instance and remanded the whole case by the order which that learned Judge passed on the 11th of April 1919. It is against this order that the present appeal and application are directed.

In order to appreciate the preliminary objection raised by the learned Vakil on behalf of the respondents, it is necessary to see under what authority the learned District Judge acted in remanding the case to the Court of first instance. It is conceded that he did not and could not have acted

under rule 25 of Order XLI. The question is, did he act under rule 23, Order XLI, or did he act in the exercise of his inherent power?

It is remarkable that the learned District Judge gives no indication whatever in his judgment as to the jurisdiction which he has exercised in remanding the case to the Court of first instance. There is, however, one line in his judgment which suggests that he acted in the exercise of his inherent power recognised and preserved by section 151 of the Code. I will accept the argument advanced to me by the learned Vakil on behalf of the respondent and assume that the learned District Judge acted in the exercise of his inherent power under section 151 of the Code. One consequence of this is that the appeal preferred by the appellant is incompetent and must accordingly be dismissed. I have still to deal with the revision petition of the plaintiff and if I am satisfied that in acting as he did the learned Judge exercised a jurisdiction not vested in him by law or that he acted in the exercise of his jurisdiction illegally or with material irregularity, I have complete power to set aside the order of the learned District Judge.

The power of the lower Appellate Court in remanding in cases other than those specified in Order XLI, rule 23, is undoubted, but it is a power which can only be exercised for the ends of justice. It has been said that section 151 of the Code confers no new power upon the Court. It merely recognises and saves all the powers which a Court had for doing justice irrespective of any provision of the Code of Civil Procedure and, I may add, inspite of the provisions of the Code of Civil Procedure. We might take section 151 of the Code then as the legislative recognition of what the Courts could always do for the ends of justice. Just because the Courts have wide powers when acting within their jurisdiction to make such orders as may be necessary for the ends of justice, it is necessary that the limits of the jurisdiction should be clearly recognised and carefully guarded.

Now what are the limits of the powers of the Court to act in the exercise of its inherent power? It seems to me that the Code itself which, as it has been said, recognises and preserves that power gives a sufficiently clear answer to the question. The Court may pass such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In these words, you have the limits on the jurisdiction of the Court to act in the exercise of its inherent power. In my view, the order passed by the Court must show, on the face of it, that such an order was necessary for the ends of justice or to prevent abuse of the process of the Court.

It is not urged before me that the order complained of was passed to prevent the abuse of the process of the Court. It is remarkable that the learned Judge does not say anywhere in his order that the order was necessary for the ends of justice, but he does say that there was no proper trial of the case. But I do not think that the mere fact that there was no proper trial of the case in the first Court is sufficient by itself, without further facts, to vest the lower Appellate Court with power to remand a case in the exercise of its inherent jurisdiction. The Full Bench of the Calcutta High Court in the case of *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank Ltd.* (1) expressly refused to answer the question whether it was competent to a Court to remand a case in which in the opinion of that Court there had been no proper trial. The learned Chief Justice of that Court in the course of his judgment said as follows:—"As regards the second part of the reference," that is to say, the question which I have just stated, "I think on further consideration that it is couched in too general terms, and that an answer to such a general question might lead to difficulty and misapprehension and inasmuch as the answer to the first part of the reference is really sufficient to dispose of the matter, I do not think it necessary to give a specific answer to the second part of the reference." Mr. Justice Woodroffe, in the same case, said as follows:—"The second part of the reference is in such wide terms that I feel a difficulty in answering it in a manner which will not lead to misapprehension. Thus the words a 'proper trial' might

(1) 41 Ind. Cas. 598; 26 C. L. J. 49; 41 C. 929; 21 C. W. N. 877.

include cases within Order XLI and an answer in the affirmative might enable the Courts to order wrongly a new trial although the particular case ought to be dealt with under the provisions of Order XLI." It is, to my mind, quite clear that the mere fact that there has not been a proper trial of the case apart from other circumstances in the case is not sufficient to vest the Appellate Court with jurisdiction to remand the case in the exercise of its inherent power. I must not be understood as suggesting that the Court has no power to order a remand when there has been no proper trial of the case. It may often happen that owing to some neglect on the part of the Court itself there has been no proper trial of the case. When the neglect is on the part of the Court itself, the Appellate Court would have ample jurisdiction in the exercise of its inherent power to remand the case for further trial. But the question is if owing to the neglect or default on the part of any of the parties to the litigation there has been no proper trial of the case, is it open to the Appellate Court to remand the case to the Court of first instance? I am of opinion that there is no such power at all in the lower Appellate Court in the exercise of its inherent power.

It is necessary, therefore, to consider the order of the learned Judge to see whether he had the power necessary for the ends of justice to remand the case to the Court of first instance. His reasons may be given in his own words: "It appears to me that the case has not been properly tried, since there has been no determination as to the share or shares of the defendants from which the share declared to be in the plaintiff's possession is to be taken. Any judgment like the present one that does not take into account the whole 16 annas in the *patti* will only lead to further litigation, and since all the persons interested in the *patti* are on the record, there is no reason why it should not be finally and completely determined." Speaking with the utmost respect, I do not see how there has not been a proper trial of the case because the Court of first instance did not determine the shares of the defendants. Nor do I see how the shares are to be taken from the defendants since the lower Appellate Court found that the plaintiff was in possession of the shares. I can quite understand, as I have said before, that if the Court of first instance had passed a decree for possession against different defendants having distinct shares in the estate without determining the proportion in which the share awarded to the plaintiff was to be taken from the defendants, there would be something in the decree which might make it unworkable and the lower Appellate Court in the ends of justice might find itself compelled to remand the case for determination of an essential issue in the case. But that is not the case here. The plaintiff asks for a declaration of his title to certain specific shares in the estate, and it was not necessary in order to give complete relief to the plaintiff that the shares of the defendants should be determined. It may be said, of course, as was said in this Court by the learned Vakil for the respondents, that if the defendants succeeded in proving that they own between themselves such shares in the estate as would make it impossible for the plaintiff to have the share claimed by him because the whole estate consists only of 16 annas, the share of the plaintiff must necessarily be reduced. In other words, the question of the shares of the defendants was never directly in issue in the suit, as it would be in a suit for partition or in a suit for possession, though it was incidentally in issue for the purpose of determining the shares which ought to have been adjudged to the plaintiff. But if that question was incidentally in issue in the Court of first instance, the defendants had every opportunity to adduce all the evidence bearing on that point. Either they have produced that evidence or they have not produced that evidence. If they have produced that evidence, then it was open to the lower Appellate Court to take that evidence into consideration in determining what are the proper shares of the plaintiff in the estate. If they have not produced that evidence, surely the ends of justice do not demand that there should be a remand in order that the defendants may have another opportunity of strengthening their case by producing such evidence as they ought to have produced in the first instance.

Nor do I see why, because owing to the neglect and default on the part of the

defendants there may be further litigation between them, the plaintiff's shares should again be put in the melting pot. On the judgment of the Court of first instance the plaintiff has proved his title to certain specific shares in the estate. It may be that if the defendants had produced all the evidence in the first instance, the plaintiff would have been unable to prove his title to the entirety of the shares claimed by him. It may be that owing to their default and neglect there may be litigation as between themselves as to their respective titles to the remaining shares, but the plaintiff having established his title to certain specific shares, those shares can again be drawn into controversy in any future litigation as between the defendants. Why then should the question of his title be re-investigated? I can see no justice in the course proposed by the learned Judge. It will only encourage the belief that it is unnecessary for the parties to be diligent in the first instance because the lower Appellate Court has always the power to remand a case in order to give the parties sufficient opportunity to produce their evidence. In my judgment, the order of the lower Appellate Court does not, on the face of it, show that in the interest of justice it was necessary to pass the order which he did. That being my view, I must allow the revision application and set aside the order of the learned District Judge ordering a remand of the case and direct the learned District Judge to hear the appeals on merits.

The Stamp Reporter has drawn my attention to the fact that there is a deficiency in the Court fee amounting to Rs. 19-8 0 due from the respondent. Let the deficiency be made good in the Court below before the appeals are heard. I make no order as to costs.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 84 OF 1919.

August 12, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

Maharaja Sir RAMESWAR SINGH BAHADUR—APPLLEANT

versus

CHUNI LAL SHAHA AND OTHERS—RESPONDENTS.

Mortgage, suit on—Receiver, appointment and position of—Order for appointment of Receiver obtained by first mortgagee, effect of, on second mortgagee—Second mortgagee purchasing equity of redemption, position of—Mortgagee, when can ask for appointment of Receiver.

Where there are two mortgages on the same property, it is open to the first mortgagee to obtain an order for the appointment of a Receiver and such order is binding on the mortgagor as also the second mortgagee, and a Receiver so appointed holds the property for the benefit of the first mortgagee and is bound to make over to him the entire income for the satisfaction of his dues The fact that the second mortgagee has obtained a decree and in execution thereof has purchased the equity of redemption places him in no position of advantage. In his character of purchaser in execution of his own decree he is as much bound by the order appointing a Receiver as the mortgagor. [p. 840, col. 2]

A mortgagee, whether he is or is not entitled to possession, may invite the Court to appoint a Receiver if the demands of justice require that the mortgagor should be deprived of possession. [p. 841, col. 1]

Appeal against the order of the Subordinate Judge, 2nd Court, Dacca, dated the 25th February 1919.

Mr. *N. Sarkar* and Babu *Ambicapada Chowdhury*, for the Appellants.

Babu *Gobinda Chandra Dey Roy*, for the Respondents.

JUDGMENT.—This appeal is directed against an order made on the Receiver in a mortgage-suit, who was appointed at the instance of the first mortgagee, now appellant before us. It appears that on the 4th May 1915 the first mortgagee, who held a mortgage over the entire property, instituted a suit to enforce his security against the mortgagor and the second mortgagee. Seven days later, he applied for the appointment of a Receiver for the preservation of the property, for payment of arrears of rent due to the superior landlord, for the realization of rent and other incomes from the property and for the payment of the income to the plaintiff in reduction of his claim under the mort-

gage. The Subordinate Judge made a conditional order for the appointment of a Receiver on the same day. The order was made absolute on the 15th July 1915. Since then, the Receiver has been in possession and the order for payment of the profits in reduction of the dues on the first mortgage has been duly carried out. On the 12th July 1916 the mortgagee obtained a decree for Rs. 1,21,540. Meanwhile the second mortgagee, who held a mortgage on one half only of the property, had instituted a suit to enforce his security, without joining the first mortgagee as a party. He obtained a decree on the 2nd August 1915 for the sum of Rs. 6,177. This decree was put into execution, and, at the sale which followed, the second mortgagee purchased the equity of redemption in relation to his mortgage for a sum of Rs. 425 on the 10th August 1916. It appears that during the pendency of these proceedings, the second mortgagee had managed to obtain an order in his suit, directing the Receiver to pay him a portion of the income in his hands derived from the mortgaged property. What followed is not clear, but we find that on the 23rd August 1918 the second mortgagee made an application to the Court for the purpose of intercepting the whole of the income of the property purchased by him and to receive the amount for the satisfaction of his own dues. This application was opposed by the first mortgagee, but the Subordinate Judge made an order in favour of the second mortgagee on the 25th February 1919. The legality of this order is called in question in the present appeal.

On behalf of the first mortgagee, it has been contended that the order for the appointment of a Receiver of the 11th May 1915 is binding upon the mortgagor as also the second mortgagee in whose presence it was made and that the circumstances which had happened did not justify a modification of that order. Our attention has been invited to the case of *Penney* v. *Todd* (1), where it was ruled that the possession of a Receiver in a mortgage suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the Receiver, who was appointed at the instance of the first mortgagee, holds the property for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion this contention is clearly well founded.

The order for the appointment of the Receiver made conditionally on the 11th May 1915, and confirmed on the 15th July 1915, was passed in the presence of the mortgagor as also the second mortgagee. They are equally bound by the order in question. Nothing has happened since then which would entitle either of them to avoid the consequences of that order. The second mortgagee has contended that the fact that he has obtained a decree on his mortgage and has purchased the equity of redemption in execution of that decree has altered the position. We are of opinion that there has been no change in his position in relation to the Receiver at the instance of the first mortgagee. If neither the second mortgagee nor the mortgagor is entitled to question the propriety of the order for the appointment of the Receiver, the circumstance that the equity of redemption has been transferred from the mortgagor to the second mortgagee cannot place the latter in a position of advantage. In his character as purchaser in execution of his own decree, he is as much bound by the order for the appointment of the Receiver as the mortgagor. If the mortgagor had made an application to the Court to modify the order for the appointment of the Receiver and had attempted to intercept the profits, no Court would have listened to him. The second mortgagee does not now stand in a different position. An argument was addressed to us on the assumption that the first mortgagee was a mortgagee by way of conditional sale and that as such he had obtained a decree for foreclosure. On that assumption it was argued, on the authority of the decision in *Khubsurat Koer* v. *Saroda Charan Guha* (2), that a Receiver should not have been appointed at his instance. On an examination of the record, however, it transpires that the decree was for sale of the mortgaged properties, consequently no question can arise as to the propriety of

(1) (1878) 26 W. R. (Eng.) 502.

(2) 12 Ind. Cas. 165; 14 C. L. J. 526; 16 C. W. N. 126.

the order for the appointment of a Receiver. It was suggested by the second mortgagee that a Receiver could not be appointed at the instance of a mortgagee who held a simple mortgage. We are unable to accept this contention as well founded on principle; there is indeed authority for the contrary view: *Venkata Rajagopala Surya Row Bahadur* v. *Basavi Reddy* (3). There is no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a Receiver; whether the mortgagee is or is not entitled to possession he may invite the Court to appoint a Receiver, if the demands of justice require that the mortgagor should be deprived of possession. The principle applicable to cases of this character was lucidly stated in the case of *Herbert* v. *Greene* (4): "In a foreclosure suit or a suit to raise a charge affecting lands by sale of the lands, an order is not made for the appointment of a Receiver unless under the following circumstances: First, where interest is due on the security, the Court usually requiring an affidavit that interest for one year at least is due; or secondly, where the property is in danger, for example, if the lands are held under a lease and head rent has been permitted to remain unpaid and in arrears; thirdly, where there is reason to apprehend that the sum for which the lands shall be sold will be insufficient to pay the encumbrances or charges thereon." [See also *Weatherall* v. *Eastern Mortgage and Agency Company* (5), *Eastern Mortgage and Agency Company* v. *Fakir-ud-din* (6)]. If we examine the case from a somewhat different point of view, the unreasonableness of the argument advanced on behalf of the second mortgagee becomes still more patent. If the property is not of sufficient value to meet the dues of all the encumbrances, it is clear that when the property is sold, the first mortgagee will be paid first and thereafter the remainder, if any, will be applied in discharge of the claims of the second mortgagee. It is inconceivable that if the relation between the first mortgagee and the second mortgagee is of this description, the latter, by purchasing the equity of redemption, should become entitled to intercept the profits of the mortgaged property before the dues of the first mortgagee have been satisfied.

The result is that this appeal is allowed, the order of the Court below set aside and the application of the 23rd August 1918 dismissed with costs in both the Courts. We assess the hearing-fee in each Court at five gold *mohurs*.

Appeal allowed.

(3) 26 Ind. Cas. 936; (1914) M. W. N. 771; 1 L. W. 785; 16 M. L. T. 407; 29 M. L. J. 457.
(4) (1854) 3 Ir. Ch. Rep. 270 at p. 274.
(5) 9 Ind. Cas. 985; 13 C. L. J. 495.
(6) 17 Ind. Cas. 849; 17 C. W. N. 16.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 105 OF 1918.
February 26, 1920.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Coutts.
Musammat MANKI KOER—PETITIONER—APPELLANT
versus
Musammat MANRAKHAN KUER AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 8—Executor, appointment of, provided he is fit for the work, meaning of—Executor, death of—Procedure—Universal or residuary legatee, when may be granted Letters of Administration.

Where a person appoints one of the sons of his executor to be an executor after the death of the latter provided that the son is fit for the work, this merely means that the person named as executor is free from any of the legal disabilities mentioned in section 8 of the Probate and Administration Act. [p. 843, col. 1.]

Where an executor appointed under a Will dies, a universal or residuary legatee may be admitted to prove the Will, and Letters of Administration with the Will annexed may be granted him of the whole estate or of such portion thereof as may be unadministered, and where such universal or residuary legatee is a minor, his mother may be appointed administrator during his minority. [p. 844, col. 1.]

Appeal from a decision of the District Judge, Patna, dated the 17th June 1918.

Messrs. *Fakhruddin* and *Panchanan Banerji*, for the Appellants.

Messrs. *P. K. Sen* and *G. Das*, for the Respondents.

MANKI KOER v. MANRAKHAN KUER.

JUDGMENT.

MILLER, C. J.—This is an appeal from a decision of the District Judge of Patna, dated the 17th June 1918. The appeal arises out of an application by Manki Kuer, the widow of Nathuni Sahu, for revocation of Probate of the Will of her husband granted to Lakhan Lal and Sita Ram, his nephew's sons, and for a grant of Letters of Administration with the Will annexed in respect to his property to herself. It appears from the evidence that the testator executed a Will on the 9th April appointing Mannu Lal his nephew as his executor. Mannu Lal applied for Probate before the District Judge, but during the Probate proceedings he died and the application was carried on in the name of Lakhan Lal his son through Manki Kuer, the widow of the testator, as his next friend, Lakhan Lal and his brother Sita Ram being at that time minors. His application to have his name substituted in place of that of his father in the Probate suit was granted and on the 13th December 1917 a grant of Probate was made to Lakhan Lal. On the 7th March 1918 Lakhan Lal applied through his mother Manrakhan Kuer as his next friend that the name of Manki Kuer, the widow of the testator, should be struck out and the name of his own mother Manrakhan substituted in her stead. On the 23rd March Manki Kuer's name was removed and Manrakhan's name was substituted as guardian and next friend of Lakhan Lal. About the same time Manki Kuer herself filed an application that the Probate be withdrawn and Letters of Administration granted to her, on the ground that she was the widow of Nathuni Sahu the testator and was interested in the property and that Lakhan Lal had no right under the Will to obtain Probate. On the 9th April 1918 Lakhan Lal through his next friend Manrakhan Kuer filed a petition that his brother Sita Ram should be added in the Probate as executor with him and that the Probate should be corrected or that Letters of Administration should be granted to them both, and on the 10th April in the same year Manki Kuer filed another petition claiming revocation of Probate and the grant of Letters of Administration to herself.

The matter came before the District Judge on the 17th June 1918, when all these questions were considered and determined and the learned Judge made an order revoking the grant of Probate to Lakhan Lal and Sita Ram, on the ground that the Probate had been granted *per incuriam*, these persons being in fact minors at that time, and he further ordered that Letters of Administration with the Will annexed be granted to Manrakhan Kuer mother and guardian of Lakhan Lal and Sita Ram, minor executors of the Will of Nathuni Sahu deceased limited until one of them should attain majority.

It is from that order that the present appeal is brought by Manki Kuer, and she contends that under the Will of her late husband neither Lakhan Lal nor his brother Sita Ram were appointed as executors at all and that, therefore, the order of the learned Judge granting Letters of Administration to their mother Manrakhan Kuer cannot stand as it was based upon the hypothesis that Lakhan Lal and Sita Ram were in fact appointed executors of the Will upon the death of their father Mannu Lal. It is necessary in order to decide this question to consider that part of the Will in which executors are appointed. There can be no doubt that the testator, who died leaving no male relations nearer than his brother's son Mannu Lal, although he left a wife and a daughter and a granddaughter, did appoint Mannu Lal his executor and in a subsequent part of his Will he provided: "If the aforesaid executor dies, then after his death his son and heir's representatives who shall be fit for the work will act as executor representative to carry on the work in place of the deceased executor in regular succession in perpetuity." It will be seen from that that the person or persons who were appointed to act as executor or executors in the event of the death of Mannu Lal were his descendant or descendants in the male line who should be fit for the work, and the contention on behalf of the appellant is that there was on the death of Mannu Lal no person alive who was fit to carry on the work, of executor as the only two people who would otherwise have complied with the description were Mannu Lal's sons, Lakhan Lal and Sita Ram, who were minors and, therefore, unfit. There was in fact no specific appointment of either Lakhan or Sita Ram as executors and that being so, section 31 of the Probate and Administration Act had no application because in fact Lakhan and Sita Ram, not fulfilling the description mentioned in the Will, were

not executors so that their legal guardian was not entitled, as the learned Judge assumed was the case, to be appointed administrator during the period of their minority. Some question has arisen during the course of the hearing and certain arguments have been placed before us as to what is the exact meaning of the words "shall be fit for the work." It is contended on the one hand that these words mean not only that the person there referred to shall be under no legal disability such as that mentioned in section 8 of the Probate and Administration Act but that they shall be persons who have shown a particular aptitude for the class of work which is required from an executor and that in any case as they are not fit under the provisions of section 8 of the Probate and Administration Act they are, therefore, not persons who are named in the Will as executors. On the other hand it is contended that the words "who shall be fit" simply mean that they shall not be excluded by reason of minority or unsoundness of mind as provided in section 8. If the first contention be accepted, *viz.*, that although they are of age and of sound mind, they must nevertheless be persons who have disclosed some particular aptitude for this class of work, then the appointment is void for vagueness and uncertainty and if that were the proper construction, I should be inclined to agree that the appointment was void on the ground that it is too uncertain and too vague as it is a matter of considerable difficulty for anybody to say which, if any, of the persons otherwise qualified was fit for the particular class of work. I think, however, speaking for myself, that the words used in that clause of the Will merely mean that the person to be appointed executor should be a person who was suffering under no legal disability such as that referred to in section 8 of the Probate and Administration Act.

That, however, does not solve the whole of the question to be considered in this case, because even taking the narrower construction of the words it is quite clear that neither Lakhan Lal nor Sita Ram were persons who came within the description in the Will and, therefore, it cannot be said that there was any appointment of them as executors after the death of their father Mannu Lal. The result is that, in my opinion, the learned Judge was wrong in appointing the mother of the two minors as administrator on the ground that she was the mother of the executors appointed under the Will. There were in fact in the circumstances no executors appointed under the Will after the death of Mannu Lal, at all events until either Lakhan or Sita Ram attain their majority, so that until that time arrives there will be a period during which there are no executors appointed under the Will.

That, however, does not dispose of the whole question, because although it may be true that the learned Judge was wrong in appointing Manrakhan Kuer administrator on the ground that she was the guardian of the executors, he may nevertheless have been justified in appointing her as administrator on other grounds, and the respondents contend in this case that they can support the learned Judge's decision upon the ground that for other reasons Manrakhan Kuer was in the circumstances the proper person to be appointed administrator and not Manki Kuer, the appellant. Two courses are open to us in such circumstances. We might either send the case back to the learned District Judge for him to consider the question of who is the proper person to be appointed administrator, or, as the whole of the evidence is before us which would enable the Court to determine this questior, we may ourselves go into it and decide it. After intimating to the learned Vakil who appeared for the appellant and the learned Counsel who appeared for the respondents that we were disposed to deal with the question ourselves to save the time and expense of remanding it to the District Judge, we invited them to address themselves to us upon this question which they did, and after hearing arguments upon it I have come to the conclusion that the order of the learned District Judge was justified, if not upon the ground which he gave at all events upon other grounds, and that his order ought not to be reversed. The reason why I arrive at this decision is that as between the claims of Manki Kuer, the widow of the testator, and Manrakhan Kuer, the mother of the two minors, it seems to me that the provisions of the Probate and Administration Act point rather to the claim of the latter as being that which we ought to recognise. Although Lakhan and Sita Ram are not in fact under the terms of the Will appointed executors, they have a very

considerable interest as reversionary legatees. Manki Kuer, on the other hand, has under the Will a life-interest in the income of half the residue after making provision for certain religious endowments, but this interest ceases if she should re-marry. The other two ladies Golabo Kuer, the daughter of the testator, and Matukni, his granddaughter, also have a life-interest in equal shares in the income of the other half. Under section 19 of the Probate and Administration Act, which applies to a case where an executor has not been appointed or when an executor appointed has died, which is the case here, a universal or risiduary legatee may be admitted to prove the Will, and Letters of Administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered. It is true that in the present case although Lakhan and Sita Ram are reversionary legatees, they cannot claim themselves to be administrators because they are not of age, but in a few years time that disability will have disappeared and it seems to me more fitting and proper that in the meantime their mother Manrakhan Kuer should be appointed administrator during their minority. Another reason which induces me to this conclusion is, as the learned Judge points out in his judgment, that Manki Kuer had already been removed from the position of next friend of the minors because it was found that she had a conflict of interest. In these circumstances I think that the order made by the learned District Judge ought to stand for the reasons I have given and that this appeal should be dismissed. In the result the order made by the learned Judge in the last paragraph of his judgment will be modified to this extent that the words "executors of the Will of Nathuni Sahu deceased limited until one of them attain majority" will be struck out.

In the particular circumstances of the case we think that both parties should pay their own costs of the appeal.

COUTTS, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1729, 1849, 1850 AND 1851 OF 1917.

March 31, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt.

ANWAR BEWA, WIDOW OF BAZAR SHEIKH CHOUKIDAR, AND OTHERS—DEFENDANTS—APPELLANTS

versus

SURENDRA NATH RAHUT AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Landlord and tenant—Under-*raiyat, *status of—Lands held as* korfa chasi or korfa raiyati—*Appeal, second—Point involving question of fact not raised at trial, whether can be taken in second appeal.*

Where in a *kabuliyat* the holdings are described as *korfa chasi* and *korfa raiyati* and the predecessors-in-interest of the holders under the *kabuliyat* had portions at least of the lands comprised in *khas* cultivation, the status of the holders is that of under-*raiyats*. [p. 845, col. 1.]

A point which ought to be, but is not, taken in the trial Court and in respect of which no direct evidence is given cannot be taken in second appeal, especially if it involves a question of fact. [p. 845, col. 2.]

Appeals against the decrees of the District Judge, Rungpur, dated the 7th of May 1917, reversing that of the Munsif, 2nd Court at Gaibandha, dated the 17th of April 1916.

FACTS appear from the judgment.

Babu *Atul Chandra Gupta*, for the Appellants.—The appeals arise out of four suits for ejectment after notice under section 49 (*a*) of the Bengal Tenancy Act. The defence was that the defendants had been holding over for 3 years. The first Court dismissed the suits. The Court of Appeal below decreed them. The learned Judge could not reverse the judgment of the Munsif without displacing the findings which are in my favour. A *korfa raiyat* does not necessarily mean an under-*raiyat*. Refers to Second Appeal No. 1557 of 1915 [*Emaduddin Chowdhury* v. *Danesh Mamud* (1)] decided by Fletcher and Richardson, JJ. The case should go back for a finding on the point as to what is the status of the defendants and, secondly, on the learned Munsif's findings in my favour. Refers to *Dougal* v. *McCarthy* (2).

Babu *Surendra Chandra Sen*, for the Respondents.—The question is whether the plaintiff is a *raiyat* and the defendant under-*raiyat*. Ryots generally take lands for purposes of cultivation. *Korfa* means under

(1) 39 Ind. Cas. 240.

(2) (1893) 1 Q. B. 736; 62 L. J. Q. B. 462; 4 R. 402; 68 L. T. 699; 41 W. R. 484; 57 J. P. 597.

and *chasi*, cultivator. The lower Appellate Court's finding is a conclusive finding of fact. As regards the question of holding over, the mere fact of the landlord's demanding rent and the tenant's not paying it does not create the relationship of landlord and tenant. The parties should be restricted to their pleadings. The point is now for the first time urged.

Babu *Atul Chandra Gupta* replied in brief.

JUDGMENT.—All the four appeals were heard together by the District Judge. They arose out of four suits for ejectment. The defence was that the plaintiffs were tenure-holders and the defendants were *raiyats* and were, therefore, not liable to ejectment. The learned Munsif found this point in favour of the defence and dismissed the suits. The learned District Judge has held that the defendants were not *raiyats* but that they were under *raiyats*. He based his judgment upon the documents filed by the plaintiffs, including Kabuliats which had been executed by the defendants or their predecessors in respect of the tenancies. In all these Kabuliats the holdings are described as *korfa chasi* or *korfa raiyati*. Having regard to that and also having regard to the fact that the original holders of the *jotes* had at least portions of the land comprised therein in *khas* cultivation, he held that the defendants were under-*raiyats*.

Reliance has been placed on an unreported judgment of this Court of Fletcher and Richardson, JJ., in Second Appeal No. 1557 of 1915 [*Emaduddin Chowdhury* v. *Danesh Mamud* (1)], in which the learned Judges say that an under-*raiyat* may mean a *raiyat* under a tenure-holder. But, I think, having regard to the facts set out by the learned District Judge he was right in coming to the conclusion that the defendants were under-*raiyats*.

A further point has been raised before me by the learned Vakil appearing for the appellants that the Munsif found that the plaintiff's *gomasta* admitted that he had been demanding rent from the defendants in these cases after the expiration of the term of the Kabuliat for every year. This he construes as an express consent to the defendants holding over after the expiry of the term of the lease, involving waiver of the forfeiture clause in the Kabuliats, granting them to be otherwise valid and operative. The learned Munsif also said that continuous demand of rent after the expiration of the terms surely indicates an intention to treat the defendants as tenants and the leases as subsisting. The learned Vakil contends that *that* being so, the defendants were entitled to notice under section 43 (*b*) of the Bengal Tenancy Act. The difficulty about this matter to my mind is this that there is no indication of any such case in the written statement filed by the defendants. There is nothing to suggest in the written statement that they ought in any event to be held as tenants holding over, having regard to the fact that rent was demanded from them after the expiration of the term of the lease. No issue was raised specifically about this, although there is a general issue, "are they liable to ejectment?" It is not competent for the defendants now to take the point which involves a question of fact which was not before the trying Court and upon which no direct evidence was given, a point merely based upon a statement made by a witness under cross-examination. The point also does not seem to have been taken before the learned District Judge and is clearly an afterthought.

I am unable to allow these appeals and must dismiss them with costs.

Appeals dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 203 OF 1919.

September 18, 1919.

Present:—Mr. Findlay, A. J. C.

RAMKRISHNA—DEFENDANT No. 2—APPLICANT

versus

NARAIN AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—NON-APPLICANTS.

C. P. Tenancy Act (XI of 1898), s. 81, decree under—Appeal—Valuation—Civil Procedure Code (Act V of 1908), ss. 2 (2), 102, O. IX, r. 8—Suit for rent of malik makbuza *field—Amount less than Rs. 500—Appeal, second, whether lies—Decree passed on "admission", meaning of—Appeal, whether lies—Jurisdiction—Court, whether can pass decree against party against whom plaintiff does not seek decree.*

RAMKRISHNA *v.* NARAIN.

The criterion for determining whether an appeal lies from a decree under section 81 of the Central Provinces Tenancy Act is the nature of the suit as originally framed, and not the form it may subsequently assume. [p. 847, col. 1.]

Lakshmandas v. *Anna*, 32 B. 356, followed.

Although a suit for rent due by a tenant of *malik makbuza* fields is not triable by a Small Cause Court, it is nonetheless one of a nature cognizable by a Court of Small Causes and unless the subject-matter involved in the suit exceeds Rs. 500 in value, there is no second appeal from a decree in such a suit. [p. 847, col. 1.]

The word "decree" in Order IX, rule 8 of the Civil Procedure Code, is governed by the definition thereof given in section 2 (2) of the Code: a decree, therefore, passed upon the admission of the defendant is appealable by the person aggrieved thereby. [p. 847, col. 2.]

A Court has no jurisdiction to pass a decree against a person against whom the plaintiff does not seek one, and who is joined as a defendant on his own application. [p. 848, col. 1.]

The position of a person who is made a defendant on his own application and that of a person who is so made without any such application are very different, in that the former has to make out a *prima facie* case before the plaintiff can be asked to meet it. [p. 848, col. 2.]

Revision of the judgment of the Additional District Judge, Nagpur, in Civil Appeal No. 87 of 1917, decided on the 29th October 1917.

Messrs. *M. B. Khinkede* and *M. R. Bobde*, for the Applicant.

Messrs. *A. Bhagwant* and *V. V. Ohitale*, for the Non-Applicants.

JUDGMENT.—The facts of the case leading to this second appeal are somewhat peculiar. The plaintiff-respondent Narayan sued the other respondent Laxmibai for Rs. 101-9-6, being arrears of rent due on account of her tenancy of 2 *malik makbuza* fields. In the course of the suit Ramkrishna, the present appellant who is alleged to be the adopted son of Laxmibai, applied to be made a party on the ground that the fields are recorded in his name at the settlement and that he has paid the rent therefor to the plaintiff. The first Court on the 6th July 1917, on which date the plaintiff was absent, passed an order to the effect that Ramkrishna was a necessary party to the suit and constituted him one accordingly. Its grounds for doing so were that in the *jamabandi* as well as in the settlement Parcha Ramkrishna's name was shown; it accordingly on the admissions of the two defendants passed a decree against them both for Rs. 82; interest and costs were disallowed in view of their having proved that the plaintiff had on several occasions refused to accept revenue money orders sent to him by Ramkrishna. The plaintiff came up on appeal to the Court of the Additional District Judge and asked that Ramkrishna's name should be struck off from the decree, and that Court upheld the appeal holding that the Additional Munsif had no power to pass a decree against Ramkrishna against the wishes of the plaintiff. The latter defendant has now come up on appeal, urging that his name should be restored in the decree. A preliminary objection has, however, been raised on behalf of the respondent to the effect that no appeal lies in the present case under section 81 of the C. P. Tenancy Act. It is held that the Additional District Judge, unlike the Additional Munsif, being in the exercise of powers no less than those of Assistant Commissioner of the First Class as defined in the C. P. Civil Courts Act, 1885, no appeal lay in view of the fact that no question of title or interest in the land was involved. On behalf of the appellant it has been urged that a question of title was involved, inasmuch as the present plaintiff-respondent in his appeal to the Court of the Additional District Judge urged in terms that Ramkrishna, the present appellant, was not a tenant of the land. The appellant in short takes up the position that the question of title was at the basis of the decree, his position being that he has an interest in the land: there must, therefore, be of necessity a decree against him. As a matter of fact in the present case the subject-matter of the suit was originally a sum above one hundred, and it seems to me that although the amount decreed by the lower Appellate Court as well as by the first Court was an amount less than one hundred, for the purposes of section 81 we must take the subject-matter of the suit to be that stated in the plaint. From this point of view, therefore, the case is not covered by section 81, C. P. Tenancy Act, and so far as that provision goes, it would not bar the appeal in the present case. As, however, a connected case, Second Appeal No. 158 of 1919 in which the subject-matter of the suit is admittedly under rupees one hundred, stands or falls with the decision in the present case also, it is necessary to determine the

question also as to whether, even if the subject-matter of the present appeal had been below Rs. 100, in that event this second appeal would have been barred under condition (*b*) in the section of the Tenancy Act quoted. In my opinion it cannot be said that the lower Appellate Court has in the present case determined any question of title. It has not by implication even confirmed either the position of the plaintiff or of the defendants on the alleged question of title. What it has done is to decide a purely legal point to the effect that the defendant Ramkrishna could not be included in the decree against the wishes of the plaintiff. Its decision in short amounts to a refusal to adjudicate on the question of title arising between Ramkrishna and the plaintiff. From this point of view, therefore, the present appeal would have been barred under section 81 had it not been for the fact that the subject matter of the suit exceeded one hundred. I may add that in determining whether a second appeal lies in such a suit as the present the criterion should be the nature of the suit as originally framed and not the form it may subsequently assume: *Lakshmandas* v. *Anna* (1).

I am of opinion, however, that in any event under section 102 of the Civil Procedure Code no second appeal lay in the present case. Although not triable by a Court of Small Causes a suit like the present for the recovery of rent was nonetheless one of a nature cognizable by a Court of Small Causes. In this connection I am referred to the decision of the Full Bench of the Madras High Court in *Soundaram Ayyar* v. *Sennia Naicken* (2). As pointed out therein, to take the opposite view would lead to a somewhat anomalous position, for it is hardly conceivable that the Legislature, when enacting the Civil Procedure Code, could have regarded rent suits of below Rs. 500 as being suitable for second appeal and yet by enacting Article 8 of the 2nd Schedule to the Small Cause Courts Act could have regarded such suits as being suitable under notification of the Local Government for trial by a Court of Small Causes, in which case not even a first appeal would lie as regards them. For these reasons I think that from that point of view the present second appeal was barred. It is, however, open to this Court to allow the second appeal to be treated as an application for revision and in view of the nature of the legal question involved in the judgment of the lower Appellate Court, I sanction this course and am prepared to hear the parties on the merits of the case.

I have already set out the facts leading to this application in my order, dated the 5th instant, in Second Appeal No. 71 of 1918. In that order I gave permission for the second appeal to be treated as one for revision. It now remains to dispose of the grounds urged therein. The first contention which the Pleader for the applicant has put forward is that having regard to the words "shall pass a decree against the defendant upon such admission" in Order IX, rule 8, of the Civil Procedure Code and to the definition of 'decree' in section 2 (2) *idem*, there could not be said to have been a formal adjudication determining the rights of the parties against which an appeal could have lain to the lower Appellate Court: I am unable to accept this contention. There is no reason to suppose that the word 'decree' in Order IX, rule 8, is not governed by the definition thereof referred to and an appeal certainly lay.

As regards the second contention that the plaintiff was not aggrieved by the decree but by the procedure adopted in his absence, this also seems to me to be quite untenable. The plaintiff, it was true, was absent on the date on which the order admitting Ramkrishna was passed, but his joinder as a defendant had been strongly opposed by the plaintiff on the ground that he was not a necessary party to the suit and in these circumstances the plaintiff is most certainly aggrieved by the decree which has been granted to him. The third point urged is that in any case the lower Court, having regard to the terms of Order IX, rule 8, had no alternative but to pass the decree it did against Ramkrishna, once he had admitted the claim. It is urged in short that the lower Appellate Court had no power to go

(1) 32 B. 356.

(2) 23 M. 547; 10 M. L. J. 329; 8 Ind. Dec. (N. S.) 785.

into the merits and that the trial Court had no alternative but to pass the decree. I do not think the contention of the applicant can be upheld in the present connection. The suit was one for money for arrears of rent and the plaintiff claimed no rights against the defendant Ramkrishna. Order IX, rule 8, clearly has in view the case of a defendant admitting the claim made against him by the plaintiff and I concur with the Judge of the lower Appellate Court in thinking that the Court had no power to pass a decree against Ramkrishna when the plaintiff sought no such decree. This finding is one which also squares with the equities of the case, for it would be a most undesirable and inequitable circumstance if a third party like Ramkrishna could come in in a simple suit for rent and seek to have a question of title determined in the manner the Court of first instance adopted in the present case. I may add that the position of a person who is made a defendant on his application and that of a person who is so made without any such application of his are very different. The former has to make out a *prima facie* case before the plaintiff can be asked to meet it, and that was the position in the present case. It seems to me doubtful whether the Court of first instance had viewed the case sufficiently from this aspect, but in view of my findings on the grounds of revision which have been urged on behalf of the applicant it is unnecessary to elaborate this point. These findings govern the application for revision which is dismissed. The applicant must bear the non applicant's costs. Pleader's fees to be Rs. 30.

Petition dismissed.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 126 OF 1920.

May 29, 1920.

Present:—Mr. Shadi Lal, Chief Justice.

FAQIR CHAND AND OTHERS—PLAINTIFFS—PETITIONERS

versus

DULLAH—DEFENDANT—RESPONDENT.

Punjab Courts Act (IX of 1919), s. 44—Revision—Error of law, whether good ground for interference.

An error of law does not amount to a material irregularity and is not a good ground for interference in revision.

Where upon an examination of all the relevant facts and the law bearing upon the subject a suit was dismissed as time-barred:

Held, that the High Court could not interfere in revision simply on the ground that the Court below had come to a wrong conclusion.

Amir Hassan Khan v. *Sheo Bakhsh Singh*, 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760, followed.

Petition, under section 44 of Act IX of 1919, for revision of the decree of the District Judge, Attock at Campbellpore, dated the 17th October 1919, reversing that of the Munsif, 1st Class, Attock, dated the 20th June 1919.

Mr. *Bhagat Ram Puri*, for the Petitioners.

Mr. *Ghulam Rasul*, for the Respondent.

JUDGMENT.—The learned District Judge has, upon an examination of all the relevant facts and the law bearing upon the subject, reached the conclusion that the suit brought by the petitioners was barred by time. The view taken by him may be erroneous, but as pointed out by their Lordships of the Privy Council in *Amir Hassan Khan* v. *Sheo Bakhsh Singh* (1), the Court of revision cannot interfere simply on the ground that the lower Court, which had jurisdiction to hear the case, has come to a wrong conclusion. After hearing the learned Counsel for the petitioners I am of opinion that the contention raised by him amounts simply to this, that the District Judge has erred in law in holding that the suit was barred by time. As observed above, an error of law does not amount to a material irregularity.

I must, therefore, dismiss the application for revision with costs.

Application dismissed.

(1) 11 C. 6; 11 I. A. 287; 4 Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760.

CALCUTTA HIGH COURT.

APPLICATION FOR ADMISSION OF CRIMINAL APPEAL No. 15 OF 1920.

February 18, 1920.

Present :—Sir Lancelot Sanderson, KT, Chief Justice, and Mr. Justice Walmsley.

HATHIM MONDAL—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860, s. 411—Receiving stolen property—Trial by Jury—Charge to Jury—Judge, duty of—Jury, functions of—Burden of proof.

Where a prisoner is charged with receiving stolen property, when the prosecution has proved the possession by the prisoner and that the goods had been recently stolen, the Jury may be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not, that is to say, if the Jury think that the explanation may reasonably be true though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That onus never changes; it always rests on the prosecution. [p. 850, col. 1.]

In a prosecution under section 411 of the Penal Code it is the duty of the Judge in delivering his charge to the Jury to point out that the possession of the stolen goods must be possession *soon after the theft* or that the stolen goods must have been "*recently*" stolen. [p. 849, col. 2.]

Application for admission of appeal against the order of the Officiating Sessions Judge, Jessore, dated the 23rd December 1919.

Babu *Frolodh Chandra Ray*, for the Appellant.

JUDGMENT.

SANDERSON, C. J.—In this case we do not admit the appeal. The charge against the accused was under section 411, Indian Penal Code, *viz.*, dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property.

The only question which had any real importance in this case was the identity of the person who was in possession of the bundle, which contained the stolen articles at Jessore Station on the 1st of October last year: and, there is no misdirection, as far as I can see, in the learned Judge's charge to the Jury in that respect. The Jury came to the conclusion that the accused person was the individual who was in possession of the bundle containing the stolen articles on the 1st of October, the burglaries having been committed between the 28th of September and the 1st of October. Therefore, it may be said that the accused was in possession of recently stolen articles. The Jury found that the accused person was in possession of them, and he offered no explanation of such possession. Consequently, we see no reason to admit this appeal.

But there is a passage in the learned Judge's charge which in our judgment is not a correct direction: and, although it is immaterial to this case, we think it is desirable to draw attention to the misdirection, in order that it may not be repeated on subsequent occasions. The learned Judge says this: "It is the business of the prosecution to prove its case entirely; and no inference should be made against an accused because he examines no witnesses, and does not attempt to explain the evidence against him. But the matter is different in a case under section 411, Indian Penal Code. When it is established that an accused is found in possession of stolen property, it is his business to show that he came by it honestly, and that he did not know that it was stolen property. In the present case the accused denies his possession altogether: he, therefore, does not make any attempt to show that he was in honest possession of the property." Therefore, (unless "there appears strong reason to the contrary) if the Jury find that the accused was in possession of the property and that the property was stolen, they should presume that the possession of accused was dishonest and that he had reason to believe that the property was stolen." In our judgment, that is not a correct direction. In the first place it is not pointed out that the possession of stolen goods referred to must be possession *soon after the theft*, or that the stolen goods must have been "*recently*" stolen. Further, the charge is not in our judgment sufficient in other respects. I think the best way of dealing with it is to draw attention to a judgment of the Lord Chief Justice of England in the case of *R.* v. *Isaac Schama and Jacob Abramovitch* (1), and as that book may not be available in all Courts, I propose to read what the

(1) (1914, 11 Cr. App. R. 45 at p. 49; 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 59 S. J. 288; 31 T. L. R. 88.

Lord Chief Justice said. Having stated the facts, he said: "It is clear that on those facts, and on a proper direction, there was sufficient evidence on which the Jury, if so minded, could convict the appellants. It is admitted by Counsel for both appellants that there was evidence to go to the Jury. The case really resolves itself into one question, whether the Judge gave a proper direction to the Jury before they arrived at their decision. Cases of this kind have come frequently before this Court complaining of language used by the Judge at the trial in pointing out the principle of law for the guidance of the Jury. It is essential in cases of this character that there should be a careful and proper direction. Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the Jury may be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That onus never changes; it always rests on the prosecution. That is the law; the Court is not pronouncing new law, but is merely re stating it, and it is hoped that this restatement may be of assistance to those who preside at the trial of such cases." I concur in the Lord Chief Justice's hope that this statement may be of assistance to those who preside at the trial of such cases.

The application for admission of this appeal must be rejected for the reasons that I have already mentioned.

WALMSLEY, J.—I agree.

Application dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1449 OF 1919.

December 17, 1919.

Present:—Mr. Justice Broadway.

SANDHI—ACCUSED—PETITIONER

versus

KHEM CHAND AND ANOTHER—RESPONDENTS.

Workman's Breach of Contract Act (XIII of 1859), ss. 2, 3—Loan disguised as advance—Breach of contract—Workman, whether liable.

However carefully it may be sought to disguise the fact that an advance is really a loan, the Workman's Breach of Contract Act would not apply to such a case [p. 851, col. 1.]

Emperor v. *Muhammad Din*, 22 Ind. Cas. 74?; 23 P. R. 1913 Cr.; 96 P. L. R. 1914; 15 Cr. L. J. 166, followed.

S. received Rs. 30 from the firm of *K.* in advance and agreed to work in their factory. Rs. 2 were to be deducted from his monthly wages to make up the money received in advance. Not having fulfilled the terms of the agreement, he was prosecuted under Act XIII of 1859:

Held, that the advance was really a loan and, therefore, the Act did not apply. [p. 851, col. 1.]

Case reported by the District Magistrate, Jullundur, with his No. 3820, dated the 30th November 1919.

FACTS.—That one Sandhi Lohar agreed with the firm of Khem Chand-Bhola Nath to work at the firm and received Rs. 30 in advance and agreed to do the Balti work in the factory and that Rs. 2 will be deducted from his monthly wages to make up the money received in advance, and in case of non compliance the accused agreed to be punished under the Workman's Breach of Contract Act (XIII of 1859). As the accused has not fulfilled the terms of the agreement, hence he was prosecuted under section 2 of Act XIII of 1859. The full particulars are given in the body of the lower Court's judgment.

The accused, on conviction by Malik Abdul Haq exercising the powers of a Magistrate of the 1st Class in the Jullundur District, was sentenced by order, dated the 12th August 1919, under section 2, Act XIII of 1859, to go to Khem Chand-Bhola Nath's factory and work there till the obligations are over. Failing he shall incur the penalty of section 3 of the Act XIII of 1859.

GROUNDS.—The money advanced was certainly a loan, not an advance on account of work to be performed. Also this Act cannot be meant to be used to compel a

man to work in a factory 4 years after he left work. The Act ought to be used at once, if at all.

I recommend cancellation of the lower Court's order.

Mr. *Nand Lal*, for the Petitioner.

Mr. *Badur ud Din Kureshi*, for the Respondents.

ORDER.—After a careful consideration of the contract in this case and the arguments of Counsel for the parties, I agree with the learned District Magistrate that the order passed by the Magistrate under Act XIII of 1859 is not maintainable.

No doubt the contract recites that the advance was made for work to be done but the re-payment was not to be made out of the wages. In this the Magistrate has erred, as has been pointed out by Mr. Kureshi.

As laid down in *Emperor* v. *Muhammad Din* (1), however carefully it may be sought to disguise the fact that an advance is really a loan, the Act does not apply. See also *Ganeshi Lal* v. *Shugan Chand* (2).

I accordingly set aside the order of the Magistrate, dated 12th August 1919.

Order set aside.

(1) 22 Ind. Cas. 742; 23 P. R. 1913 Cr.; 96 P. L. R. 1914; 15 Cr. L. J. 166.

(2) 5 Ind. Cas. 914; 9 P. R. 1910 Cr.; 12 P. W. R. 1910 Cr.; 11 Cr. L J. 329.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCES Nos. 165, 166 AND 167 OF 1919.

December 18, 1919.

Present:—Sir Asutosh Chaudhuri, KT., Mr. Justice Newbould and Justice Sir Syed Shamsul Huda, KT.

EMPEROR—PROSECUTOR

versus

AKUB ALI MAZUMDAR AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 412, 429, 439—Petroleum Act (VIII of 1899), s. 15 (a)—Guilty, plea of—Written statement by accused, value and effect of—Procedure.

Accused was charged with having in his possession a quantity of kerosine oil without a license or pass: he pleaded guilty and filed a written statement in which he raised the defence that he did not trade in kerosine oil, that the oil belonged to a firm which had a transport license, and that under that license he had been employed to convey the oil from the Railway station to the firm's godown:

Held, that the plea of guilty must be taken in connection with the written statement, that the plea was really not a plea of guilty and was of no value, and that it was incumbent on the Magistrate to try the case on the merits. [p. 853, col. 1.]

Per *Newbould, J.*—The principle of section 412 of the Code of Criminal Procedure should ordinarily be applied in cases in which the High Court is asked to exercise its revisional powers. [p. 851, col. 2.]

Where a Court of revision holds the conviction of an accused person to be bad on the ground that a plea of guilty should not have been recorded, it should order a retrial of the accused. [p. 852, col. 1.]

Queen v. *Mittun*, 11 W. R. 53 Cr., followed.

Criminal references by the Sessions Judge, Tipperah, dated the 18th November 1919, against an order of the Sub-Divisional Officer, Chandpur, dated the 12th August 1919, convicting the accused under section 15 (*a*) of the Petroleum Act.

JUDGMENT.

NEWBOULD, J.—Each of these three accused was separately tried on a charge of keeping more than 300 tins of kerosine oil in his boat without a license or pass, an offence punishable under section 15 (*a*) of Act VIII of 1899. Each accused pleaded guilty and filed a written statement. The Magistrate after recording the plea of guilty adjourned the cases. At the next hearing after examining one Court witness in each case, he convicted each accused and sentenced them to pay a fine of Rs. 10 each.

The learned Sessions Judge of Tipperah has referred these cases with a recommendation that the convictions and sentences be set aside, on the ground that the accused merely carried the kerosine tins under the orders of the sub-agent of Messrs. Bullock Brothers and Company who had a general license for the transport of kerosine oil.

Differing with regret from my learned brother I would hold that we should not interfere in this case There can be no doubt that the principle of section 412, Criminal Procedure Code, should ordinarily be applied in cases in which we are asked to exercise our revisional powers. This section provides that where a person has pleaded guilty and has been convicted on such plea, there shall be no appeal except as to the extent or legality of the sentence. I agree with the remarks of Sargent, J., in *Empress* v. *Jafar M. Talab* (1), and would hold that by their pleas of guilty the accused waived their right

(1) 5 B. 85; 5 Ind. Jur. 423; 3 Ind Dec. (N. s.) 55,

to question the legality of their convictions. The case of *Queen* v. *Mittun* (2) seems to me distingulishable, on the ground that it was held in that case that the accused never intended to plead guilty and the plea should not have been recorded. In the present case it has not been alleged by the accused in their petitions to the Sessions Judge that they did not intend to plead guilty. In none of the grounds taken it is suggested that the plea was wrongly recorded. As I read their written statements, they were not inconsistent with the pleas of guilty but were filed in order to set out extenuating circumstances that might mitigate the sentences.

Further if the convictions be held to be bad on the ground that the pleas of guilty should not have been recorded, I think a retrial should be ordered as was done in the case of *Queen* v. *Mittun* (2). As the accused were convicted on their plea of guilty, the question has not been investigated whether the license held by Bullock Brothers and Company was sufficient to cover possession by the accused of an excess amcunt of kerosine oil.

As my learned brother and I are divided in opinion, the case will be submitted to the Hon'ble the Chief Justice in order that it may be laid before another Judge of the Court under section 429 read with the concluding portion of clause (1) of section 439, Criminal Procedure Code.

SHAMSUL HUDA, J.—The facts of the case are set out in the letter of reference submitted by the learned Sessions Judge to this Court. On the point of law I agree with him. I do not think it makes any difference that the accused pleaded guilty to the charge. The plea of guilty was accompanied with a statement in writing filed by the accused. In that statement the accused said that they worked for Bullock Bros. who had a license, that the accused were illiterate persons and were not aware that a pass was necessary and that in future they would take out a pass. The plea of guilty cannot be dissociated from the statement that accompanied it and taking that statement into consideration, it seems to me that the plea was based on a mistake of law and should not have been accepted : *Queen* v. *Mittun* (2).

I regret I am unable to agree with my learned brother in holding that we should refuse to interfere with the conviction and sentence in this case in the exercise of our revisional jurisdiction because a person who is convicted on his own plea cannot appeal against the conviction.

CHAUDHURI, J.—These three cases have been referred to me under section 429, Criminal Procedure Code.

The three accused were separately summarily tried for having kept more than 300 tins of kerosine oil, each in his own boat, without a license or pass, which is an offence punishable under section 15 (*a*) of Act VIII of 1899. The record shows that they pleaded guilty and filed written statements. The trying Magistrate examined one Hemanta Kumar Mukherjee, Station Master, on the point as to who took delivery of the oil at the railway station and he also appears to have examined the accused. There is no record of what the accused were asked and what they said other than a note in each case. He says "the oil belonged to Khamesh Chandra Rakkhit, sub-agent of Messrs. Bullock Bros. and Company, Limited." Each written statement is to the following effect: "I work under Bullock Bros. They have a license. I do not know that a pass has to be taken under the rules. I am an ignorant man. In future I shall work after taking a pass. It is prayed that the Court will show kindness in doing justice. I have no objection to this Court trying me." It further appears from the record in Jalaladdi Chowkidar's case that a notice was issued on him on the 16th July 1919 to show cause on the 25th why he was not to be prosecuted under section 15 (*a*) of the Petroleum Act (Act VIII of 1899) "for transporting without license about 400 tins of kerosine oil in his boat from the Hazigunge Railway station to the Bazar." He showed cause and filed a petition on the 25th July to the effect he did not trade in kerosine oil : that he only carried the oil from the railway station to the Bazar in the dry season in *gharries* and in the

(2) 11 W. R. 53 Cr.

rainy season in boats: that he used to take kerosine oil belonging to Bullock Bros. under orders of their officers to their godown: that he had done so for a considerable time: that Bullock Bros. had a transport license from Government and under that license he had been employed to take the oil from the railway station to the godown: that it was, therefore, not necessary for him to take any license.

All the accused clearly raised the same defence. The plea of guilty as recorded must be taken in connection with their written statements. I am not prepared to hold that there was really a plea of guilty. All they meant to admit was that they had not a license or pass, and that the oil was in their boat. The written statements make it perfectly clear that they were relying on the transport license of Bullock Bros. as exonerating them. There is also on the record a letter from Bullock Bros. which was filed with Jalaluddi's petition, that they hold a general transport license for the transport of oil throughout India and that the oil is under their control until it leaves the hands of their sub agents. It also said that the oil in these cases was being conveyed to their sub agent's godown and was covered by their license.

The plea of guilty in these cases to my mind is of no value and it was incumbent on the Magistrate to try them on their merits. He was dealing with illiterate men and ought to have been very careful. He has clearly failed to consider the defence raised in the written statements. The convictions and sentences ought, therefore, to be and are set aside. The fines, if paid, are to be refunded.

The question whether the license held by Bullock Bros. was sufficient to cover possession by the accused of an excess amount of kerosine oil has not been investigated. It is, therefore, left open to the Magistrate to proceed with a retrial if he thinks it necessary. I find it noted that the trying Magistrate wanted to see the general transport license of Bullock Bros. Whether he saw it or not does not appear. There can be no difficulty in getting it from them. It should be asked to be produced and if found to cover the possession of the accused, the cases ought not to be proceeded with.

Convictions set aside.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISIONS NOS. 2 AND 3 OF 1920.

April 15, 1920.

Present:—Mr. Justice Sultan Ahmed.

BIRAN RAI AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Order under s. 476—Judicial proceeding, existence of, whether necessary—Court sanctioning prosecution under s. 195—Sanction subsequently altered to order under s. 476, legality of—Time limit for passing such order.

For the purposes of section 476 of the Criminal Procedure Code it is not necessary that judicial proceedings should be in existence before an order under that section is made; all that is required is that the order should be passed with respect to an offence which may have been committed before the Court or brought to its notice in the course of a judicial proceeding. [p. 854, col. 2.]

Where a Court sanctions a prosecution under section 195, Criminal Procedure Code, and is subsequently directed by the Appellate Court to which it is subordinate to draw up a proceeding under section 476 as being more appropriate, a compliance with such a direction is not fatal to the proceedings, as the granting of sanction to prosecute at an earlier stage of the proceedings was present in the mind of the Court. [p. 854, col. 2; p. 855, col. 1.]

Although there is no time limit fixed for the making of an order under section 476, Criminal Procedure Code, yet where there has been undue delay, the High Court is entitled to set aside the order and arrest further proceedings. [p. 856, col. 1.]

Civil criminal revisions against the order, dated the 2nd March 1920, of the Subordinate Judge, Shahabad, directing the prosecution of the petitioners under section 476, Criminal Procedure Code, for an offence under section 186, Indian Penal Code.

Messrs. *S. K. Banerji* and *A. B. Mukherji*, for the Petitioners.

Mr. *Manohar Lal* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application against an order passed by the Subordinate

Judge of Shahabad under section 476, Criminal Procedure Code, directing the petitioners to appear before the Sub-Divisional Magistrate of Arrah for trial for an offence under section 186, Indian Penal Code.

The facts of the case may be shortly stated as follows:

There was an execution proceeding in the Court of the Subordinate Judge, in the course of which an application was filed by the decree holder under section 195, Criminal Procedure Code, for the prosecution of the petitioners under section 186, Indian Penal Code.

The learned Subordinate Judge granted the application of the decree-holder and sanctioned their prosecution under section 195, Criminal Procedure Code.

The petitioners thereupon applied to the learned District Judge against the order of the Subordinate Judge granting sanction. The learned District Judge on the 22nd December 1919 passed an order, portions of which relevant to the point that I have to consider may be quoted.

He says: "I think that a *prima facie* case has been made out. I could not reasonably revoke the sanction which the learned Subordinate Judge has given. The application is rejected" Then later on he says—"It may be pointed out that a prosecution under section 186, Indian Penal Code, ought to be conducted by the Crown and not by any private party. It is manifest that if at any stage in the proceeding this case is to be withdrawn or abandoned, it should be withdrawn or abandoned by the Crown and not by the decree-holder. I think, therefore, that before criminal proceedings are actually instituted in this case, the Subordinate Judge should be moved to take action in the regular way under section 476, Criminal Procedure Code."

In pursuance of this order the decree-holder filed an application before the Subordinate Judge for a direction for the prosecution of the petitioners under section 476, Criminal Procedure Code.

The learned Subordinate Judge thereupon on the 2nd March 1920 drew up a proceeding directing the prosecution of the petitioners under section 186, Indian Penal Code, and in that proceeding he says—"And whereas under the direction of the District Judge this Court has been moved to take action under section 476, Criminal Procedure Code, and being satisfied that there is a *prima facie* case against the said persons, I hereby under section 476 direct that the said persons accused in the case do appear before the Sub-Divisional Magistrate of Arrah for trial and the connected papers be sent to him for necessary action."

It is against this order that this Court has been moved, and the learned Vakil, appearing for the petitioners, has contended that there was no judicial proceeding pending before the Subordinate Judge at the time when he passed the order under section 476; and that, therefore, the order is without jurisdiction. In my opinion this contention has no force. It is not necessary that there should be in existence a judicial proceeding in the course of which an order under section 476 should be passed; all that is required by law is that the order should be passed with respect to the offence which may have been committed before it, or brought to its notice in the course of a judicial proceeding; and that being so, in my opinion, this contention must fail. The offence under section 186, Indian Penal Code, was brought to the notice of the Subordinate Judge in course of the section 195 proceeding, which was a judicial proceeding. The necessity of a judicial proceeding pending, in the course of which an order under section 476 is passed, arises in exceptional cases, where, for instance, an officer, who heard the judicial proceeding, in the course of which the offence was brought to his notice, is succeeded by another officer—see the case of *Ram Nigah Singh* v. *Emperor* (1).

The second point urged by the learned Vakil, appearing for the petitioner, is that the Subordinate Judge did not pass the order under section 476, Criminal Procedure Code, *suo motu*, but he was simply carrying out the direction of the District Judge, when he directed the prosecution of the petitioners on the 2nd March 1920.

There can be no doubt that the idea of the prosecution of the petitioners was present in the mind of the learned Subordinate Judge at the time when he passed his order, because he had already passed an order

(1) 41 Ind. Cas. 1007; 1 P. L. W. 772; 18 Cr. L. J. 895; (1918) Pat. 64; 4 P. L. W. 141.

under section 195 granting sanction for the prosecution of the petitioners at an earlier stage at the instance of the decree-holder. Apart from that, the proceeding itself shows that he was himself satisfied that an offence had been committed.

In my opinion, the learned District Judge should have himself passed an order under section 476; but I am inclined to follow the decision of Jwala Prasad, J., in the case of *Awadh Behari Lal* v. *Emperor* (2) where an order like the one I am considering was upheld.

The third ground urged is that the order under section 476 was passed by the Subordinate Judge after the lapse of the sanction under section 195, Criminal Procedure Code, granted by him and as such the order was wrong and liable to be set aside; and reliance is placed for this contention on the decision of my brother Das, J, in the case of *Lalji Tewari* v. *Emperor* (3). With due respect to him I regret that I find myself wholly unable to agree, either with his reasonings or his decision on this point in that case. The learned Judge, and I say so again with the greatest respect to him, has ignored the cardinal difference between a sanction under section 195, Criminal Procedure Code, and a direction for prosecution under section 476, Criminal Procedure Code. He has introduced into section 476, Criminal Procedure Code, the provisions of section 195, clause (6), Criminal Procedure Code, for which there is no authority whatsoever. As was laid down by Sharfuddin, J, in *Rajkumar Singh* v. *Emperor* (4) section 476 is a self contained section and the reference made to section 195, Criminal Procedure Code, in section 476 is only for the purpose of avoiding the enumeration of the sections mentioned in section 195, Criminal Procedure Code. Even if this view be held to be too narrow and the words "any offence referred to in section 195" in section 476 be held to read "subject to the restrictions contained in clause 1, sub-clauses (*a*), (*b*) and (*c*) of section 195", yet they cannot, by any stretch of reasoning, be held to read "subject to the restrictions laid down in clause (6) of section 195."

I am confirmed in the view that I take of this matter by a reference to section 195, clause (6), itself. That clause in the first part points out the appellate authority to grant or revoke sanction. There is no authority for the suggestion, if made, that this part applies to an order under section 476, Criminal Procedure Code, as it is well established that the latter order is only revisable by the High Court. If this part of clause (6) does not apply to section 476, I fail to see why the second part which fixes the period during which a sanction under section 195 is to remain in force can be held to control an order under section 476. The cases reported as *Nawal Singh* v. *Emperor* (5), *Emperor* v. *Tilak Pandey* (6), *Lakshmidas Lalji, In re* (7) and *Waman Dinkar Kelkar* v. *Emperor* (8) also support the view that no time limit can be fixed when an order under section 476, Criminal Procedure Code, should be passed.

The last ground taken is the undue delay which has occurred in passing the order under section 476. The offence was alleged to have been committed in February 1919. The order under section 195, Criminal Procedure Code, was passed by the Subordinate Judge on the 5th July 1919; the order of the District Judge in appeal under section 195, clause (6), was passed on the 22nd December. The Subordinate Judge passed the order under section 476 on the 2nd March 1920. There can be no doubt that this delay is unduly long. Whatever may be said with respect to the time taken up to the 22nd December 1919 when the District Judge disposed of the appeal, there is no explanation whatsoever for passing the order under section 476 about two and half a months after the District Judge's order. The learned Assistant Government Advocate has, however, referred to the decision of my learned brother Jwala Prasad, J., in *Awadh Behari Lal* v. *Emperor* (2)

(2) 50 Ind. Cas. 162; 20 Cr. L. J. 274.

(3) 54 Ind. Cas. 894; 5 P. L. J. 58; 1 P. L. T. 147; (1920) Pat. 125; 21 Cr. L. J. 190.

(4) 37 Ind. Cas. 487; 1 P. L. J. 298; 18 Cr. L. J. 135; 3 P. L. W. 33.

(5) 14 Ind. Cas. 766; 34 A 393; 9 A. L. J. 481; 13 Cr. L. J. 302.

(6) 29 Ind. Cas. 97; 37 A. 344; 13 A. L. J. 466; 16 Cr. L. J. 465.

(7) 32 B. 184; 10 Bom. L. R. 28; 7 Cr. L. J. 35; 3 M. L. T. 116.

(8) 51 Ind. Cas. 257; 43 B 300; 20 Bom. L. R. 998; 20 Cr. L. J. 433.

where it has been held that mere delay is not a ground for interference by the High Court.

On a fair reading of that judgment I think my learned brother made the observation referred to with reference to the facts of the case before him. I cannot induce myself to believe that he laid down any general proposition of law and by doing that he meant to differ from the observations of the learned Judges composing the Full Benches of the Calcutta and Madras High Courts in the cases of *Shaikh Bahadur* v. *Erodatullah Mallick* (9) and *Rahimadulla Sahib* v. *Emperor* (10) respectively, in which it was held that action under section 476 should be as far as possible prompt and expeditious.

In my opinion whether in a particular case there has been undue delay in making an order under section 476, is a question which must be decided on the facts of each case, and where undue delay has been established, the High Court is entitled to set aside the order and arrest further proceedings.

On the facts of the case before me I have come to the unhesitating conclusion that the petitioners have been prejudiced by the delay and will be further prejudiced in their defence if there be a trial of an offence alleged to have been committed by them over 14 months ago, when the responsibility of the delay in passing the order under section 476 of at least two months and a half cannot be fastened on their shoulders. The result, therefore, is that I set aside the order of the Subordinate Judge directing the prosecution of the petitioners under section 476, Criminal Procedure Code, for an offence under section 186, Indian Penal Code.

This order will also govern Civil Criminal Revision No. 3 of 1920.

Orders set aside.

(9) 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407.

(10) 31 M. 140; 17 M. L. J. 581; 3 M. L. T. 79; 7 Cr. L. J. 54.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 75 OF 1920.

March 20, 1920.

Present:—Mr. Justice Walsh.

MAHBOOB—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 411—Receiving stolen property—Stolen property, value of—Evidence, nature of—Criminal trial—Procedure—Evidence for defence, method of recording—Criminal Procedure Code (Act V of 1898), s. 439—Revision—High Court, power of interference of.

In a case in which a person is charged with receiving or being in possession of property alleged to have been stolen, an important factor is the value of the property and as to this the Court should insist on having direct evidence, as the accused is entitled to have some sworn testimony of value which he can cross-examine. [p. 857, col. 1.]

A Magistrate should record the evidence for the defence with the same amount of care and precision as that for the prosecution, as otherwise his opinion that the evidence is false is not easy to test. [p. 857, col. 2.]

In dealing with an application under section 439, Criminal Procedure Code, the High Court has to see not merely whether it disagrees with the findings but whether there is something in the way in which the trial Court has looked at the law or in the method by which it has dealt with the evidence which makes it so doubtful whether the conviction is right that it would amount to a miscarriage of justice to allow it to stand. [p. 857, col. 1.]

Application for revision of an order passed by the Sessions Judge, Moradabad, upholding a conviction by a First Class Magistrate, Moradabad.

Mr. *Sitol Prasad Ghosh*, for Mr. *Satya Chandra Mukerjee*, for the Applicant.

Mr. *Malcomson* (Assistant Government Advocate), for the Opposite Party.

JUDGMENT.—This is a revision application from an order passed in appeal by the Sessions Judge of Moradabad, upholding a conviction by a First Class Magistrate. The charge was originally against two men, named Munir and Mahbub, for dishonestly receiving or being in possession of stolen property which they must have known to be stolen. The theft is clearly established and although it is not quite true to say that Munir was convicted of the theft, he was convicted of being in wrongful possession of the cattle so shortly after their loss as to raise a strong presumption that in fact he was a thief; though this has not been proved, yet for the purposes of this case it must be taken that he was

either the thief or wrongfully came into possession of the animals well knowing that they had just been stolen. He has not appealed, and that fact and his conviction must necessarily form part of the case against his associate Mahbub. That is a risk every man runs who deals with other persons in the purchase of cattle whom he does not know to be absolutely honest.

This is not an appeal. It is an application in revision and, therefore, I have to see not merely whether I disagree with the findings, but whether there is something in the way in which the trial Court has looked at the law or in the method by which it has dealt with the evidence which makes it so doubtful whether the conviction is right that it would amount to a miscarriage of justice to allow it to stand.

Personally I always endeavour to look at the facts in applications in revision in this light rather than in the light of an ordinary appeal. There are two matters about this case to which Mr. Sital Prasad Ghosh on behalf of the applicant has rightly referred and which, I think, would have been enough to upset the conviction altogether if it were not for the other circumstances to which I am going to refer. These two matters are: (1) Both Courts have rightly attached great importance to the fact that these buffaloes were sold by the present applicant for Rs. 79 when their value was really Rs. 190. That is in such cases as this an almost certain test. A man in the ordinary way of business does not sell a thing at less than half price where there is an ordinary market in which he can get anything like the real value. The fallacy in this case is that there was no evidence in law to support a finding that the value of these baffaloes was Rs. 190 and I would warn the lower Courts, if they should happen to read this judgment, to insist in future in these rather difficult cases on having direct evidence of value. There is only a report. Really a report is a dignified name for that which is in truth a complaint by the owners who have lost their animals, and what a man says his own property is worth when he has lost it, and not when he is asking somebody to give him a price, does not always fit in with the real value. Nor does the estimated value always fit in with what a thing actually fetches in the market, so that to establish a value in this case of Rs. 120 in the case of one of the buffaloes, Rs. 50 in the other and Rs. 20 in the third, the accused were entitled in every case to have some sworn testimony of value which they can cross-examine. You cannot examine a report or a complaint, and I have known cases in which owners of property took a very different view of the value when they had been asked some fairly obvious and relevant questions by a hostile critic. So that this view of the case against the applicant, to my mind, breaks down. Neither of the owners was even called. The Courts below were content with the evidence of the man who was grazing them and with the so-called reports. The reports, I think, were admissible, but anyhow they prove nothing except what the men who had lost their cattle thought they were worth.

The other point is that the affirmative evidence for the defence does not appear upon the record. I think this is a sound objection. In a case, however tiring it may be, the Magistrate ought really to take down the evidence for the defence with the same care as he does that for the prosecution. He might see reason afterwards to think it was true, but anyhow his opinion that it is false is not easy to test at all unless the evidence is recorded.

I now come to the circumstances which, in my opinion, justify this conviction and prohibit me from interfering. According to the findings of the first Court Munir and Mahbub were known to one another for two years; secondly, it was a remarkable coincidence that they should run up against one another so shortly after the loss of the cattle; thirdly, the Court has held that Munir never sold to Mahbub and that Munir and Mahbub were really working together. Mahbub himself admits in his statement that after the purchase from Munir he actually took this cattle dealer with him at Re. 0 4 0 a day, not only that but he took him to the sale and relied upon him as surety in one of the re-sales which took place shortly afterwards. Lastly, and the most important of all, he must have heard in the course

the address which had been given by Munir in his presence and which he must have known perfectly well to be false. Whether he heard Munir give it does not matter, the receipt was read out to him. All this is conduct pointing strongly to his guilt justifying the view which the Courts below have taken of the facts and leading me to think, although this is really immaterial, that these two men are really the thieves themselves. I see no reason to interfere either with the conviction or the sentence and dismiss this application.

Application dismissed.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 663 OF 1919.
February 18, 1920.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.
Mir MOUZE ALI—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 297, 439—Trial by Jury—Previous proceedings against accused—Failure to warn Jury to disregard result of such proceedings—Misdirection—Joint trial of two accused—Appeal by one—High Court, power of, to deal with non-appealing accused.

Where in his summing up to a Jury the Judge considers it necessary to refer to previous proceedings against the accused, he ought to deal with them in such a manner as to avoid, if possible, the minds of the Jury being affected by the result of the proceedings. It is his duty to warn the Jury to pay no attention to the result of those proceedings, and his omission to so warn the Jury amounts to a misdirection sufficient to vitiate the whole of the proceedings. [p. 859, col. 2.]

The High Court in the exercise of the powers vested in it under section 439 of the Code of Criminal Procedure can, in a proper case, while setting aside the conviction and sentence of an accused appellant, also release his co-accused who has not appealed. [p. 860, col. 2.]

Appeal against the order of the Sessions Judge, Barisal, dated the 1st November 1919.

Babus *Manmatha Nath Mukherjee*, *Jyotish Chandra Guha* and *Radhika Ranjan Guha*, for the Appellant.

Mr. *Orr* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.

SANDERSON, C. J.—In this case the appellant, who was a Head Constable named Mir Mouze Ali, has been convicted at a trial by the Jury of offences under section 384 (extortion), 448 (house trespass), 342 (wrongful confinement) and 323 read with section 109 for abetment of the offence of voluntarily causing hurt. He was tried along with another man who was a constable called Belat Ali, who was found guilty of an offence under section 354 which offences is that of assaulting or using criminal force to a woman with intent to outrage her modesty. He was also convicted of offences under sections 323 and 342 of the Indian Penal Code. The second accused has not appealed.

We have to deal at the present moment with the appeal of Mir Mouze Ali alone.

There were other charges against these two men in respect of which they were acquitted. The first accused was charged with abetment of rape under section 376 read with section 109 and the second accused was charged with rape under section 376. Of these charges the accused were acquitted. There was a further charge against the first accused under section 354 together with section 109, that is, the abetment of assaulting a woman with intent to outrage her modesty. He was acquitted of that charge. There was a charge against the second accused under section 384, together with section 109, that is, the abetment of extortion, and the second accused was acquitted of that charge.

The learned Vakil has argued that the direction of the learned Judge was wrong inasmuch as he referred to certain previous proceedings against these two accused and that such reference was inadmissible. The reference which the learned Judge made is as follows: After referring to the visit of Khorshed (the husband of the complainant) and his wife Baroo Bibi (the complainant), who appeared before Purna Chandra Mukerji, Mukhtear, and told him their story, whereupon the Mukhtear drafted a petition, Exhibit 2, and filed it in Court and the Sub-Divisional Magistrate examined the complainant Baroo Bibi on solemn affirmation on the same day, the learned Judge said: "The

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Sub-Divisional Magistrate, in accordance with departmental rules, made a local investigation into the case and on the 9th of November made a report to the District Magistrate recommending the prosecution of the head constable and the constable under sections 342, 384, 448, 354 and 323, Indian Penal Code. The District Magistrate ordered their prosecution as recommended and sent the case for trial to the Additional District Magistrate. The Additional District Magistrate tried the case, and on the 23rd of December 1918 he convicted both the accused and sentenced them to 6 months' imprisonment each under the above sections. Though the woman repeated to him her story of rape by the constable and two others, he held that the story of rape was an exaggeration and a fiction. In appeal the Additional Sessions Judge affirmed the conviction and sentence on the 24th February 1919. Thereafter the two accused men moved the Hon'ble High Court and the High Court on 10th June* reversed the conviction and ordered that the case be committed to the Court of Session for trial. Accordingly on 18th July the two accused men were committed to this Court for trial." My learned brother Mr. Justice Walmsley was a member of the Court which reversed the conviction and ordered a new trial, and as I understand the view which he and the other learned Judge took was that inasmuch as the story on behalf of the prosecution involved a charge of rape against one of the accused and abetment of rape against the other accused, the case ought to have been tried by a Court of Session, and ought not to have been tried by the Additional District Magistrate. Consequently they set aside the conviction and directed a new trial.

We have been informed by the learned Vakil for the appellant that although there may have been during the course of the trial a reference made to the evidence which the individual witnesses gave on the previous occasion when the two accused were tried, there was no reference either by the prosecution or the defence to the result of those proceedings and, after reading the summing up of the learned Judge, we think we must take it that that was so. The learned Judge, as I have shown by reading a part of his judgment, not only referred to the previous proceedings but referred to the result of those proceedings, and also referred to the fact that the Additional District Magistrate convicted them of certain offences and that his decision was upheld by the Additional Sessions Judge. The learned Vakil has pointed out that there was no warning given to the Jury that they must disregard altogether the result of the previous proceedings and that the responsibility was upon the Jury, and that they must act upon the evidence which was given in the case and upon that evidence alone. He urged that the fact that the learned Judge has referred to those previous proceedings and to the result of the previous proceedings and the omission to warn the Jury to pay no attention to the result of those previous proceedings may have affected the minds of the Jury materially in arriving at the conclusion at which they did. In my judgment that does amount to misdirection. In my judgment, if it was necessary for the learned Judge to refer to the previous proceedings, he certainly ought to have warned the Jury that they must not allow the result of those previous proceedings to affect their minds. It would have been much better if all reference to the previous proceedings could have been avoided. I am not in a position to say whether it was, but assuming for the sake of argument that it was necessary to refer to the previous proceedings, then I think that the learned Judge ought to have dealt with them in such a manner as to avoid, if possible, the minds of the Jury being affected by the result of the previous proceedings.

I need not consider the further points raised by the learned Vakil, because in my judgment the matter to which I have already referred amounted to misdirection.

Then we have to consider what course should be taken. The appellant has already stood his trial on two occasions and in my judgment it would not be right, having regard to the circumstances of this case, to direct that he should stand his trial a third time.

It remains for me to consider whether

*See *Mir Moze Ali* v. *Emperor*, 54 Ind. Cas. 58; 30 C. L. J. 7 132; 23 C. W. N. 1031; 21 Cr. L. J. 10.—*Ed.*

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I should accede to the argument of the learned Counsel for the Crown that the misdirection of the learned Judge was not sufficient to vitiate the whole of the proceedings and that we ought to uphold the conviction of the appellant having regard to the evidence which was given in the case.

The facts of this case are extraordinary. The charges are that the head constable and the constable went to the house of the complainant's husband with the main object of ascertaining the whereabouts of a man who was supposed to be connected with a dacoity and who was also supposed to be a paramour of the complainant; that the offences of which these two men were charged were committed on that occasion in daylight with a considerable number of people in the immediate neighbourhood. The woman's story is that the second accused went into her house, her husband having been previously bound in the courtyard of the house by the first accused, and that the second accused ravished her in her house; that the first accused was close by and the ravishing practically took place under his nose, so to speak; that she called out that she was being ravished and losing her honour and begged her husband to pay money to the head constable in order that she might be released from the oppression which was being practised upon her. Thereupon, her husband begged the first accused to accept money and release his wife and after some haggling as to what the amount should be, the husband of the complainant paid to the first accused the sum of Rs. 80.

As I have already pointed out, the Jury have rejected the charge of rape against the second accused. They have rejected the charge of abetment of rape against the first accused. They have further found the second accused to be guilty of an offence under section 354, which is assaulting a woman with intent to outrage her modesty, but they have rejected the charge of abetment against the first accused: and the learned Counsel for the Crown was constrained to admit that he did not understand how they could find the second accused guilty of an offence under section 354 and at the same time acquit the first accused of the abetment of that offence, which, if it took place at all, must have taken place under the nose, so to speak, of the first accused. The facts of this case are so bound up together and the evidence with regard to them is so dependent one part upon the other, that I find it very difficult to say—seeing that the evidence with regard to the rape and the abetment of rape is taken by the Jury to be unreliable and seeing that the evidence with regard to the abetment of an offence under section 354 against the first accused is taken by the Jury to be unreliable with regard to the rest of the evidence, that the other charges were made out. In my judgment in this case when part of the evidence as regards the main charges against the accused men must be rejected, it would not be safe to convict the accused upon the rest of the evidence.

For these reasons in my judgment the conviction and sentence of the appellant must be set aside and he must be released. If he is on bail, his bail bond must be discharged.

With regard to the second accused Belat Ali Khan, who has not appealed, the judgment which we have just delivered with regard to the misdirection will affect his case as much as the case of the first accused. We asked the learned Deputy Legal Remembrancer if he had anything to say why we should not set aside the conviction in his case also. He having nothing to say, we are of opinion that we ought to exercise the powers vested in us under section 439 of the Criminal Procedure Code and relying upon the authority of the case of *Broja Rakhal Mozumdar* v. *Empress* (1), we exercise the powers vested in us under that section and set aside the conviction of and the sentence passed on the second accused, Belat Ali Khan, and direct that he be released.

WALMSLEY, J.—I agree.

Appeal accepted.

(1) 5 C. W. N. 330.

EMPEROR *v.* JAGAT SINGH.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 668 OF 1920.

June 12, 1920.

Present:—Mr. Justice Scott-Smith.

EMPEROR—PETITIONER

versus

JAGAT SINGH AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 439 (3)—Enhancement of sentence—High Court, power of, extent of.

In revision the High Court can enhance a sentence and inflict any punishment for the offence which in the opinion of the Court has been committed which might have been inflicted for such offence by a Magistrate of the first class, even although the trial Magistrate was invested only with second or third class powers. [p. 862, col. 1.]

Emperor v. *Kamal*, 30 Ind. Cas. 100; 16 Cr. L. J. 712; 9 S. L R. 82, followed.

The accused were convicted by a Magistrate of the second class of an offence under section 325, Indian Penal Code, and sentenced to 3 months' rigorous imprisonment and a fine of Rs. 25 each. Their appeal was rejected by the Sub-Divisional Magistrate, who sent the record to the District Magistrate with a recommendation that the High Court should be moved to enhance the sentences which in his opinion were inadequate. The District Magistrate reported the case to the High Court:

Held, that the Court had power to enhance the sentences to the limit of the sentence which could have been passed by a Magistrate of the first class, inspite of the fact that the trying Magistrate could only have awarded six months. [p. 862, col. 1.]

Case reported by the District Magistrate, Lahore, with his No. 1467 of the 29th March 1920.

FACTS.—Fauja, a *mehra*, had ceased working for the accused some time before. On 5th November 1919 they saw him taking water for his cattle from the pond. They were angry and they said that they would not let him take water as he would not supply water for them, and they at once attacked him. He was helped by Sohni, a relative, who had also been getting water there, and thereupon the accused turned on him and beat him severely; he then ran away and on the way came up with Phuman, a relative who was washing clothes. Phuman tried to help him and then the accused turned on him and ferociously attacked him with *lathis*, so that the parietal bone of his head was broken and two wounds were inflicted on the back and the right side of the head. The accused were challaned and convicted. They appealed, which was rejected by Mr. P. Marsden, Sub-Divisional Magistrate, Kasur. He found that while the lower Court had come to a right finding in the case, the sentences passed were quite inadequate. The case should have been heard by a higher Court, and the offence called for a punishment of at least three years' rigorous imprisonment. I agree with Mr. Marsden that the attack by the accused was a most wanton and savage one and that the punishment awarded is not sufficient either from a retributive or a deterrent point of view. Therefore, the case is submitted for enhancement of sentence.

Dewan *Ram Lal*, Government Advocate, for the Petitioner.

Dewan *Mehar Chand*, for the Respondents.

ORDER.—Bur Singh, Jagat Singh and Arur Singh were convicted by a Tahsildar exercising powers of a Magistrate, 2nd Class, of voluntarily causing grievous hurt to Phuman Singh and Sohni, and were sentenced to three months' rigorous imprisonment and a fine of Rs. 25 each. Their appeal was dismissed by the Sub-Divisional Magistrate of Kasur who sent the record on to the District Magistrate, with a recommendation that the High Court should be moved to enhance the sentences which he considered to be inadequate. The District Magistrate has now reported the case to this Court in order that the sentences may be enhanced.

The sentences of imprisonment awarded by the Tahsildar expired more than two months ago and the accused are, therefore, now at liberty. It has been the practice of the Chief Court in the past, when an accused person has completed his sentence of imprisonment, not to enhance the sentence and send him back to jail except in exceptional circumstances. I have considered the facts of this case and I am satisfied that the accused have been rightly convicted. They made a very ferocious and unprovoked attack upon Phuman Singh. The latter received no less than three injuries on the head, one was on the forehead and caused the fracture of the skull. There was another serious injury on the back of his head and the ulna bone of his left arm was broken. In addition he received other injuries on other

parts of the body. The fracture of the skull was a very serious one and his life was in danger from it. I agree with the Sub-Divisional and the District Magistrates that the sentences imposed in this case were grossly inadequate.

It is contended by Diwan Mehar Chand on behalf of the accused that this Court cannot enhance the sentences and inflict a greater punishment for the offence than might have been inflicted by the Tahsildar who tried the case. He has, however, no authority in support of this proposition and section 439 (3) is against him. It runs as follows:—

"Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the 1st Class."

The power of enhancement of sentence conferred upon the High Court by section 439, Criminal Procedure Code, is limited only by clause (3) of that section which clause does not regard the difference in the powers of the trying Magistrate under section 32 of the same Code, but lays down the general rule that in cases of sentences passed by Magistrates not empowered under section 34, the limit of enhancement shall be the sentence that may be inflicted by a Presidency or a 1st Class Magistrate. This was the view taken by two Judges of the Sind Judicial Commissioner's Court in the case reported as *Emperor* v. *Kamal* (1). In accordance with this interpretation of law this Court can inflict any punishment for the offence which in the opinion of the Court has been committed which might have been inflicted for such offence by a Magistrate of the First Class. In other words, it can inflict a sentence of two years' rigorous imprisonment in spite of the fact that the Magistrate who tried the accused could only have inflicted a sentence of 6 months' rigorous imprisonment.

I have perused the evidence for the prosecution and I find that all the witnesses say that Bur Singh struck Phuman Singh the blow upon his forehead. Arur Singh then came up and aimed a blow at his head and felled him to the ground but Phuman Singh warded off the blow with his arm and the consequence was that it did not hit his head, but his arm was broken. Jagat Singh then came up and hit him on the head and all the accused gave him a sound beating. Under the circumstances there is very little to choose between any of the three accused and I can find no reason for making any difference in the sentences imposed upon them.

I consider the case to be a very bad one and I enhance the sentences to one of two years' rigorous imprisonment each and the fine as imposed by the Magistrate.

Sentences enhanced.

(1) 30 Ind. Cas. 1000; 16 Cr. L. J. 712; 9 S. L. R. 82.

CALCUTTA HIGH COURT.

CRIMINAL REVISION NO. 59 OF 1920.

February 12, 1920.

Present:—Sir Lancelot Sanderson, KT, Chief Justice, and Mr. Justice Wälmsley.

NANDO LAL GUHA—PETITIONER

versus

THE CORPORATION OF CALCUTTA—OPPOSITE PARTY.

Calcutta Municipal Act (III of 1899), ss. 299, 575, proceedings under—Stay of proceedings—Proceedings, revival of, after long delay, effect of.

Criminal proceedings under section 575 of the Calcutta Municipal Act were initiated against the petitioner on the 15th August 1916, but at his request the proceedings were stayed pending negotiations between himself and the Municipal Corporation. Nothing came of these negotiations, and on the 28th February 1919 application was made to revive the proceedings and on the 20th November 1919, the petitioner was sentenced to pay a daily fine for 30 days from the 16th May 1916:

Held, that, in view of the special circumstances of the case and the very great delay that had occurred, it must be taken that the proceedings had been abandoned, and that the conviction for an offence from the 16th May 1916, made on 20th November 1919, was invalid. [p. 864, col. 1.]

Rule against the order of the 2nd Municipal Magistrate, Calcutta, dated the 20th November 1919.

NANDO LAL GUHA *v.* CORPORATION OF CALCUTTA.

Babu *Manmotha Nath Mookherjee*, for the Petitioner.

JUDGMENT.

SANDERSON, C. J.—This is a Rule calling upon the Chairman of the Corporation and the Municipal Magistrate to show cause why the order complained of should not be set aside or why such other order should not be made in the matter as may seem fit to this Court. The order complained of is dated the 20th of November 1919, and by that order the Municipal Magistrate sentenced the petitioner to a daily fine of eight annas for 30 days from the 16th of May 1916, that is, Rs. 15 in all, under section 575 read with section 299 of the Calcutta Municipal Act, III of 1899.

The facts of this case are to my mind exceptional, and the decision at which we have arrived depends upon the exceptional facts of this case and should not be taken as covering any other case in which the facts are different.

It appears that the petitioner was convicted on the 28th of January 1916 for not having complied with the requisition which was served upon him in May 1915, requiring him to do certain things in connection with his premises and relating to the drainage thereir: and he was fined Rs. 2. Apparently he did not even then comply with the requisition and on the 15th of August 1916 a fresh complaint was made against him. The charge was for failing to comply with the requisition under section 299 of the Act requiring him within 60 days to make a house drain emptying into the sewer and to do other matters "(after being convicted and fined Rs. 2 on the 28th January 1916)." These proceedings were taken under section 575 of the Act. On the 29th of August the accused's son appeared and said he was making arrangements for departmental execution of work. The order was: "Two weeks' time allowed. Fix 12th September 1916." Then on the 12th of September proceedings were stayed for one month at the instance of the prosecution. Apparently, negotiations were then entered upon between the petitioner and the Municipal authorities, the petitioner alleging that he was too poor to carry out the requisition. It is not necessary for me to go into the details of the negotiations, but they seem to have lasted for a very long time. Eventually, they fell through and nothing came of them. Then on the 25th February 1919, more than two years after the proceedings had been stayed, an application was made to the Municipal Magistrate. I will read the application, because the wording of it to my mind is somewhat unusual:—

"The prosecutor prays that Case No. 2580 in which proceedings were stayed in this Court on the 12th of September 1916 may be revived as the accused has not complied with the requisition of notice served. Proceeding was stayed in the case pending the disposal of the party's application for departmental execution of work, as the application for departmental action has been refused, the present application for revival of proceedings is being made." Upon that application the Magistrate made this order: "Case revived. Issue summons for 16th October 1919. Inform Sub Inspector of the date." On the 18th of September the application was granted and the case was revived. Then on the 20th of November, as I have already stated, the petitioner was convicted and the period for which he was fined was for 30 days commencing from the 16th May 1916. The Municipal Magistrate stated in his judgment "the period for which the accused has been prosecuted is mentioned as the 29th of January to the 4th of August, but as the complaint was filed on the 15th of August I cannot take into consideration the days previous to the 16th of May." Presumably he was acting under the provisions of section 631 and he was of opinion that he could not deal with any period more than three months prior to the 15th of August 1916.

The Rule that has been obtained has been supported upon the grounds, first, that inasmuch as the proceedings were stayed on the 12th of September 1916 for one month at the instance of the prosecution and as at the expiration of that one month nothing was done by the complainant, and as he did not appear at the expiration of that month, it was the duty of the Magistrate under section 247 of the Criminal Procedure Code to acquit the accused unless the Magistrate thought proper to adjourn the hearing of the case to some other day. The Magistrate did

not adjourn the case and the complainant did not appear at the end of the month. It was further argued that having regard to the great delay which had occurred from the date when the proceedings were stayed until the application for revival (namely, from the 12th September 1916 to the 25th of February 1919), it must be assumed that those proceedings were abandoned and that the application for revival on the 25th of February, if it is to be regarded at all as a competent proceeding, must be regarded as a fresh complaint. I prefer to rest my judgment upon the second ground, namely, that having regard to the special circumstances of this case the very great delay that has occurred, namely, that from the 12th of September 1916 till the 25th February 1919 nothing was done with regard to the proceedings, it must be taken that those proceedings were abandoned, and, consequently I am of opinion that the order of the Municipal Magistrate convicting the petitioner of offences committed from the 12th of May and 30 days afterwards, which conviction was made on the 20th November 1919, was invalid.

This Rule must, therefore, be made absolute.

The fine, if paid, must be refunded.

WALMSLEY, J.—I agree in the order proposed. I should like to add that such reluctance as I may feel in interfering in this case springs from the fact that it was the petitioner who in the first instance caused the proceedings under section 575 to be held in abeyance.

Rule made absolute.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 95 OF 1920.

June 8, 1920.

Present:—Mr. Mittra, A. J. C.

MOHAN—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 107, proceedings under—Hearsay evidence.

Proceedings under section 107, Criminal Procedure Code, cannot be based upon hearsay evidence.

Revision against the order of the Sub-Divisional Magistrate, Saugor, in Miscellaneous Case No. 2 of 1920, decided on 8th April 1920.

Mr. *P. Lobo*, for the Crown.

JUDGMENT.—The Saugor Police have received information from an informer that Daolat Darji, aged 25, and Mohan Ganoo, aged 30, two cultivators of Parsone, are about to become dacoits. The Sub-Divisional Magistrate upon this ordered these two persons to furnish security under section 107, Criminal Procedure Code. Not being able to furnish the security, they are undergoing imprisonment and have applied to this Court for revision.

The Sub-Inspector on special duty states that he was informed by a reliable informer that five persons, including these two persons, were to run away from their village and join the gang of dacoits headed by Kunjalsingh and Baldwansingh. This information was received in August last and the Sub-Inspector submitted a confidential report to the District Superintendent of Police at the time. Three of the persons named have since the 19th January last become untraceable and it is believed that they have joined the gang of dacoits, though the evidence on the point is purely hearsay.

The learned Magistrate is quite right in calling this a novel case, but I cannot agree with him when he says that the Sub-Inspector has first hand knowledge of the applicants' intention. He does not depose to a single fact within his knowledge. The whole of his evidence is hearsay based upon statements made to him by informers whom he does not name and whom he does not produce. Proceedings under section 107 cannot be based upon hearsay evidence. The order is so palpably and manifestly wrong that it must be set aside, and the applicants ordered to be immediately released.

Order set aside.

KARM ILAHI v. HAKIM SHAH.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 92 OF 1920.

April 27, 1920.

Present—Mr. Justice Scott Smith.

KARM ILAHI AND OTHERS—PLAINTIFFS—PETITIONERS

versus

HAKIM SHAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 107 (2), O. VII, r. 10, O. XLIII r. (1) (a)—Order returning memorandum of appeal for presentation to proper Court—Appeal, whether lies—"Plaint" in O. XLIII, r. (1) (a), whether includes memorandum of appeal—Revision, maintainability of.

No appeal lies against an order returning a memorandum of appeal for presentation to the proper Court. A revision is, however, competent against such an order. [p. 866, col. 2.]

The word "plaint" in Order XLIII, rule (1) (*a*), of the Civil Procedure Code does not include a memorandum of appeal. [p. 866, col. 2.]

Petition, under section 44 of Act IX of 1919, for revision of the order of the Additional District Judge, Gujrat, at Gujranwala, dated the 17th January 1920.

FACTS.—Plaintiffs brought a suit under section 92 of the Civil Procedure Code in respect of certain *waqf* property, alleging that defendants, who were *mutwallis* of the *waqf*, had been guilty of acts of waste and were, therefore, unfit to hold the office of *mutwalli* of the *waqf*. Plaintiffs also claimed to be appointed *mutwallis* of the *waqf* property in place of the defendants and to be put in possession of the same. The defendants objected to the valuation of the suit and the trial Court appointed a Commissioner to value the properties in dispute. The Commissioner assessed the total value of the properties at over Rs. 8,000. The plaintiffs were called upon to make up *ad valorem* Court fees on the value assessed by the Commissioner, but this order was subsequently set aside by the Court and eventualy the plaintiffs' suit was dismissed on the merits. The plaintiffs appealed to the District Judge, who held that inasmuch as the value of the property in dispute had been assessed at over Rs. 8,000, he had no jurisdiction to hear the appeal. He, therefore, made an order that the memorandum of appeal should be returned to the plaintiffs for presentation to the proper Court. Against this order the plaintiffs filed a petition for revision in the High Court on the ground that inasmuch as the bulk of the property in respect of which the suit had been brought consisted of land which was permanently assessed to land revenue, the value of the suit for purposes of jurisdiction was not the market value of the land but thirty times the land revenue, and that the value of the suit, calculated in this manner, fell far below Rs. 5,000, so that the District Judge had in refusing to hear the appeal failed to exercise a jurisdiction vested in him by law.

Mr. *Mukand Lal Puri* (with him Mr. *Hargopal*), for the Respondents, raised a preliminary objection that a petition for revision was not competent in this case. Order VII, rule 10, of the Civil Procedure Code, read with section 107 (2) of the Code, empowers an Appellate Court to return a memorandum of appeal for presentation to the proper Court. Order XLIII, rule 1 (*a*), provides that an appeal shall lie against an order under Order VII, rule 10. By virtue of section 107 (2) an appeal under this rule would also lie from an order returning a memorandum of appeal for presentation to the proper Court. Therefore, an appeal being competent, a petition for revision does not lie.

[SCOTT-SMITH, J.—Order XLIII, rule 1 (*a*), applies only to orders returning plaints. It has no application where a memorandum of appeal is returned. Plaint does not include a memorandum of appeal.]

Section 107 (2) gives an Appellate Court the same powers as an original Court has.

[SCOTT-SMITH, J.—This only means that an Appellate Court can make such orders as an original Court can. It does not mean that where an appeal lies from an order of an original Court, an appeal would also lie from a similar order of an Appellate Court.]

It has been held that the word "plaint" in Order XLIII, rule 1 (*a*), includes a memorandum of appeal. *Kunhikutti* v. *Achotti* (1).

[SCOTT-SMITH, J.—I can hear this petition as an appeal.]

Your Lordship can treat an appeal as a revision, but it is not the practice to convert a petition for revision into an appeal.

[SCOTT SMITH, J.—If the petition has been filed within limitation and bears the requisite

(1) 14 M. 462; 5 Ind. Dec. (N. S.) 323.

stamp, the mere fact that it has been presented in the form of a revision and not in the form of an appeal should make no difference. It is a case of a *bona fide* mistake.]

Mr *Zafrulla Khan*, for the Petitioners.—The view expressed by your Lordship that in Order XLIII, rule 1 (*a*), of the Civil Procedure Code, the word "plaint" does not include a "memorandum of appeal" is the correct view, and, therefore, the proper remedy in this case was by way of revision and not by way of appeal. *Nur-ud-din* v. *Pran Kishen Chakravarty* (2). In that case a Division Bench of the Allahabad High Court took the same view. It was held that a memorandum of appeal is not a plaint, and that, therefore, no appeal lay from an order returning a memorandum of appeal for presentation to the proper Court. Sections 104 and 105 of the Civil Procedure Code expressly provide that no appeal shall lie from any original or appellate order except where the Code itself provides for an appeal. The Code nowhere lays down that an appeal shall lie from an order returning a memorandum of appeal for presentation to the proper Court. I submit, therefore, that the revision is competent.

[SCOTT SMITH, J.—Mr. Puri, do you still maintain that the revision is not competent ?]

Mr. *Puri*.—In view of *Nur-ud-din* v. *Pran Kishen Chakravarty* (2) I admit that the petition is competent.

[SCOTT-SMITH, J.—On the merits do you support the District Judge's order ?]

I submit that the valuation fixed by the District Judge cannot be questioned under section 12 of the Court Fees Act.

[SCOTT-SMITH, J.—That section does not apply. The petitioners do not object to the assessment of the market value. They contend that a wrong rule of law has been applied in valuing the suit.]

So far as the valuation is concerned, I admit that in respect of the land permanently assessed to land revenue the rule to be applied is that which is put forward in the grounds for revision. But there is a plot of *banjar* land about 123 *kanals* in area which has not been valued at all and which is not assessed to land revenue. The market value of that plot must be ascertained and added to the value given in the grounds for revision.

JUDGMENT.—This is an application for revision of the order of the Additional District Judge, Gujranwala, returning a memorandum of appeal to the petitioners for presentation in the High Court. Mr. Mukand Lal Puri for the respondents raises a preliminary objection that an application for revision is not competent because an appeal lies under Order XLIII, rule 1(*a*), read with section 107 of the Civil Procedure Code. Section 107 (2), Civil Procedure Code, lays down that an Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. Order XLIII, rule 1(*a*), allows an appeal from an order under rule 10 of Order VII, returning a plaint for presentation to the proper Court. Counsel's contention is that the word 'plaint' here includes a memorandum of appeal. Now under section 107 an Appellate Court no doubt has powers to return a memorandum of appeal for presentation to the proper Court just as a Court of original jurisdiction has the power to return a plaint for a similar purpose, but while an order returning a plaint is made appealable under Order XLIII, rule 1(*a*), nothing is said about an appeal lying from an order returning a memorandum of appeal. It was held by a Division Bench of the Allahabad High Court in a case reported as *Nur ud-din* v. *Pran Kishen Chakravarty* (2) that a memorandum of appeal was not a plaint and that no appeal lay against an order of an Appellate Court directing a memorandum of appeal to be returned for presentation to the proper Court. Mr. Puri in support of his argument refers to *Kunhikutti* v. *Achotti* (1) in which it was held that an appeal did lie from an order returning a memorandum of appeal. I, however, prefer the Allahabad ruling reported as *Nur-ud-din* v. *Pran Kishen Chakravarty* (2) which is, in my opinion, in accordance with the actual wording used in Order XLIII, rule 1 (*a*), of the Code. I, therefore, hold that no appeal lay from the order of the Additional District Judge and that the petition for revision is competent.

(2) 47 Ind. Cas. 16; 16 A. L. J. 630; 40 A. 659.

JAG SAHU *v.* RADHA KISHUN.

In the first Court a Commissioner was appointed to assess the value of the property in dispute, and the value fixed by him exceeded Rs. 8,000. In order to arrive at this he valued 159 *kanals* 17 *marlas* of land, part of the property in dispute, at Rs. 5,957, which he held to be the market value. This land, however, is assessed to land revenue as appears from the *fard* attached to the plaint, the land revenue being Rs. 23-1-3. The value of this land for purposes of Court fee and jurisdiction is ten times and thirty times respectively of the assessed land revenue and it was incorrect for the lower Appellate Court to adopt the market value as the correct value for these purposes. In addition to this land there is another plot of 123 *kanals* 14 *marlas* out of which $2\frac{1}{2}$ *kanals* is cultivated and the remainder uncultivated. The cultivated portion is assessed to land revenue at Re. 0-6-9 and the uncultivated portion does not appear to have been assessed at all, and if this is so its market value should be ascertained.

I, therefore, allow the revision and setting aside the order of the lower Appellate Court, remand the case thereto in order that it may assess the value of the property in suit (1) for purposes of Court-fee and (2) for purpose of jurisdiction in accordamce with the rules. Having done this, it will be able to see whether the total value is within its jurisdiction or not and will be in a position to pass a proper order. Costs in this Court to be costs in the cause.

Revision alloured;
Case remanded.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 139 OF 1917.

March 23, 1920.

Present:—Mr. Justice Das and Mr. Justice Adami.

JAG SAHU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Rai RADHA KISHUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow, alienation by—Cesses, payment of, whether legal necessity—Interest, high rate of, necessity for, proof of—Burden of proof.

The reversionary heirs of a Hindu widow are not bound by a debt incurred by her for the payment of cesses. [p. 869, col. 1.]

Where a mortgagee from a Hindu widow sues to enforce his mortgage against the reversioners of the widow, and the principal is found to have been advanced for necessity, the question as to the necessity for the rate of interest does not arise and ought not to be gone into, unless the defendants by their written statement specifically raise that question. [p. 869, col. 2; p. 874, col. 1.]

Appeal from a decision of the Subordinate Judge, Mozafferpore.

Messrs. *P. K. Sen*, *C. C. Das*, *Sunder Lal* and *Satya Sunder Bose*, for the Appellants.

Messrs. *Kulwant Sahay* and *Kailaspatti*, for the Respondents.

JUDGMENT.

ADAMI, J.—This appeal arises out of a suit in which the plaintiffs sought to recover Rs. 14,500, the principal and interest, due on a simple mortgage bond. The plaintiffs alleged that the bond was executed on the 21st October 1902 by *Musammat* Bachu Koer, widow of Rai Gudur Sahai, in favour of Tulshi Das and Harakh Das, who, by a deed dated 13th February 1905, assigned it to the plaintiffs. The consideration for the bond was a payment of Rs. 775 bearing interest at the rate of Rs. 2 per cent. per mensem with six-monthly rests, and the document shows that the objects of the loan were:

(*a*) to re-pay Rs. 125 due to Dr. Leakat Hussain on a hand-note;

(*b*) to re-pay Rs. 204 due to Damri Das on a hand-note

(*c*) to re-pay Rs. 275 lent by Damri Das, and

(*d*) to provide the widow with Rs. 171 in cash.

The defendants, the minor sons of the late Rai Mahabir Prashad who succeeded to the estate of Rai Gadur Sahai as nearest reversionary heir, contested the suit denying that the bond was genuine or that consideration passed. They asserted that, even if the bond was executed by *Musammat* Bachu Koer as alleged, she was kept in ignorance of its contents and that there was no legal necessity for the borrowing, while they described the rate of interest stipulated for in the bond as being "contrary to law and enquity and altogether

improper" and contended that the estate of Rai Gudur Sahai could not be bound by it.

The learned Subordinate Judge found that the bond was genuine and was duly executed by *Musammat* Beebu Koer, who understood its contents and received Rs, 171 in cash, the balance being set off against the antecedent debts mentioned in (*a*), (*b*), (*c*) above. He held that at the time the loan was taken there was pressure on the estate and money was wanted. The deed of assignment of the bond to the plaintiffs was also found to be genuine and for consideration. In considering, however, the items making up the sum of Rs. 775, the Subordinate Judge decided that only the items (*a*) and (*b*) could be held to be debts incurred by *Musammat* Beebu Koer for legal necessity. With regard to item (*c*) it was found that the sum of Rs. 275 had been borrowed with the object of recovering property sold for arrears of cesses, and a debt incurred for that object by a Hindu widow could not bind the reversionary heirs, while item (*d*) Rs. 171 was taken in cash partly if not wholly for the purpose of paying cesses and, therefore, could not bind the defendants.

With regard to the interest claimed, the lower Court found that there was no evidence to show that the pressure for re-payment of the debts was so great as to compel *Musammat* Beebu Koer to agree to pay compound interest at the high rate stipulated and that the plaintiffs had failed to prove that she could not get money at a lower rate. The Subordinate Judge awarded simple interest at the rate of 24 per cent. As a result the plaintiffs obtained a decree only for re-payment of the items (*a*) and (*b*), namely, Rs. 329 with simple interest as above stated.

The plaintiffs have appealed to this Court on the ground that the lower Court erred in finding that the sums of Rs. 275 and Rs. 171 [items (*a*) and (*d*)] were not borrowed for legal necessity, and in changing the rate of compound interest under the bond into simple interest. There is a cross-objection by the respondents that the findings of the Subordinate Judge as to the genuineness of the bond and deed of assignment were wrong, and that, even if the bond was duly executed, there was no legal necessity for the debt due to Dr. Leakat Hussain or for the hand-note executed in favour of Dumri Das, and that there had wrongly been thrown on the defendants the onus of proving absence of legal necessity.

We have carefully considered the evidence as to the execution of the bond and of the deed of assignment and the passing of consideration in both cases; it is quite one-sided and fully proves not only that the two documents were duly executed as alleged by the plaintiffs, but also that consideration passed, and that *Musammat* Beebu Koer was cognisant of the terms and conditions of the bond.

The existence or absence of legal necessity for each one of the items included in the bond has been questioned by either one or the other of the parties to this appeal and cross-objection.

It is quite clear from the oral and documentary evidence that the debt of Rs. 125 to Dr. Leakat Hussain was incurred for his fees and medicine during the illness of *Musammat* Beebu Koer's daughter, *Musammat* Bhagwati Koer, and there is no doubt that there was legal necessity for the debt.

Similarly in the case of the debt due to Dumri Das of Rs. 204, the evidence goes to show that the money was borrowed for lodging and other necessary family expenses. At the time these loans were taken, *Musammat* Beebu Koer was involved in litigation with her daughter-in-law regarding Probate of the Will of Rai Gudur Sahai and by reason of this dispute, though the property left by her husband brought in an income of over a lakh yearly, rents could not be collected, while it seems that Rai Gudur Sahai left debts amounting to five lakhs. We are satisfied that due inquiry was made by Dumri Das as to the necessity for the loan and that *Musammat* Beebu Koer was at that time in need of money to supply the necessities of life.

The respondents' cross-objection that these two items of debt were not incurred for legal necessity cannot be upheld.

With regard to the two other items, which have been disallowed on the same ground, namely, that the money was borrowed to satisfy a personal

obligation, to pay cesses or to get the sale of a portion of the estate sold for arrears of cesses set aside, the learned Counsel for the appellants, while agreeing that it is settled law that the payment of cesses by a Hindu widow is a personal obligation which cannot bind the reversioners, contends that there may be cases where such payment would become a legal necessity. He suggests a case where the whole estate is about to be sold for arrears of cesses so that after the sale the widow will have no source of income from which to meet the daily necessities of life or to pay off debts the payment of which is a legal necessity, and urges that in such a case the payment of the cess would be a legal necessity. That is an extreme case and does not fit in with the circumstances of the present one, and we see no reason to depart from the well-settled principle that the reversionary heirs of a Hindu widow are not bound by a debt incurred by her for the payment of cesses.

It is next contended by Mr. Sen for the appellants that, with regard to the loan of Rs. 275, only Rs. 200 was to be spent on payment of cesses and the rest was for family purposes. The evidence, however, as to the portion of the total sum which was to be taken for cesses is uncertain, while Damri Das from whom the money was taken says that the whole sum was for payment of cesses.

We thus uphold the findings of the lower Court with regard to all four of the items.

We finally come to the question whether the lower Court was right in reducing the interest from compound to simple interest. The learned Subordinate Judge held that it lay on the plaintiffs to prove that the pressure on the estate was so heavy, and the difficulty of getting money at a less rate of interest was so great, that the compound interest agreed on in the bond was reasonable. He relied on *Harmanoje Narain Singh* v. *Ramprosad Singh* (1).

In the case of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2) their Lordships of the Privy Council decided that it is incumbent on those who support a mortgage made by a manager of a joint Hindu family to show not only that there was a necessity to borrow but that it was not unreasonable to borrow at a high rate of interest, and that decision has been followed by the Allahabad High Court in *Makrand Singh* v. *Kallu Singh* (3). The same principle would apply even more in the case of a mortgage by a Hindu widow.

In the case of *Prem Sukh Das* v. *Ram Bhujawan Mahto* (4) my learned brother, sitting with Coutts, J., considered the case of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2), and pointed out that there the want of necessity for the high rate of interest was put forward in the written statement of the defendants and held that the ruling of the Judicial Committee applied where want of necessity was pleaded.

We have then to look at the written statement of the defendants. There they aver that "the rate of simple and compound interest is altogether contrary to law and equity and is altogether improper. It is never fit to be enforced in any way nor are the plaintiffs entitled to get the same. Moreover, these defendants beg to submit that the estate of Rai Gudur Sahai is not and cannot be bound by such heavy rate of interest, especially after expiration of such a long period the rate of simple and compound interest cannot be allowed."

This is not an averment of want of necessity for the high rate of interest, it is a contention that the interest is unconscionable, and it has not been found to be such. There is in fact no plea in the written statement that there was a want of necessity for the high rate of interest and there was no issue framed on this point.

Under the circumstances, following the ruling of this Court in the case of *Prem Sukh Das* v. *Ram Bhujawan Mahto* (4),

(1) 6 C. L. J. 462.

(2) 50 Ind. Cas. 434; 41 A. 571; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49; 11 L. W. 188; 46 I. A. 145 (P. C.).

(3) 50 Ind. Cas. 640; 41 A. 581; 17 A. L. J. 647; 1 U. P. L. R. 73.

(4) 52 Ind. Cas. 964; (1919) Pat. 451; 1 P. L. T. 54.

we must hold that in the absence of a plea by the defendants that there was no necessity for compound interest, the lower Court was wrong in holding it incumbent on the plaintiffs to prove that there was necessity and that the rate was reasonable.

As a result the cross-objection is disallowed and the appeal allowed in part. The decree of the lower Court will be modified to this extent that in place of simple interest at 2 per cent. per mensem compound interest at the rate claimed will be allowed. The appellants will get costs proportionate to their success.

DAS, J.—I agree. I desire, however, to express my opinion on the question whether, when the mortgage transaction is established against the estate as having been entered into for a justifying necessity, it is open to the Court to reduce the rate of interest mentioned in the bond on the ground that there was no necessity to borrow at the rate of interest mentioned in the bond. In dealing with this question, it is necessary that there should be no confusion between the different principles on which the Courts of law have reduced the rate of interest. Acting on one principle, the Courts of law have reduced the rate of interest when they have been of opinion that the agreement to pay an exorbitant rate of interest was the result of undue influence on the part of the money-lender. On this point, I expressed my opinion as follows in a recent case [*Prem Sukh Das* v. *Ram Bhujawan Mahto* (4)]: "When all the cases relating to money-lending transactions are examined, it will appear that the Court has relieved the debtor by reducing the rate of interest only when it has been satisfied that the lender was in a position to dominate the will of the borrower and that the 'bargain' was unconscionable within the meaning of section 16 of the Contract Act. It is only the concurrence of these two elements that can justify the Court in granting relief to the borrower." I still adhere to the view which I expressed in the case of *Prem Sukh Das* v *Ram Bhujawan Mahto* (4) and I am still of opinion that, in the absence of these essential elements, the Court is not at liberty to make a new contract for the parties. It is sufficient to say that in this case it has not been found that the money-lender was in a position to dominate the will of the borrower.

The other principle is that the Court is at liberty to reduce the rate of interest if it is not shown that there was any necessity to borrow at the rate of interest mentioned in the bond. In other words, the necessity for the loan being established, it is still open to the Court to enquire into the necessity for the rate of interest. I desire to discuss the question whether there is any justification for this view in Hindu Law and how far the decisions of the Judicial Committee have gone in this matter.

It may be taken as established that under the Hindu Law, a Hindu widow has a special estate in the properties left by her deceased husband which cannot be described by any of the well-known terms of the English Law of real property. For certain purposes, however, her powers are as wide as those of a full male owner. The restriction on her power of alienation is not an absolute one. For certain purposes denominated necessary purposes, she is competent to alienate the estate and to bind that estate in the hands of the reversioners. This is admitted; but what is not admitted is that she can bind the estate in the hands of the reversioners for the payment of interest agreed to be paid by the widow without further proof of necessity. It is admitted that the necessity supports the alienation for the principal sum secured, but it is denied that the alienation stands good for the entirely of the interest due in respect of the transaction without proof of further necessity.

It is remarkable that very little is to be found in the ancient texts on the subject, but this is because, as Mr. Myane suggests, restriction under the Hindu Law was the rule, absolute power the exception. But it is undoubted that the power of the Hindu widow to deal with the estate is placed on the same footing as the power of the managing member of a joint family. It is certain that the power possessed by a Hindu widow is not less, though it is not more, than that which resides in the managing member of a joint family. I can find no text that deals with the question of interest in relation to the transac-

tion of the managing member of a joint family, but we may usefully consider in this connection the question of the liability of a son to pay the interest due in respect of a debt incurred by his father. In referring to this branch of the law, I am not forgetting that the liability of a son to pay the debt of his father arises only on the death of his father and is determined on a somewhat different principle from that adopted to fix his liability on the transaction of his father as the managing member of the joint family. But, in my view, once the liability is ascertained, the question of interest must stand on the same footing, whether you seek to make him liable on the debts of his father after the death of his father, or whether you seek to make him liable on the transaction of his father as the managing member of a joint family. It is, in my view, very important to see whether there are any ancient texts dealing with the question of interest. If it is established that a son, where he is bound to pay the debt of his father, is bound to pay the same with the interest agreed to be paid by the father,—if it is not open to him to say, "I may be liable to pay the principal, but there is no reason whatever why I should be compelled to pay the excessive interest agreed to be paid by my father," I do not see on what principle it can be said that a son sued as a member of a joint family on a transaction entered into by his father as the manager of the family can challenge the rate of interest where he admits the necessity for the loan itself, except, as I have said before, on the ground of undue influence. Once the liability of the joint family for interest on a transaction by the manager thereof is established, there is no escape from the conclusion that the estate is equally liable for interest on a transaction by the widow, for, as I have said before, the power of a Hindu widow to deal with the estate is placed by the Hindu lawyers on the same footing as the power of the manager of a joint family. In my view, the liability of the estate for interest due is the same, whether that liability arises on the transaction of a Hindu widow or of the manager of the joint family, and is co-extensive with the liability of a son in respect of the debt incurred by his father.

There is a text of Vrihaspati to the effect that sons must pay the debt of their father, when proved, as if it were their own, that is with interest (see Shayama Charan Sarkar's Vyavastha Chandrika, Volume I, page 241). This rule is of course subject to exceptions as regards immoral debts, which need not be considered. According to the text, therefore, debt includes such interest as was agreed to be paid by the debtor. The liability of the son to pay the debt being established, he must discharge it, as if the debt were his own, that is to say, with such interest as was agreed to be paid by the father. In my view, the liability of the reversioners stands exactly on the same footing. Once the necessity for the debt is established, it must be assumed that the widow completely represented the estate, and thereafter it is the estate that is liable to discharge the debt as if the debt was incurred by it. Once the complete identity of the widow with the estate is established, it is difficult to see on what principle the estate can be allowed to take up a position different from the widow herself. In my view, once the necessity for the debt is established, the estate cannot be heard to put forward a defence not available to the widow herself. The original necessity supports the transaction and binds the estate, into whoever's hand the estate may come.

It is necessary now to consider how far the cases have gone. The foundation of all the decisions of course is the case of *Hunoomanpersand Panday* v. *Musammat Babooee Munraj Koonweree* (5). After laying down under what circumstances the manager for an infant heir can charge an estate not his own, Lord Justice Knight Bruce proceeded to say as follows:—"Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity is not a con-

(5) 6 M I A. 393; 18 W. R. 81*n*.; Sevestre 253*n*.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

dition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." It seems to me that this case is no authority for the proposition that the creditor must not only prove the necessity for the loan, but also the necessity for the rate of interest. All that the creditor is required to do is to inquire into the necessities for the loan and to satisfy himself that the borrower is acting in the particular instance for the benefit of the estate. There is no suggestion at all that, once the creditor is satisfied as to the necessity for the loan, he must solemnly proceed to inquire whether the loan could be secured at a lower rate of interest elsewhere. The necessity for the loan being established, it must follow that the loan could not be secured on better terms elsewhere, for, if it could, there is no reason why the widow, who, it must be remembered, completely represented the estate, and was entitled to the income of the estate for her lifetime, should agree to reduce her income by taking a loan on more onerous terms. Speaking with great respect, it seems to me that the discussion of this question has missed one important point, and it is this, "the Court is entitled to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." Section 114, Evidence Act The simple question is this, a person has an opportunity to borrow at a lower rate of interest, is it likely that he would borrow at a higher rate of interest? Is it the common course of natural events for a person to borrow at a higher rate of interest, when he has the opportunity to borrow on less onerous terms? There is a general rule of universal application that a man having a right to act in either of two ways shall be assumed to have acted according to his interest. This rule is founded on the still more general rule that a person is assumed to know his own interest. If it is permissible to make the assumption in the case of a Hindu widow taking a loan for a justifying estate necessity, it is difficult to see why it should be for the creditor to show that the borrower could not have obtained the loan on more advantageous terms elsewhere. Only in two cases would the assumption be wrong, firstly, when there is no justifying necessity for the loan, for then the widow would be eager to obtain the loan on whatever terms she may secure, and secondly, when the creditor is in a position to dominate the will of the widow, for then her consent to take the loan on onerous terms is not a free consent. In my view, the necessity for the loan being established and there being no proof that the creditor was in a position to dominate the will of the borrower, it must follow in the common course of natural events that the borrower could not have secured the loan on more advantageous terms elsewhere.

There is another matter which must be considered in this connection. According to the decision of Lord Justice Knight Bruce, the creditor is amply protected so long as he makes the enquiry and honestly satisfies himself that the necessity exists. Now, what form is this enquiry to take? Is he expected to make a tour through the principal banking houses in the town or is it enough for him to ask the borrower whether he could not secure the loan on more advantageous terms elsewhere. My object in raising this question is to show that either the undertaking must be an impossible one for the creditor, for the banking houses would be within their rights in refusing to disclose their business to a rival, or the enquiry must, in the nature of things, degenerate into an absured formality and would consist in the lender putting certain formal questions to the borrower. When Lord Justice Knight Bruce said that the lender is bound to enquire into the necessities for the loan, he never meant to lay down that the lender must proceed further and solemnly satisfy himself as to what he is entitled to assume, namely, that in the common course of natural events, the borrower would not agree to his terms if he could secure the loan on better terms elsewhere.

There is one argument, however, which I must not omit to consider. It is said that if the properties hypothecated afford a sufficient security for the loan, there is clearly no necessity to borrow at an exorbitant rate of interest. It must be re-

membered that the question under discussion arises only in connection with the dealings of qualified owners, and in dealings by qualified owners it can never be said with confidence that the securities offered by him or her are a good or sufficient security. A creditor lending money to a qualified owner lends with a certainty of knowledge that litigation will follow, and, when it is remembered that the costs allowed by our Courts are only a small proportion of the costs actually incurred in prosecuting the claim through the tedious processes of Court after Court, when it is remembered that it takes years for the creditor to realize his money, during which time every procedure known or unknown to law is resorted to for the purpose of delaying or defeating and, in any event, harassing the creditor, the injustice of reducing the interest agreed to be paid becomes manifest. If there were no later decisions of the Judicial Committee to guide or control us, I would unhesitatingly hold that once the necessity for the loan is established, there is no power in the Court to reduce the interest except on proof that the lender was in a position to dominate the will of the borrower, or that the "bargain" was unconscionable within the meaning of section 16 of the Contract Act.

The first case which I ought to consider is the case of *Hurro Nath Rai Chowdhuri* v. *Randhir Singh* (6). The interest agreed to be paid in that case was 18 per cent. per year. With reference to the interest charged, the High Court said as follows:—"We do not think that the plaintiff is entitled to this high rate of interest as a charge upon the estate. But we are of opinion that the ends of justice would be quite met by allowing him interest at the rate of 12 per cent. per annum * * *." The passage cited leaves no doubt in my mind that the decision rested, to quote the words of Lord Phillimore in the case next to be cited, "upon a supposed discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee." It is now established that there is no such discretion in the Court, and that the Court is not at liberty to make a new contract for the parties. The decision of the Judicial Committee on appeal was in these words:—"Was there a necessity to borrow at the rate of 18 per cent? That is a question to which he ought to have applied his mind; and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent, he ought not to have charged her that interest. Their Lordships think, therefore, that the High Court was right in not allowing interest as against the estate at a higher rate than 12 per cent." It may be said that the Judicial Committee accepted the view of the High Court in the matter, a view which did not commend itself to Lord Phillimore in the case which I must next consider. But it is impossible to ignore that the Judicial Committee did cast on the lender the duty of considering the propriety of charging interest at the rate claimed by him. If there was nothing in the later decision of the Judicial Committee to suggest that a different rule should be adopted, I would, with all humility, be bound to give effect to that decision, whatever my own view may be in the matter.

The next case is the case of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2). The written statement filed in that case specifically denied that there was any necessity to borrow the money at the rate of interest mentioned in the bond. This will appear from the judgment of the High Court reported as *Rao Raghunath Singh* v. *Nazir Begam* (7). With reference to this specific denial in the written statement, Lord Phillimore delivering the judgment of the Judicial Committee said as follows:—"In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of this mortgage. This line of defence being thus open to the defendants, the principles laid down by this Board in *Hurro Nath Rai Chowdhuri* v. *Randhir Singh* (6) and in *Nand Ram* v. *Bhupal Singh* (8) apply."

(6) 18 C. 211; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar. P. C. J. 642; 9 Ind. Dec. (N. S.) 207.

(7) 19 Ind. Cas. 639.

(8) 13 Ind. Cas. 5; 8 A. L. J. 1294; 34 A. 126.

In my view, it is impossible to misunderstand the decision of the Judicial Committee. The principles laid down in the cases cited do not apply, if the line of defence is not open to the defendants, and such a line of defence is not open to the defendants if it is not specifically raised in the written statement. I take it as settled by the Judicial Committee in this case that the plaintiff is not called upon to prove the necessity for the rate of interest unless he is required to do so by the defendant. To this extent then the Judicial Committee has encroached on the rule which I find established on principle, namely, that the necessity for the loan being found to exist, and there being no proof that the lender was in a position to dominate the will of the borrower, the necessity for the rate of interest must be assumed to exist until the contrary is shown. On this case I am bound to hold that if the defendant does specifically deny the necessity for the rate of interest, but not otherwise, the Court is entitled to, and even bound to, investigate into the necessity for the rate of interest, and to reduce the interest if it is not satisfied that there was a necessity for the rate of interest.

I now come to the last case, the case of *Manna Lal* v. *Karu Singh* (9). The judgment of the High Court, so far as I know, has not been reported, but I have examined the original records of the case and I find that the High Court reduced the rate of interest in this case on the ground that the bargain as to interest was unconscionable on the face of it and that, therefore, the Court was at liberty to reduce the rate of interest. The exact words of the High Court were as follows :—"As regards issue No. 5, there can be no doubt that under the provisions of section 74, Contract Act, the stipulation for enhanced compound interest is a penalty. The unconscionable character of the bargain is apparent on the face of it, and we are, therefore, clearly of opinion that the stipulation in the contract cannot be enforced and that all that can be decreed is the principal of the two bonds, with simple interest at the original bond rate of 18 per cent." It is this view which prevailed in the Judicial Committee. Lord Phillimore delivering the judgment of the Judicial Committee said as follows :—"There is, however, a question as to interest, as to which their Lordships are inclined to agree with the view taken by the High Court." His Lordships then quoted with approval the decision in the case of *Nawab Nazir Begam* v *Rao Raghunath Singh* (2) and concluded as follows :—"These principles must be applied to the present cases. In conformity therewith, the necessity for the high rate of interest secured by these bonds must be proved, if it is to stand. And in this matter their Lordships are not disposed to interfere with the view taken by the High Court." This decision, in my judgment, cannot be read as having departed either expressly or by implication from the principle laid down in the case of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2).

On an anxious consideration of the decisions of the Judicial Committee, I hold that the question as to the necessity for the rate of interest does not arise and ought not to be gone into, unless the defendant by his written statement specifically raises that question. In this case the defendants did not raise that question, and, therefore, the Court below erred in going into that matter.

I agree with the order proposed by my learned brother.

(9) 56 Ind. Cas. 766; 1 P. L. T. 6 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 591 OF 1920.

June 22, 1920.

Present:—Mr. Justice Abdul Raoof.

ILA-UD-DIN—DEFENDANT—APPELLANT

versus

AMIR ULLAH—PLAINTIFF—

Musammat SUBA JAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation by widow—Consent of reversioner—Acquiescence—Mutation, failure to object to, effect of—Alienee making improvements—Silence—Estoppel.

ILA-UD-DIN *v.* AMIR ULLAH.

A widow permitted an occupancy tenant to exchange one of his occupancy fields with a non-occupancy one. Plaintiff, one of the collaterals of the last male holder and a *lambardar*, not only did not object to the exchange but was present when mutation was sanctioned and affixed his seal to the *patwari's* report. Subsequently the occupancy tenant sank a well in the field obtained by him under the exchange and even then the plaintiff raised no objection. Six years after the exchange had been effected, he brought a suit for a declaration that the exchange would not affect his reversionary rights;

Held, that the plaintiff, having acquiesced in the exchange and having failed to object to the sinking of the well by the defendant, was equitably estopped from now objecting to the exchange. [p. 876, col. 2]

Second appeal from the decree of the District Judge, Attock at Campbellpore, dated the 12th December 1919, modifying that of the Munsif, 1st Class, Attcok, dated the 25th August 1919.

Mr. *Zafrulla Khan*, for the Appellant.

Mr. *Chaman Lal Gulati*, for the Respondents.

JUDGMENT.—One Sardar Bahadur, the last male proprietor, having died, his mother *Musammat* Suba Jan and his grandmother *Musammat* Hasham Nur succeeded him. They exchanged the lands in dispute to which mutation entries No. 238 sanctioned on the 13th of August 1913 and No. 325 sanctioned on the 12th of June 1917 relate. The plaintiff as a reversioner brought a suit for a declaration that the two exchanges effected by the two females mentioned above shall not affect his rights after the death or re-marriage of the two alienors. *Musammat* Hasham Nur, the grandmother of Sardar Bahadur, having died, the Court of first instance passed a declaratory decree as regards the share of the surviving lady, *Musammat* Suba Jan, and gave a decree for possession *qua* the share of the deceased *Musammat* Hasham Nur. The alienee Ila-ud-Din appealed and the lower Appellate Court modified the decree by disallowing the claim for possession and by passing a decree for declaration with respect to the entire property. In all other respects the decree of the first Court was allowed to stand. Ila-ud-Din, the transferee, has come up in second appeal to this Court.

His learned Counsel has confined his argument to the mutation No. 238 dated the 13th August 1913 and has admitted the correctness of the decree of the Court below with respect to the mutation No. 325 dated the 13th of June 1917. I shall accordingly deal in my judgment with questions raised in respect of the alienation effected under mutation No. 238 only. The facts found with respect to this mutation by the Courts below and not challenged here are as follows:—

Musammat Suba Jan and *Musammat* Hasham Nur permitted Ila-ud-Din, an occupancy tenant, to take possession of a portion of field No. 1154 (7 *kanals*) in exchange for the same area of the field No. 1155, which was the occupancy holding of Ila-ud-Din. There were four collaterals at the date of the exchange, all of whom with the exception of the plaintiff Amir Ullah expressed their consent to the exchange from the very commencement. The Patwari made a report relating to the exchange in July 1913. This report was signed by Ila-ud-Din the alienee and Ghulam Qadir the agent of the widows. The plaintiff Amir Ullah also put his seal on it. The final order, as already mentioned, sanctioning the mutation was made on the 13th day of August 1913. The present suit was instituted on the 14th of March 1919, *i. e.*, nearly six years after the alienation. In the meantime Ila-ud-Din had constructed a well in the land acquired by the exchange and had incurred considerable expense (Rs. 800). The suit was resisted by the defendant Ila-ud-Din on the ground that the plaintiff had consented to and acquiesced in the exchange and was, therefore, not entitled to question it after the expiration of such a long period. He further contended that having stood by and having allowed the defendant to construct a well on the land with considerable expense, the plaintiff was equitably estopped from questioning the alienation. Both the Courts below refused to entertain this plea. On the question of acquiescence the lower Appellate Court found that the mere fact that the plaintiff affixed his seal to the Patwari's report could not establish acquiescence of the plaintiff in the exchange, inasmuch as the plaintiff being a Lambardar had to affix his seal in his capacity as a Lambardar. On the question of estoppel the lower Appellate Court recorded a somewhat vague and inconclusive finding in these words: "it is admitted that the well was being constructed when the second exchange was

effected and, therefore, the sinking of the well could have no effect on the second exchange. *And even as regards the first the reversioners could not be responsible* for the money laid out by an alienee at his risk."

It is contended on behalf of Ila-ud-Din appellant that on the facts found the plea of acquiescence and equitable estoppel are fully made out. For the respondents it is contended that the findings on the question of acquiescence and estoppel are findings of fact and cannot be challenged in second appeal. There is no force in this objection, as the appellant does not seek to challenge the findings of fact. His contention is that the conclusions drawn from the findings of fact are not legitimate conclusions in law. There is force in this argument and I hold that the question raised is a question of law and not of fact.

In the case of *Sewa Singh* v. *Ganeshi Lal* (1) it was found that the reversioner in his capacity of a Lambardar had realized revenue from the alienee and it was held that a reversioner who recognises an alienee's right is estopped from disputing the validity of the alienation. Realizing revenue of the alienated land in the capacity of a Lambardar was held to be an act of acquiescence.

In the case of *Ismail* v. *Jagannath* (2) Mr. Justice Banerji held that the fact that the reversioner had signed the sale-deed executed by a Hindu widow established acquiescence on the part of the reversioner.

In the case of *Ganda Singh* v. *Gulab Singh* (3) it was held that a reversioner by attesting as a witness the deed of exchange of the property in dispute was estopped from contesting the validity of its alienation.

In the case of *Gopi Chand* v. *Ram Chand* (4) the facts were these:—The plaintiff sued for possession of a house property which had been sold by his father. The vendees had taken possession immediately on the sale and it was proved that soon afterwards they had commenced building and from time to time had continued their building operations, spending a considerable sum of money and largely enhancing the value of the property. The learned Judges Mr. Justice Shah Din and Mr. Justice Chevis, who decided the case, held that the plaintiff's long silence, coupled with the fact that he knew all along of the building operations, must be taken to show acquiescence in the alienation. In the opinion of the learned Judges on the facts of that case the plaintiff was held to be estopped from contesting the alienation.

In the present case the plaintiff knew perfectly well that out of the four collaterals three had clearly given their consent to the exchange. He himself did not put forward any objection to it. On the contrary he signed the Patwari's report in respect of the exchange and was present during the proceedings relating to mutation. The alienee commenced to construct a well by spending a considerable sum of money. The plaintiff then also did not raise any objection. When the well had been constructed and the value of the property had been considerably enhanced, plaintiff thought of defeating the rights of the alienee and laid claim to the property after its value had been enhanced. In my opinion the legitimate conclusion from the facts disclosed in this case is that the plaintiff had no objection to the exchange and had actively acquiesced in it; but now that he finds that the value of the property has been greatly increased, he wishes to avoid the exchange. He is clearly estopped from doing so and it will be highly inequitable to allow him to question the alienation after nearly six years.

I accordingly accept the appeal in respect of mutation No. 238 of 1913 and dismiss the suit of the plaintiff with respect to that portion of the claim. The decree of the lower Appellate Court will be modified to the extent above indicated. The parties will receive and pay costs throughout in proportion to their success and failure.

Appeal accepted; Decree modified.

(1) 5 Ind. Cas. 59?; 8 P. W. R. 1910.
(2) 19 Ind. Cas. 255.
(3) 25 Ind. Cas. 724; 66 P. W. R. 1914; 159 P. L. R. 1914.
(4) 12 Ind. Cas. 729; 177 P. W. R. 1911.

MATA DIN *v.* MADHO CHARAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECTION 115 APPLICATION No 42 OF 1917.

April 10, 1917.

Present:—Mr. Lindsay, J. C.

MATA DIN—PLAINTIFF—APPLICANT

versus

MADHO CHARAN—DEFENDANT—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II Arts. 15, 35 (ii)—Suit for return of article lent or for compensation, whether cognisable by Court of Small Causes.

A suit for the return of an article lent by the plaintiff to the defendant or, in the alternative, for compensation is not cognisable by a Court of Small Causes. [p. 877, col. 2.]

Application for revision of the order of the Munsif, Sitapur (Exercising Small Cause Court powers), dated the 8th January 1917.

Mr. *Ali Ausat*, for the Applicant.

Mr. *Ganga Dayal Khare*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act, and the ground raised by the applicant, who was the plaintiff in the suit, is that the suit was not cognizable by a Court of Small Causes. A reference to the plaint shows that the case was based upon the following allegations. The plaintiff alleged that he had lent, by way of bailment, a certain *dushala* to the defendant to enable him to go and pay a visit to some relations. It was alleged that the understanding between the parties was that the *dushala* was to be returned after the purpose for which it had been lent had been fulfilled. The plaintiff went on to say that the defendant had, in spite of a notice sent to him, refused to return the *dushala*. Consequently two reliefs were prayed for. In the first instance the Court was asked to pass a decree directing return of the *dushala* which the plaintiff had lent. In the alternative it was prayed that if for any reason the *dushala* could not be returned, the plaintiff should be awarded a sum of Rs. 100 compensation, that being the estimated value of the garment. It is a little difficult to understand how the case was dealt with after it was filed, as I have been unable to get any one to read the orders recorded on the plaint and the *fard ahkam*, but what I am inclined to think happened is this. The suit was clearly presented on the regular side. The Munsif for some reason or other called upon the plaintiff to show cause within four days why the suit should not be dealt with as a Small Cause Court suit. On the 6th June, the date fixed for the plaintiff's appearance in this matter, it is stated that the plaintiff did not appear; and thereafter we find an order transferring the case from the Court of the Munsif to the Court of the Bench of Honorary Munsifs. It may be remarked here incidentally that unless the case were a case of a Small Cause Court nature, the Bench of Honorary Munsifs would not be able to entertain it. After the case got to the Bench, the defendant made an application to the District Judge to have the case returned to the Court of the Munsif and an order was made accordingly. After the case was brought back, it seems to have been treated as a Small Cause Court case and thereafter all the proceedings taken by the Court were taken professedly in the exercise of Small Cause Court jurisdiction. I agree with the contention which has been put forward here on behalf of the applicant that the suit was not cognizable in the Court of Small Causes. So far as it was a suit for return of the specific article mentioned in the plaint, it fell within Article 15 of the Second Schedule to the Provincial Small Cause Courts Act; and so far as it purported to be a suit for compensation, it was excluded from the cognizance of the Small Cause Courts under Article 35 (*ii*), one of the new articles which have been introduced by Act VI of 1914. I should not have been disposed to interfere in this matter merely on the ground that there had been a wrong assumption of jurisdiction, for it is apparent that the case has been very carefully tried out by the Munsif, the record is a very voluminous one and it is not possible to argue that there was anything in the nature of a summary trial. But the fact remains that if the case is to be treated as having been dealt with on the Small Cause Court side, the party who has lost is deprived of the right of appeal. That is an important point to be borne in mind. Further this much is to be said in the plaintiff's favour that he took the case to the right tribunal in

the first instance and it appears to be no fault of his that the case was subsequently transferred to the Small Cause Court side and dealt with there erroneously. I must allow the application. I set aside all the proceedings which have taken place including the decree. The case will be transferred to the Court of the Munsif of Biswan sitting at Sitapur, with directions to deal with it as an ordinary suit and give judgment accordingly. The plaintiff is entitled to his costs of this Court.

Application allowed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 274 OF 1916.

November 28, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

JHANDA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat LACHHMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. IX, r.* 13—Ex parte *decree—Suit to set aside decree, whether competent—Remedy, proper—Minor—Compromise sanctioned by Court under material misapprehension—Decree, whether binding on minor.*

In order to impeach an *ex parte* decree not tainted with fraud, the proper remedy is by an appropriate proceeding taken in the suit in which the decree was passed, *e. g.*, an application under Order IX, rule 13 of the Civil Procedure Code, to set aside the decree, or an application for review, or an appeal to a superior Court. A separate suit to set aside the decree will not lie. [p. 879, col. 1.]

Where the sanction of the Court is obtained to a compromise on behalf of a minor under a misapprehension of a material fact as to the true position of the minor, a decree based on such compromise is not binding on the minor. [p. 879, cols. 1 & 2.]

First appeal from the decree of the Senior Subordinate Judge, Sialkote, dated the 16th December 1915.

Mr. *Sham Lal*, for the Appellants.

Messrs. *Devi Dial* and *B. A. Cooper*, for *Musammat* Lachmi Respondent.

JUDGMENT.—The property in dispute belonged to one Jiwan, and was inherited upon his death by his son Buta Singh. It appears that Buta Singh died in 1892 and was succeeded by his mother, *Musammat* Bhagan. This lady remained in the enjoyment of the property for many years, and it appears that upon her death the collaterals of Buta Singh seized the estate. On the 8th of February 1914 *Musammat* Lachhmi, the daughter of Jiwan Singh and the sister of Buta Singh, brought a suit against the collaterals for the recovery of the property, and on the 29th of May 1914 a compromise was arrived at between the parties upon which a decree followed on the same date. The present plaintiffs, who were some of the defendants in that case, have brought this action for setting aside the decree based on the compromise. Their main contention is that the compromise was the result of a fraud practised upon them but they have produced no satisfactory evidence in support of their allegation. It is true that *Musammat* Lachhmi brought the previous suit on the ground that she, as the daughter of Jiwan, was entitled to succeed to the estate, and that she did not refer to the fact that Jiwan was succeeded by his son Buta Singh. It appears that Buta Singh died during his minority, and it is probable that she thought, as often happens in cases of this kind, that she was entitled to claim the estate as the daughter of his father. It is, however, clear that she did not intend to practise any fraud upon her adversaries, who, it is to be remembered belonged to the village of Jiwan and could easily ascertain the true fact if they were not already aware of it. Indeed, the judgment of the Divisional Judge, dated the 22nd of August 1912, to which they were parties, makes a distinct mention of Buta Singh and leads us to the conclusion that the collaterals were aware of the fact that Buta Singh inherited the estate on the death of his father. We consider that there was equal knowledge on both sides or, at any rate, means of knowledge, and that no fraud has been established. This ground of attack must, therefore, fail.

It is further contended that the plaintiffs were not present at the time when the compromise was arrived at and did not give consent to the terms of the compromise. The decree was consequently *ex parte* so far as they were concerned and should not adversely affect their interests in the estate. The simple answer to this contention is that the proper remedy to impeach a decree is by an appropriate proceeding taken in the suit in which the decree was passed, *e. g.*, an application under Order IX, rule 13, Civil Procedure Code, to set aside the *ex parte* decree, or an application for review or an appeal to the superior Court. But if the decree is not tainted with fraud, no suit lies to set it aside, *vide*, *inter alia*, *Sadho Misser* v. *Golab Singh* (1).

Upon both the grounds set out above, the action brought by the plaintiffs must fail. It, however, appears that two of the plaintiffs, Budha Singh and Ishar Singh, are minors, and the case stands on quite a different footing so far as they are concerned. It is undeniable that the sanction of the Court to the compromise was obtained under a misapprehension of a material fact, *viz.*, the status of *Musammat* Lachhmi *qua* the estate. She was represented as the daughter of the last male owner, but as a matter of fact she could come in only as a sister. There can be no manner of doubt that under the customary law there is a great deal of difference between the right of inheritance of a daughter and that of a sister, and that if the Subordinate Judge had been aware of the real state of affairs, he would not have sanctioned the compromise; indeed, Mirza Zafar Ullah, who sanctioned the compromise, has been examined as a witness and states that if he had been informed of the fact that *Musammat* Lachhmi was the sister of the last male owner, and not his daughter, he would not have granted the minor's guardian leave to enter into the compromise.

There can be no doubt that the compromise was sanctioned by the Court under a misapprehension of a material fact, and that the decree based upon such compromise is not binding upon the minors, *vide* *Bibee Solomon* v. *Abdool Aeeez* (2). It is unnecessary to consider whether it was due to fraud, practised by either of the parties to the previous litigation, or to the negligence of the guardian that the matter was not brought to the knowledge of the Court. In any case it is beyond dispute that an important fact was not present to the mind of the Court, and the compromise sanctioned under a misapprehension of the true position of the minors cannot stand.

We accordingly accept the appeal so far as to pass a decree in favour of the plaintiffs, Budha Singh and Ishar Singh, that the compromise, dated the 29th of May 1914, and the decree based thereupon, shall not be binding upon them. These plaintiffs are entitled to their costs in both the Courts. The appeal preferred by the other plaintiffs is dismissed with costs.

Appeal dismissed.

(1) 3 C. W. N. 375

(2) 6 C. 687; 8 C. L. R. 169; 3 Ind. Dec. (N. S.) 446.

PATNA HIGH COURT.
FIRST CIVIL APPEALS NOS. 196 & 197 OF 1917.
March 10, 1920.
Present:—Mr. Justice Das and
Mr. Justice Adami.
IN F. A. No. 196 OF 1917
SHEOTAHAL SINGH AND OTHERS—
APPELLANTS
versus
B. ARJUN DAS AND OTHERS—
RESPONDENTS.
IN F. A. 197 OF 1917
SITA RAM SINGH AND ANOTHER—
APPELLANTS
versus
ARJUN DAS AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Manager, power of, to alienate family property, extent of—Test to be applied.

SHEOTAHAL SINGH v. ARJUN DAS

In order to determine whether a mortgage by the manager of a joint family is binding on the family, the real test is the benefit to the family and not a justifying legal necessity for the transaction. The manager of a joint family has implied authority to do whatever is best for all concerned and the test in each case is, was it a transaction into which a prudent owner would enter in order to benefit the estate. [p. 881, col. 2.]

Appeals from a decision of the Additional Subordinate Judge, Monghyr.

Messrs. *Naresh Chandra Sinha* and *Sishir Kumar Mitra*, for the Appellants.

Messrs. *P. K. Sen*, *Gangadhar Das* and *Sivnandan Rai*, for the Respondents.

JUDGMENT.

DAS, J.—These analogous appeals come before us from the judgment of the Additional Subordinate Judge of Monghyr and arise out of suits instituted by the respondents to enforce mortgage-bonds against the appellants.

It appears that the defendants in each of the actions are members of a joint Mitakshara Hindu family. The two families, who were once joint but are now separate, joined in taking a lease for 7 years of certain valuable lands in Mouza Chor Kusumbha, for which they had to pay a premium of Rs. 1,500. They paid the earnest money out of their own funds and on the 14th July 1909 they raised the balance from the plaintiff and executed the mortgage-bonds in question in his favour. Exhibit 1 is the mortgage bond executed by Sita Ram Singh, who is one of the appellants in First Appeal No, 197 of 1915. The other appellant in this appeal is the minor son of Sita Ram Singh. Exhibit 2 is the mortgage-bond executed by Sheo Tahal Singh and Ram Tahal Singh, who are the appellants in First Appeal No. 196 of 1917. The other appellants in this appeal are the minor sons of Ram Tahal Singh and a son of Sheo Tahal Singh, who was a minor at the time of the transactions in question but who has since attained majority. The learned Subordinate Judge discussed all the issues raised in the suit and gave the plaintiff the usual mortgage decrees.

The learned Vakil for the appellants, in the first place, urged before us that the signatures, purporting to be the signatures of Ram Tahal Singh as an attesting witness in Exhibit 1 and as one of the executants in Exhibit 2, are in fact not the signatures of Ram Tahal Singh and that the bonds consequently cannot be sued upon. In the second place he argued, an argument confined to First Appeal No. 196 of 1917, that Sheo Tahal Singh delivered to the plaintiff 3,969 maunds of grain valued at Rs. 7,131 12-0 by way of part payment and that the plaintiff ought to have given him credit for the whole of this amount in his account, whereas he has given him credit only for Rs. 1,000.

The consideration of these points need not detain us long. I will first deal with the question of forgery. On this point the chief criticism is that the Subordinate Judge should have given Ram Tahal Singh a reasonable opportunity to call a handwriting expert. After a careful perusal of the order-sheet in the case I am unable to agree with the learned Vakil. But although I am clearly of opinion that the question of adjournment was in the discretion of the learned Subordinate Judge and that it has not been shown in this case that that discretion was unreasonably exercised, still we intimated to the learned Vakil that we would give him an opportunity to call an expert witness, if the evidence recorded in the case left any doubt in our minds as to the genuineness of Ram Tahal's signatures. A perusal of the evidence in the record has, however, left no manner of doubt in our minds that the signatures of Ram Tahal in Exhibits 1 and 2 are genuine and that an impudent attempt has been made to escape from the liability under the mortgage-bonds.

It is worthy of note that though Ram Tahal denies his signatures in Exhibits 1 and 2, he admits having admitted execution of Exhibit 2 before the Sub-Registrar. His story is that he and his brother were threatened with a criminal prosecution if he refused to admit the execution of the document before the Sub-Registrar. This story I absolutely disbelieve for two reasons: first because until he filed his written statement in the Court he never told anybody that the plaintiff had caused his signature to be forged in Exhibit 2, although, if his evidence is to be believed, he certainly knew of the forgery on the 16th July 1909 when he admitted having executed the document before the Sub-Registrar, and secondly because Sheo Tahal in his written statement did not attack the signatures of his brother as forgeries

although that would be a complete defence to the suit.

In my view the evidence is conclusive on this point, and it would have been useless to adjourn the hearing of the appeal to enable the appellants to call an expert witness. Experts, like lawyers, differ in their opinion, and when the admitted facts lead to one conclusion and to one conclusion only, it would be in the highest degree unsafe to rely on expert testimony, assuming that that testimony would be in favour of the appellants.

The second point is equally without merit. The plaintiff has produced his books of accounts, whereas the defendants have withheld them. There is, no endorsement of the payment of Rs. 7,131·12·0 on the back of the bond, although the bond itself provides that no payments other than those endorsed on the back of the bond would be recognised. I hold that the decision of the learned Subordinate Judge on these points is right and must be affirmed.

I now come to the main and indeed the only point in the case, namely whether the mortgage bonds are enforceable against the joint families. In his very able argument before us Mr. Naresh Chandra Sinha contended that the transactions must inevitably fail on the very recital of the necessity for the loans in the mortgage bonds themselves. The mortgage bonds show that the money was borrowed in order to pay the premium in respect of a lease for 7 years which they took from certain persons. It is established that the lease was of considerable benefit to the joint family, for though they had to pay a premium of Rs. 1,500 and a yearly rental of Rs. 30,000, they made a profit of Rs. 15,000 or Rs. 16,000. This is what Sheo Tahal himself, in the course of his evidence in a previous suit, admitted. Raj Kumar Singh, one of the witnesses called by the defendants, admitted that the income from the property taken over by the defendants was Rs. 40,000. In my view there can be no doubt at all that the families have greatly benefited by the mortgage transactions. The defence is, therefore, a dishonest one, but it may still be a legal one, and the question for our determination is—is the defence put forward by the defendants a legal defence?

Mr. Sinha argues that the real test is, not whether the transaction was for the benefit of the joint family but whether it was for a justifying legal necessity. I can find no support for this proposition in the cases. In the leading case of *Hunoomanpersaud Panday* v. *Musammat Babozee Munraj Koonwaree* (1) Lord Justice Knight Bruce laid down the law as follows:—"The power of the manager for an infant heir to charge an estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." This passage has always been understood as recognising the powers of the manager of a joint Hindu family to affect or dispose of joint family property in the ordinary course of management and for the benefit of the joint family. In my view the manager of a joint family has an implied authority to do whatever is best for all concerned, and the test in each case is, was it a transaction into which a prudent owner would enter in order to benefit the estate? Mr. Sinha, however, argues that the latest decisions of the Judicial Committee have modified the rule laid down by Lord Justice Knight Bruce and that the rule is now well-recognised that in order to bind the joint family properties the mortgagee must show that there was a justifying family or estate necessity for the loan. In other words, according to Mr. Sinha, the creditor must show that there was a calamity affecting the whole family requiring the alienation or that the support of the family rendered it necessary or that the indispensable religious duties made it unavoidable. It becomes necessary, therefore, to examine the cases on which Mr. Sinha relies.

The first case relied upon by Mr. Sinha is the case of *Sahu Ram Chandra* v.

(1) 6 M. I. A. 393; 18 W. R. 81*n*.; Sevestre 253*n*.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147 (P.C.).

Bhup Singh (2). It was not suggested in that case that the joint family was in any way benefited by the debt contracted by the *karta* and consequently it was not necessary for the Judicial Committee to discuss the point that has been raised before us. But Lord Shaw in the course of his judgment did say as follows: "The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at liberty to affect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or Mutb, or of the guardian of an infant. In all of the cases where it can be established that the estate itself, that is under administration, demanded, or the family interests justified, the expenditure, then those entitled to the estate are bound by the transaction." It will be noticed that the term deliberately used by Lord Shaw is "necessary purposes," which, in my view, is wider than the term "necessity". Family or estate necessity is undoubtedly a "necessary purpose" for which the manager of a joint Hindu family can affect or dispose of joint family property, but is by no means the only 'necessary purpose' contemplated by Hindu Law, as understood and administered in our Courts. In my view the case of *Sahu Ram Chandra* v. *Bhup Singh* (2), far from narrowing down the dictum of Lord Justice Knight Bruce, has recognised and approved of it.

The next case relied upon by Mr. Sinha is that of *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (3). In that case, the grant, at a fixed rent and on payment of a premium, of a permanent lease by a Shebait of a portion of the lands dedicated to the worship of the idol, of which he was a trustee, was in question before the Judicial Committee, and the Judicial Committee held that such a grant was invalid as against the successor in Shebaitship, as the evidence did not establish that the Shebait was constrained by any necessity to make such a lease, or that any benefit accrued to the estate from it. When the case is carefully examined, it will be found that the decision really rests on the view of the duty of a trustee to act in accordance with the trust deed. Lord Atkinson, in the course of his judgment, said as follows:—"Should the property, the subject of such an endowment as this, have been formally dedicated to the deity or the idol for worship in the temple by a deed of endowment, it would presumably contain directions as to the mode in which the property is to be used, and its income applied for the particular religious or charitable purposes mentioned in the instrument. But where, as in the present case, no deed of this kind is forthcoming, the rules according to which the property and its income are to be dealt with in order to carry out the intention of the original endower can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case of *Ram Parkash Das* v. *Anand Das* (4). But these rules, so to be inferred, must not in their Lordships' view be inconsistent with or repugnant to the very nature and purpose of the endowment. If, for instance, the worship of the idol in the temple be intended to be perpetual, as it could hardly fail to be, then the preservation and use of the dedicated property to support and maintain that worship must, they think, be assumed to have been similarly intended to be perpetual. A rule, therefore, which would authorize and empower the Shebait of such a temple, arbitrarily, at his own mere will and pleasure, to alienate the dedicated property, either bit by bit or *en bloc* would be so repugnant to the whole purpose and object of the endowment that it could not, in their view, be rationally held to embody the intention of the original endower." He did undoubtedly examine the meaning of the terms "neces-

(2) 39 Ind. Cas. 280; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 457; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 39 A. 437; 44 I. A. 126 (P. C.).

(3) 39 Ind. Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 507; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 6 L. W. 222; 44 I. A. 147 (P. C.).

(4) 33 Ind. Cas. 583; 43 C. 707; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 20 M. L. T. 267; 43 I. A. 73 (P. C.).

sity" and "benefit of the estate": but I do not think that his judgment contains a complete definition of those terms. The arguments before us proceed on the hypothesis that the powers of a Shebait to affect or dispose of trust properties are exactly the same as those enjoyed by the manager of a joint family property. This, in my view, is a mistake. The powers are no doubt analogous to those of the manager of a joint family property, in the sense that they correspond or bear some resemblance or proportion to the powers of the manager of a joint family property; but still, in determining whether in a particular case the authority has been exceeded or not, we must have regard to what is usually done in the ordinary course of management. The manager of a joint Hindu family may embark in money-lending business in the ordinary course of management, and for that purpose sell a property, which brings no income to the family. But the Shebait of an idol may not do so, because such an act, unless empowered by the terms of the endowment, cannot be said to be in the ordinary course of management of the *debettur* property, and must, therefore, amount to a breach of trust. Where the manager of a joint Hindu family, in the ordinary course of management and for the benefit of the family, sells an unprofitable piece of land and invests the proceeds in a lucrative transaction, it is proper to imply a consent of all the persons entitled to that piece of land. It is impossible to imply the consent, either of the idol or of the founder of the endowment, where the Shebait, unless expressly permitted by the terms of the endowment, disposes of trust property for the purpose of embarking with the proceeds thereof in a lucrative and attractive business. I do not think that the decision of Lord Atkinson in any way helps the argument advanced on behalf of the appellants.

The last case relied upon by Mr. Sinha—the case of *Manna Lal* v. *Karu Singh* (5)—is a direct authority against him. In that case, as in the case before us, one of the mortgages was expressed to be for payment of premium of a lease due in respect of a certain Mouza. That mortgage was upheld by the Judicial Committee as against coparceners, who were not parties to the mortgage transaction. If the decision of the Judicial Committee in the last mentioned case is right, then the argument advanced before us by Mr. Sinha must fail.

That being so, the only other question that remains for our consideration is—was this a transaction in the ordinary course of management and for the benefit of the joint family? It cannot be disputed that the transaction, in its result, has undoubtedly benefited the joint family. But Mr. Sinha has argued with considerable force that we must carefully scrutinize the purpose for which the transaction is entered into, and that if we are unable to say that benefit must inevitably accrue to the joint family, we ought not to uphold the transaction as against persons who are not parties thereto though, in the result, benefit has in fact accrued to them. The argument is in part unassailable, but I am unable to accept the whole of it. I quite agree that the manager of a joint family has no authority whatever to affect or dispose of any portion of joint family property in order to enable him to embark on speculative transactions, but I cannot say that the mortgagee must in each case satisfy the Court that the transaction was bound to benefit the joint family. There is a certain element of risk in every business transaction and if we are to hold that when the business has succeeded and the entire family has benefited by it, we ought not to uphold the mortgage transaction entered into by the manager to enable him to embark on such a business unless the mortgagee satisfies us that the business was bound to succeed and that benefit was bound to accrue to the family, we would unnecessarily handicap the managers of joint Hindu families and place a limitation on their powers which would have the effect of stopping all business transactions in every Mitakshara family. In this connection great reliance has been placed on the judgment of Mr. Justice Mookerjee in the case of *Ohakouri Mahton* v. *Ganga Pershad* (6), in which that great and distinguished Judge summarised the provisions of all the

(5) 56 Ind. Cas. 766; 1 P. L. T. 6 (P. C.).

(6) 12 Ind Cas. 609; 15 C. L. J. 228; 16 C. W. N. 519; 39 C. 862.

texts relating to the non-obligation of the son to pay the debt of the father. Commercial debt is said to be one of the debts which a son is not under any obligation to pay. The short answer to the argument is that Mr. Justice Mookerji was merely summarising the texts on the subject, not giving his decision on the texts. On referring to the texts, it will appear that Gautama is the only writer who says that the son is under no obligation to pay the commercial debts of the father. Gautama made no distinction between 'gambling debts' and 'commercial debts;' but neither in the Institutes of Manu nor in the Institutes of Yajnavalkya nor in the commentary on Yajnavalkya by the author of Mitakshara is 'commercial debt' mentioned as one of the debts which a son is under no obligation to pay, although in each of them 'gambling debt' is mentioned as a debt which a son is exempt from paying. It was argued that it is at times difficult to distinguish between gambling debts and commercial debts. That may be so, but the mere difficulty of distinguishing between the two is no ground for holding that a son is not bound to pay the commercial debts of the father. The question is, in each case, a question of fact, and will be decided by application of principles which are well recognized in Courts of law. The question of the liability of the son to pay the debt of the father does not, however, directly arise in this case, though it may be conceded that a transaction which a son is not bound to recognize after the death of the father, is not a transaction which can be said to have been entered into in the ordinary course of management. In this case, we are concerned with the power of the manager of a joint family of taking a beneficial lease for the benefit of the joint family. The test, in my view, is was it a transaction into which a prudent owner would enter in the ordinary course of business; if it was, then the transaction ought to be upheld. In this case I have no doubt at all that the transaction was one into which a prudent owner would enter in the ordinary course of management of joint family properties. The lease was a lease of 3,000 *bighas* of *khudkasht* land and there was every probability that the transaction would be a profitable one for the joint family. It has undoubtedly been a profitable one and in my view the mortgage bonds ought to be enforced as against the joint families. In my view, the decision of the learned Subordinate Judge is right and ought to be affirmed. I would therefore dismiss these appeals with costs.

ADAMI, J.—I agree.

Appeals dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3077 OF 1918.

December 1, 1919.

Present:—Mr. Justice Martineau.

LUCHHMAN DASS AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEVI DIAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 3, 4—Dismissal for default—Application to set aside order—Forum, proper.

An order of dismissal for default can, under rule 4 of Order IX of the Civil Procedure Code, be set aside only by the Court which passed the order. [p. 585, col. 1.]

Second appeal from the decree of the District Judge, Shahpur, at Sargodha, dated the 29th June 1918, affirming that of the Munsif, 1st Class, Shahpur, dated the 28th January 1918.

Mr. *Badar Din Qureshi* for Dr. *Nand Lal*, for the Appellants.

Mr. *Ganpat Rai*, for the Respondents.

JUDGMENT.—The plaintiffs in this case sued for Rs. 592 on the basis of an agreement to supply wheat. The suit, after being first sent for disposal to the Court of the Munsif of Shahpur, was transferred to the Court of the Munsif of Bhera, who on the 24th April 1915 dismissed it for default. The plaintiffs, who had received no intimation of the date for the hearing of the case, made an application to the Senior Subordinate Judge at Sargodha, on the 9th June 1915, inquiring in which Court the case was and asking that if it had been dismissed, it might be restored. Enquiry was made in the office and it was ascertained that the suit had been dismissed for default by the Munsif of Bhera. The

plaintiffs then on the 14th June made a fresh application for the restoration of the case to the Senior Subordinate Judge, who sent it for disposal to the Munsif of Sargodha. The latter restored the case to the file and finally passed a decree for Rs. 440 in the plaintiffs' favour. The decree has been upheld by the District Judge, and the defendants have filed a second appeal in this Court.

The two main contentions on behalf of the appellants are (1) that the Munsif of Sargodha had no jurisdiction to set aside the order of the Munsif of Bhera dismissing the suit for default and (2) that the application for restoration of the case was barred by limitation.

The first contention is correct, for reading together rules 3 and 4 of Order IX, Civil Procedure Code, it is clear that the Court which can under rule 4 set aside an order dismissing a suit for default is the Court which passed the order of dismissal. The application made by the plaintiffs for the case to be restored could not be entertained either by the Senior Subordinate Judge to whom it was made or by the Munsif of Sargodha to whom it was sent. *Shib Lal* v. *Paras Ram* (1), which is referred to by the learned District Judge, is not in point, because in that case the application in question, which was one for setting aside an *ex parte* decree, had actually been made to the Court which passed the decree, although it was afterwards transferred to another Court. Had the plaintiffs' application in the present case been made to the Munsif of Bhera and then transferred to the Court of Munsif of Sargodha, the latter would no doubt have been competent to dispose of it, but this was not done. The application was presented to a Court which had no jurisdiction and was also disposed of by a Court which had no jurisdiction. The order of the Munsif of Sargodha setting aside the dismissal of the suit having been passed without jurisdiction, it follows that all the subsequent proceedings in the suit are *ultra vires*, and the decree must consequently be set aside.

There is no necessity to go into the question of limitation and consider whether the District Judge was right in applying section 151 of the Civil Procedure Code.

I accept the appeal, reverse the decrees of the Courts below, and restore the order of the Munsif of Bhera by which the suit was dismissed for default. Under the circumstances I direct that the parties shall bear their own costs throughout.

Appeal accepted.

(1) 42 Ind. Cas. 242; 84 P. W. R. 1917; 86 P. L. R. 1917.

SIND JUDICIAL COMMISSIONER'S COURT.

SUIT No. 365 OF 1917.

September 24, 1918.

Present:—Mr. Kemp, A. J. C.

FIRM OF GOBINDRAM—PLAINTIFFS

versus

FIRM OF KHUSHALDAS—DEFENDANTS.

Contract, construction of—Contract for delivery of sugar—Contract on "usual terms"—Late shipment—Office contracts, meaning of—Shortage of steamers—Force majeure clause, when can be taken advantage of.

Plaintiffs entered into four contracts with the defendants at Karachi on the "usual terms" for the purchase of 60 tons of Java sugar, July-September 1917 shipment. Owing to the war and the Government requisitioning tonnage, part of the July 1917 shipment was shut out at Java and July shipment goods arrived in Karachi, some in August 1917 and the remainder in February 1918. Plaintiffs demanded delivery of the goods in August 1917 and were informed that July shipment goods were still to come. In September they again demanded delivery and were informed that the defendants were entitled to perform at any time up to the arrival of the steamer. In response to a further demand for delivery the defendants intimated that they had been advised that on account of Government requisitioning steamers August and subsequent shipments would be late and that it would be taken as a case of "Force majeure." The plaintiffs were also informed that the defendants were entitled to tender delivery at any time until arrival of the last steamer of July shipment, which was yet to come. In October, that is, before the last steamer arrived, plaintiffs instituted the present suit claiming damages for breach of contract owing to defendants' failure to tender the sugar of the July shipment by 12th September 1917, the latest date by which such shipment sugar could be tendered for delivery under the contracts. The defendants contended that the contracts were made on the usual terms of office contracts, by virtue of which in case of delay in shipment due to unavoidable circumstances they were exempt from liability. In other words, the benefit of what is

known in the contract forms of importing firms as the "Force majeure" clause was claimed:

Held, (1) that the contracts between the parties were on the terms of the office contracts with the buyers, meaning thereby that the parties were bound by the terms of those contracts as to whether the goods tendered were such as could be tendered as July shipment goods; [p. 909, col. 2: p. 910, col. 1.]

(2) that the defendants were entitled to wait till the arrival of the last steamer, and could take advantage of the "Force majeure" clause; [p. 910, col. 1; p. 909, col. 1]

(3) that the plaintiffs' suit, having been instituted before the arrival of the last steamer, was premature and must be dismissed. [p. 913, col. 1.]

Mr. *Ruxchand Billaram*, for the Plaintiffs.

Mr. *T. G. Elphinston*, for the Defendants.

JUDGMENT.—By four contracts of different dates in 1917 made on "usual terms," defendants agreed to sell plaintiffs in all 600 tons white Java sugar July-September 1917 shipment, 3 equal lots at different rates. The four acceptance memos. relating to these four contracts have been put in and marked Exhibits 1 to 4 in the case. The contracts were entered into on the following dates, for the following quantities and at the following rates:—

Contract	dated	20-3-17	for	75	tons	at	19	0	0	per cwt.	(Ex. 1)
"	"	31-3-17	"	150	"	"	18	14	0	"	(Ex. 2).
"	"	11-7-17	"	225	"	"	17	8	6	"	(Ex. 3)
"	"	21-7-17	"	150	"	"	19	13	0	"	(Ex. 4)

The acceptance memos, Exhibits 1 and 2, describe the contracts referred to in them as having been made on "usual terms," etc., and acceptance memos. Exhibits 3 and 4 describe the contracts referred to in them as "subject to usual terms and conditions." The present suit relates to the July shipments aggregating 200 tons.

Plaintiffs claim that defendants committed breach of the contract in that they failed to tender the sugar of the July shipment by the 12th September 1917, the latest date when according to the plaintiffs such shipment of sugar could be tendered for delivery under the contract. They fix this date thus. They concede that the 10th August is the latest date for shipment at Java of July shipment and calculating that the voyage, without transhipment, from Java to Karachi would take three weeks and allowing 10 or 11 days for the ship to discharge her cargo on to the Bunder and for the seller to obtain the necessary delivery orders, etc, the 12th September 1917 is the reasonable date on which to expect the latest July shipment goods to be ready for delivery. The plaintiffs thereupon assess their damages as of that date at Rs. 15,515 10 0, being the aggregate amount payable under the contracts on the basis of the difference between the market rate of 12th September 1917 (Rs. 22-8-0) and the contract rates.

Defendants in their written statement contend that the contracts were made on the usual terms of office contracts by virtue of which delay in shipment due to unavoidable circumstances exempts the seller from liability. In other words, the defendants claim the benefit of what is known in the contract forms of the importing firms as the "Force Majeure" clause. The position is this. Neither the plaintiffs nor the defendants themselves import Java sugar. By their contracts they contemplate a sale of imported goods of a certain shipment *ex* Bunder. Performance may take place at any time upto the last date that July shipment goods can arrive and be available for delivery. Thereafter, the sale will not be *ex*-Bunder. But the parties have made their contract according to the terms of the office contracts, and by these July shipment goods, though shipped late, are still under certain circumstances regarded as July shipment goods and in some cases, only if the office insists on the performance. Therefore, defendants say, plaintiffs must wait till the arrival of such goods for the defendants to perform. It depends on the terms of each office contract whether the goods late shipped are by the indent to be accepted, *i.e*, regarded as July shipment. If they are not, then the defendants cannot rely on them as July shipment goods. This is what is meant when it is said that the "Force Majeure" clause is inserted in the contracts between the parties.

Now it is common ground that the goods shipped between 20th June and 10th August at Java are by the custom of trade

regarded as July shipment goods. The defendants' contention operates on the following state of affairs which arose in 1917. Defendants say that owing to Government requisitioning all steamers of the only two regular lines of steamers that run from Java to Karachi, part of the July 1917 shipment sugar was shut out at Java. Whereas sugar of July shipment would in ordinary times arrive at Karachi at the latest in the beginning of September and be available for delivery about the date the plaintiffs contend for, it happened that in the present case, owing to the Government requisitioning the steamers, the last steamer to leave Java before the Government action was the S. S. "Rajah" which arrived here on 15th August 1917. As a matter of fact, another steamer with July shipment goods arrived here after the S. S. "Rajah" although leaving Java before her. That steamer was the S. S. "Dogra" which did not arrive here till 20th August 1917. Defendants say that there were 300 tons of July shipment belonging to David Sassoon and a quantity of similar shipment goods belonging to an Indian importer Gobindram Murlidhar, which were shut out at Java, and owing to the impossibility of obtaining tonnage these goods could not be shipped until so late as January or February 1918 on board the S. S. "Kanjean," which arrived at Karachi on 25th February 1918. Defendants say the time for performance remained open till then, as delay in shipment owing to war causes beyond the control of the importers is provided for by the terms of the contracts of the importing firms and by David Sassoon's indent and such delay is, therefore, provided for in their contracts as a "usual term" of the offices. If the plaintiffs had desired performance of the contracts, the defendants would have tendered them a delivery order from David Sassoon by the terms of whose indent the goods, though shut out, were a good tender of July shipment to their buyers. Gobindram Murlidhar's contract with his buyers being on the same terms as that of an importing firm with a printed form of contract, a delivery order tendered to plaintiff by the defendants would have had the same effect. At any rate the defendants say plaintiffs were bound to wait till the "Kanjean's" arrival to see if defendants would perform and if there had been breach then by the defendants, they would be liable at the market rate of that day for July shipment goods. They say that the "Force Majeure" clause contained in the offices' contracts extended the time for performance till the arrival of S. S. "Kanjean".

One can grasp that position better if one considers the various kinds of transactions in Java sugar which are entered into in this city, but before doing so I may refer to one further point at issue between the parties and that is this, that whilst both parties admit that July shipment covers goods shipped on board ten days before and 10 days after the shipment month July, the defendants contend that the goods are of July shipment *if delivered* at wharf of the port of shipment within the shipment period, *viz.*, 20th June to 10th August. The defendants also contend that apart from the incorporation by the use of the phrase "usual terms" of the "Force Majeure" clause in the importing firms' contracts into their contracts with the plaintiffs, the action of the Government in requisitioning steamers was such as to excuse the delay in performance or the performance altogether by the defendants of the contracts. The written statement is shockingly drawn and is a model of vagueness, but this I take to be the meaning of clause 6 of the written statement, which is apparently an attempt to rely on those recent decisions which have inserted the existence of an implied condition of possibility of performance into certain contracts and to add to them the further question whether the delay excused is such as to defeat the commercial venture or not.

Also it must not be forgotten that as the case was filed long before the "Kanjean" landed at Java, defendants could not very well say in it which particular office's indent would apply.

Now to properly understand this case, it is necessary to have in view the kinds of transactions which are entered into here in Java sugar. The persons engaging in this business are, firstly, the importing firms, most of whom are Europeans. All these European firms have printed indent forms containing the terms on which they do the business with their buyers. Strictly

speaking, these are not indents, for the importing firms do not place orders for the dealers but themselves buy in Java and sell to them direct. Some of the Indian importers have no printed contract forms and it is alleged that the terms on which they do business are the general terms, of the importing firms who have printed contract forms. Most of the European firms' forms of contracts have been put in (see Exhibit 30, 39 and 161). Some, if not all, of the European importing firms also buy and sell locally. In some instances they have special local purchase and sale forms, (see Exhibits 89, 139 and 175) in others they transpose the words "buyer" and "seller" in their indent forms (Exhibit 75). Besides the importing firms there are the local buyers and sellers.

Now, owing to the Government requisitioning ships, of the two lines which ordinarily carried this commodity from Java to Karachi, a portion of the July shipment sugar was shut out at Java. It is a point in issue whether it could or could not have been brought here between the arrival of S. S. "Dogra" on 20th August 1917 and the arrival of the S. S. "Kanjean" on 25th February 1918. At any rate the consequence was that a large number of disputes arose in the bazar. In the first place there were the importing firms on the one hand and their buyers on the other. Then there were the local sellers and the local buyers. A large number of suits were filed in this Court involving many lacs of rupees. The European firms, whose contracts contained printed clauses as to arbitration, claimed the benefit of those clauses and some of those suits were disposed of by arbitrators' or umpires' awards. As between the importing firm, however, which had a printed form of contract and its buyer the terms, at any rate, of the contracts were ascertained, although there might be a dispute as to the applicability or construction of those terms. The case of the local seller and buyer presented more difficulty. Apart from European importing firms who sold or bought locally, the local sales and purchases of the dealers in the bazar assumed a variety of forms. Speaking firstly of the existing practice, when a contract is made between a local seller and a local buyer, it is evidenced by a document called an acceptance letter or memo. signed by the merchant and purporting to confirm the contract made. Exhibits 1 to 4, 64 and 65 may be taken as examples of such memos in this suit and it is the meaning of the words "usual terms" which I am called upon to decide. Sometimes the acceptance memo. was on "Sidi Chiti Office" terms, in which case a direct or clean delivery order, *i. e*, one without any intermediate endorsements of any importing firms would have to be given. "Sidi" means direct and the advantage of this form of contract was that the buyer obtained delivery quicker, and for this he had to pay 2 annas or 3 annas more in the rate. Or again the memo. might be on "Sidi Chiti a named office" terms, in which case a direct delivery, order of that importing office had to be tendered. Or the memo. might be on "Sidi Chiti any European office" terms. in which case the direct delivery order of a European office had to be given. Lastly the memo. might state the particular indent, in which case the number of the indent was inserted in the memo. and goods of that indent had to be tendered.

So much for the existing practice, but it is material to consider what was the earlier practice, *i. e.*, before outbreak of the war in 1914, as it is argued that the words now in use, *viz*, "usual terms" is the equivalent of the expressions used before acceptance memos. came into force and in consequence, each side relies on the meaning of the expressions formerly employed to support his construction of the meaning of "usual terms."

Now, before 1914, instead of an acceptance memo on "usual terms" being passed, brokers used to note the contract in the merchant's book as on "office Dhara terms," or, according to the plaintiffs, with those words in conjunction with the words "Bunder delivery" either preceding or following them. As, however, some merchants began to repudiate the authority of the brokers, the acceptance memos. came into force after 1914 and in these acceptance memos. we find instead the words 'usual terms.' This expression is, therefore, intended to cover what was intended to be conveyed before 1914 by the words "office Dhara" according to defendants and "office Dhara Bunder delivery" or 'Bunder delivery, office Dhara' according to the plaintiffs. Plaintiffs' con-

tention is that, "office Dhara" whether alone or with the words "Bunder delivery", meant nothing more than that the delivery was to be according to the custom of the importing offices. Defendants say that the word 'office Dhara' meant that the contract was according to the terms of the importing offices and did not mean that only the delivery was according to the practice of those offices. The defendants say, the words 'Bunder delivery' have nothing to do with the words 'office Dhara' and mean simply that the goods are to be taken delivery of from the Import Yard as distinguished from the godown.

Defendants say that under such a contract on 'office Dhara' or 'usual terms' it was open to them to deliver sugar of any office if of proper shipment according to the terms of that office indent.

The following steamers brought July 1917 shipment goods from Java :—

S. S. "Bahadur" arriving Karachi 26th July 1917.

S. S. "Rajah" arriving Karachi 15th August 1917.

S. S. "Dogra" arriving Karachi 20th August 1917.

The next steamer to arrive was the S. S. "Kanjean" which left Java in January 1918 and arrived here on 25th February 1918.

On 21st August 1917 plaintiffs' Pleaders wrote to defendants saying that the last steamer bringing July shipment goods, *viz.*, S.S. "Dorga," had arrived and demanding delivery (Exhibit 5). On 23rd August 1917 defendants replied saying July shipment goods were still to come (Exhibit P 6). On 8th September 1917 plaintiffs' Pleaders again wrote asking for delivery (Exhibit 7). Defendants replied by their letter of 13th September 1917 (Exhibit 8), saying they were entitled to perform at any time up to the arrival of the last steamer. On 17th September 1917 the plaintiffs sent their letter of demand (Exhibit 9). Defendants on 18th September 1917 (Exhibit 10) intimated that the offices and merchants had advised them that on account of Government requisitioning steamers August and subsequent shipments would be late and they intimated plaintiffs that it will be taken as a case of 'Force Majeure'. On 29th September 1917 defendants replied (Exhibit 10A) through their Pleaders to plaintiffs' Pleaders' letter of demand, saying defendants were entitled to tender delivery at any time until arrival of last steamer of July shipment which was yet to come. On 1st October 1917 plaintiffs filed this suit. Defendants filed their written statement on 19th November 1917.

Under these circumstances my predecessor in office Mr. Crouch on 14th December 1917 framed the following issues (I read them:—

1. What were the terms of the contract? (covers paragraph 2 of the plaint and 2 of written statement).

2. When did the last steamer of July shipment arrive?

3. Has there yet been breach of contract to sell and deliver sugar July shipment?

4. Are the plaintiffs estopped from contending that the July shipment is not outcoming? (Paragraph 5 of written statement).

5. Is the contract with regard to July shipment void on the ground of impossibility of performance?

6. Is defendant protected in respect of non performance or delay in performance by the 'Force Majeure' clause, if any?

7. What damages, if any, are plaintiffs entitled to?

The case was commenced before him and on 13th March 1918 he began to hear the evidence. His last hearing of the case was in May. Thereafter he went on furlough. I considered it desirable to re-hear the evidence that had been taken before him, as it appeared to me that the procedure that had been adopted in calling, first, the defendant for cross-examination only and then the plaintiff and his witnesses for cross-examination only might be open to grave objection. I, therefore, tried the case *de novo*. I do not know where and how I could have proceeded with the evidence at the state at which it had been left. I had also in mind the observations of their Lordships of the Privy Council in *Lal Kunwar* v. *Chiranji Lal* (1), where their Lordships condemned the practice of compelling a plaintiff to call the defendant as his witness. It followed that as it

(1) 5 Ind Cas 549; 37 I. A. 1; 14 C. W. N. 285; 11 C. L. J. 172; 7 M. L. T. 57; (1910) M. W. N. 8; 12 Bom. L. R. 244, 20 M. L. J. 182; 32 A. 104 (P. C.).

appeared to me that the trial had up to the date Mr. Crouch left been irregular, I was unable to allow any of the evidence already recorded before him to be put in before me as such evidence could not be said to have been taken according to law, there having been no examination of the witnesses but merely cross-examination. I have had to mention this at some length, because both parties have continually wished to refer to what the witnesses who were called before Mr. Crouch said before him and I have had to rule it out. Although the case was in consequence lengthened, I felt it safer to restart the evidence from the beginning.

Each party had charged the other with having altered his case since the hearing before Mr. Crouch. Plaintiffs say defendants' case as made out in paragraph 2 of the written statement is that the contracts were made on the usual terms of office contracts and that the case made out in the evidence is that only the terms of the particular office apply whose delivery order the seller selects to tender, I have already pointed out that the written sta'ement has not been very clearly drawn, but it was filed before the S. S. "Kanjean" arrived and it is clear that what the defendants have throughout been contending for is that if plaintiffs wanted performance, they were bound to wait till the arrival of the S. S. "Kanjean" before they could claim defendants had committed breach of the contracts, because on board the S. S. "Kanjean" were July shipment goods which the defendants might still have been able to tender and which, although late shipped, were so under contracts covered by a term to be found in every office contract, *viz*, the clause relating to 'Force Majeure' which was, therefore, one of the 'usual terms' in the contracts between plaintiffs and defendants. The correspondence shows this, as the defendants in effect wrote on 13th September 1917 (Exhibit 8) saying they were entitled to perform at any time up to the arrival of the last steamer. See also their letters (Exhibits 10 and 10A) of 18th September 1917 and 25th September 1917. It must not be forgotten that the written statement was filed before it was known the "Kanjean" could load, so defendants could not very well say at the time the terms of David Sassoon's or Gobindram Murlidhar's indent would apply until they knew what goods were coming and by which steamer. Plaintiffs do not go so far as to say that 'the seller must have already purchased goods when he makes the contract of sale. The evidence shows he need not. The point is, when could it be said the defendants could no longer perform their contract? Plaintiffs say when the July shipment goods ex-S.S. "Dogra" were ready for delivery. Defendants say when the July shipment goods aboard the S. S. "Kanjean" were ready for delivery and if he failed to tender them. This turns on the question, was the 'Force Majeure' clause in the office indents included in the contracts between the parties?

I do not think too great attention should be paid to the attempt of the witnesses who after all were only laymen to define the meaning of 'usual terms.' Plaintiffs' witnesses all meant the same thing, *viz.*, that if by the office's indent the goods were tenderable as of the particular shipment, they were also so tenderable as between plaintiffs and defendants. They have expressed this in a variety of ways by saying the contracts of the importing offices apply, and that the terms of the office whose delivery order is tendered apply. The 'Force Majeure' clause is a clause common to all the indents and is also in David Sassoon's indent.

The first issue is what were the terms of the contract between the parties? In order to determine this we must ascertain what the parties intended by 'usual terms.' Now the first thing to note is that defendants were not selling to plaintiffs ready goods in the bazar, which they could have no apprehension they might be unable to supply. They were selling goods of a particular shipment which were to be brought from Java. There were many unforeseen things that might happen to the goods before reaching the ship and which might cause delay in shipment. It is unlikely that when the offices who import these goods inserted in their contracts with the buyers all kinds of conditions to safeguard them (the importers) against the possibility of events, over which they had no control, delaying shipment, local sellers could contract for the sale of goods to be imported

without such or similar conditions. If the importers considered the probability of their being able to ship the goods within the shipment period was not unaccompanied by a certain degree of risk, it could scarcely be expected that local sellers would contract unconditionally to supply such goods. This seems to me a point against plaintiffs' contention that the words 'usual terms' merely referred to the method of giving delivery of the goods.

We have the origin of this term disclosed in the evidence. There is no disagreement about this, at any rate that before the war the brokers used to note the contracts in the books of the merchants but since the war the practice has been to pass acceptance memos. In these acceptance memos. are found the words 'usual terms'. There is a dispute as to what were the words used when the brokers noted the contracts.

The evidence shows the words were 'office Dhara' with or without the words 'Bunder delivery,' which when accompanying 'office Dhara' sometimes preceded and sometimes followed those words. Plaintiffs, in order to associate the 'Dhara' with the delivery to which alone they say it applied, attempted at first to show that the words 'office Dhara' never occurred alone but were always accompanied by the words 'Bunder delivery.' This, however, is not so. Defendants' witness, Ramji Kewalram, has produced his *soudas* book, which shows entries of *soudas* made by the broker in which the words 'office Dhara' appears unaccompanied by the words 'Bunder delivery' (see Exhibit 138). It is true that these are the only entries in the whole book in which the words 'office Dhara' appear alone, but the fact that the words are entered there alone tends to show that there is no connection between the 'office Dhara' and the delivery at the Bunder. I take this to be the effect of all such entries shown in the evidence. If this be the effect, then the mercantile equivalent before the war of the words 'usual terms' was the terms of the offices. Other entries in which the words 'office Dhara' appear alone are Exhibit 11, a Kutcha slip sent by plaintiffs' Shikarpur branch to plaintiffs in Karachi and containing the terms of a contract on which plaintiffs here issued an acceptance memo (Exhibit 12), Exhibits 114 5, Noondh entries of 1913 and 1915, and Exhibit 103 which is an entry of a contract in the books of defendants' witness Abdul Husain. This last witness says he has 27 *souda* entries in which the words 'office Dhara' alone appear. It is true that they go over a period of some years but the point is they are sufficiently numerous to show the words 'Bunder delivery' were not omitted by accident. These entries were made before the disputes had arisen. Moreover, the occurrence of the words 'Bunder delivery' in close proximity if not next to words 'office Dhara' does not by any means suggest that one qualifies the other. I think it is probable in writing the contract they would appear in juxtaposition.

If we turn to see how the same idea that was present to the minds of these parties was expressed by other merchants in their local sales and purchases of this commodity, we find the following expressions used in the market.

In Exhibits 27 and 28 (two acceptance memos.) "subject to usual office agreement terms", in Exhibits 54 and 55 (five acceptance letters) "subject to usual agreement terms", in Exhibits 89 and 90 (David Sassoon's local purchase and repurchase forms) "Ex-Bunder Karachi including duty usual term", in Exhibit 175 (Louis Dreyfus & Co.'s local purchase form) "on usual Bunder terms", Exhibit 139 (Mitsui Bushan Kaisha's local sale form) "terms as customary," Exhibit 104 (acceptance letter) "subject to usual terms" and again "according to office terms", Exhibits 103, 114 and 115 (Noondh entries of *soudas*) "office Dhara", and Exhibit 138 "office Dhara". Exhibit 27 is an important document. It is an acceptance memo. passed to plaintiffs themselves and it contains the words "usual office agreement terms." Teckchand, one of the partners in plaintiffs' firm though not the principal partner, when called upon to explain this, could only say the person who passed his acceptance memo. Exhibit 27, one Chandumal Chellaram, wrote it in English and he did not understand it. Then there are other entries relating to *soudas* in which the words "office Dhara" and "Bunder delivery" are separated by other words, showing that there could be no con-

nection between them. These are Exhibit 138 (a series of entries in the witness Tekchand Pershotam's book) and Exhibit 87 (an entry in the broker Poker Kishindas and Co's Noondh).

Exhibit 87, after mentioning "the rate of Rs. 15-10-6 per cwt Bunder delivery," continues "the purchaser will be responsible for the increase and decrease in customs duty according to office usage," etc. This clearly shows that there could be no connection between the delivery and the "office Dhara." I think the deduction from all these documents is that the words "usual terms" were not intended to be restricted to the method of delivery. They suggest there are some terms which are current in the trade and so well known as to be incorporated without being specifically set out in the acceptance memos. I draw this conclusion not only from the absence of all connections in the memos. between such expressions as "usual terms", "terms as customary," "office Dhara" "and delivery," but also because, as we have seen, in the case of local purchase forms of several large firms we have an express reference to the terms intended being without words of qualification the terms of the offices. Moreover in *Rupchand Ramchand* v. *Hukumatrai* (2) we have a judicial interpretation of the translation of "office Dhara".

Before proceeding to the oral evidence of the witnesses as to the meaning of the words "usual terms" it is advisable to refer to the procedure in this business which the parties have sought to avail themselves of to support their respective contentions. I refer firstly to the sending of '*miti khari*' notices. A '*miti khari*' notice is a notice of arrival of the ship or readiness to deliver. The former practice used to be that when the ship carrying the particular shipment goods arrived, the importing firm sent a '*miti khari*' notice to its buyer. That buyer endorsed the date with his buyer and sent the notice on to him and so on. Ultimately the last buyer went to the office of the importing firm, paid the price and obtained the delivery order. Accounts between the different sellers and buyers were subsequently adjusted (see evidence of Yusifali, lines 296 7). It is noteworthy that so long as the original chits were handed on, it was impossible for the local sellers to notify arrival of a quantity exceeding that stated in the original '*miti khari*' notice. After the war, the buyer from the importing firm, on receipt of a notice of arrival from the firm, went to the office and paid the price and received the delivery orders. This delivery order was handed on from buyer to buyer and the last holder went for delivery. At the same time the 1st buyer and subsequent buyers also issued '*miti khari*' notices on themselves to the purchaser but they did not state the quantity of the goods that had arrived nor the name of the steamer (see Exhibit 103). The object of this was to intimate a readiness to deliver and if, say, only 20 tons out of 50 tons contracted for were delivered under the *miti khari* notice of tender of the whole quantity, the rate was settled in one way or another. The point is that this practice enabled local sellers to profess to tender for much larger quantities than they would get under the delivery orders and thus encouraged speculation. Ultimately the evidence shows the issue by a local seller of the *miti khari* notice became altogether independent of the arrival of a ship and was utilized merely as an expression by the local sellers of an intimation to conclude the contract either by payment of damages at the market rate, effecting a cross contract or what is known as '*pich pichao*.' This last expression is the settlement by which if various sellers and buyers have contracted with one another so that their transactions go round in a circle they meet together and adjust the transactions *inter se*. All these various ways of settling contracts are known as "*bhugtan*" (lit. fed.) These expressions have been used over and again in the evidence and I have, therefore, had to refer to them. The form of *miti khari* notice, therefore, issued since 1914 by the local sellers on their buyers did not contain the name of the importing firm whose delivery order was going to be tendered. A specimen of such notice is Exhibit 42.

This evidence regarding *miti khari* notices and the practice in respect of them before and after the outbreak of the war was really led to support the defendants' contention that the parties to contracts in

(2) 42 Ind. Cas. 829; 11 S. L. R. 56 at p. 59.

the bazar adopted the same procedure on the ship's arrival as the importing firms did and did so in order to entail the same consequences on their buyer as followed under the terms of the indents from the service of a '*miti khari*' notice on the buyer from an importing firm, *viz.*, liability for demurrage, interest, etc, if delivery was not taken within a certain time from receipt of such notice. Defendants wanted to show that the local sellers imposed these same conditions on their buyers and to deduce therefrom that 'usual terms' or 'office Dhara' meant the terms of the offices. But it is clear from the evidence that defendants' contention cannot receive support from the practice of imitating, when a ship actually arrives, the procedure adopted by the importing firms, because the despatch of a *miti khari* notice has now degenerated into a method of intimating a desire to settle the contract and none of the consequences contemplated by the importing firm's notice could in such a case follow.

There has been a good deal of guess work by the various witnesses on both sides as to within what time the bazar requires a buyer to take delivery. At one time plaintiffs allege that there was a written bazar agreement on the point which required delivery to be taken within 16 days, but that agreement has been burnt and only secondary evidence of its contents can be given (see evidence of plaintiff line 331 and of Kodumal). Mr. Rupchand for plaintiffs, however, does not rely on this agreement. Turning to the importing contracts it will be seen that some of them (*e. g.*, E. D Sassoon's and Volkart's, Exhibits 32 and 33 respectively) give the buyer 7 days for taking delivery, whilst others (*e. g.* David Sassoon and Ralli, Exhibits 30 and 31) give him 10 days. David Sassoon's indents provide for a re-sale and brokerage, warehousing, fire insurance, commission and interest charges after the 10 days allowed for delivery. Ralli's indent contains a similar clause except that interest is charged at 9 per cent. from the 11th day, instead of at 6 per cent. from 11th to the 20th day after ship's arrival and thereafter at 9 per cent. as provided for in David Sassoon's indent. E. D. Sassoon's and Volkart's indents provide for interest at 9 per cent. after 7 days from steamer's arrival. Volkarts also can claim $\frac{1}{4}$ per cent. re sale brokerage, whilst David Sassoon's indent provides for $\frac{1}{2}$ per cent. There are thus minor points of difference and it is in evidence that the firms only insist on their strict rights as to re sale, brokerage, commission, etc, when a buyer has given them a lot of trouble (see evidence of defendants' witness Nusserwanji, line 360). There seems to have been a general idea in the bazar that the terms between the offices and their buyers should regulate the dealings between the local sellers and buyers, for we find the plaintiff Tekchand at line 313 of his evidence admitting that the former practice was that interest was charged according to the contract of the office when delivery order was given, but he continues to say that interest is now charged after 7 days according to the bazar agreement which was burnt. It is to be noted that 7 days is the period provided in some of the importing firms' indents. At lines 337—343 plaintiff admits if he buys on usual terms and delivery is offered from Ralli's or Volkart's, he is bound by the time for delivery laid down in Ralli's or Volkart's indent respectively. He then goes on to say "interest is still charged since the agreement after expiry of 7 or ten days according to the order of the office." See also, as to the local sellers' right to claim commission on resale, the evidence of Luxmandas at line 113. The evidence further suggests that the *miti khari* notice must be given within 3 days of the ship's arrival. Madhowdas, plaintiffs' witness No. 7, at line 19 onwards says the "*miti khari*" notice is issued within 3 days of ship's arrival and that the buyer must come within 7 days after the receipt of the notice. Then he goes on to say seller must wait 15 days for him according to the committee rules, meaning apparently the burnt agreement. The bazar seems, therefore, to have attempted to adopt the stipulation as to interest in the importing firms' indents. The evidence as to other clauses in the indents running in the bazar varies according to the particular clause. The 10 days' margin before and after the month of shipment allowed by the importing firms' indents is current in the bazar as describing a particular month's shipment (see *e. g.*, evidence of plaintiffs'

witness No. 2 Parasram line 171, plaintiffs' witness No. 5 Hemandas line 52, and plaintiffs' witness No. 6 Lakhamsi line 80). So also the clause exempting the importing firms from responsibility for bags damaged by sweat or rain (see evidence of Nusserwanji defendants' witness No. 4 lines 320-1, witness No. 1 Girdharilal line 209, plaintiff Teokchand line 225). On the other hand the evidence relating to clauses in the indents referring to arbitration and insolvency being current in the bazar is meagre. In *Lenz* v. *Lalchand* (3) Crouch, A. J. C., held that the arbitration clause would not be incorporated by the use of the words "office Dhara." As to the war insurance rate charged by the importing firms, the bazar sellers seem also to have charged for war risks but not at quite the same rate (see evidence of plaintiff Teokchand line 26, and defendants' witnesses Nusserwanji line 348, and Laxmandas witness No. 3 line 102), but it seems to me that all this and other oral evidence to prove the terms of indent were incorporated by the use of the expression "usual terms" travels beyond what the defendants have to show in this case. I have already pointed out that they are out to prove that the goods under David Sassoon's or Gobindram Murlidhar's contracts with those firms' buyers were tenderable as July shipment goods under the indent of those firms and were, therefore, to be recognised as such by the plaintiff. It will be enough if the defendants show that the 'Force Majeure' clause in the indents was recognised in the contracts with plaintiffs as stamping the goods ex S. S. "Kanjean" with the description of July shipment goods.

The oral evidence on the point may now be considered. A large number of witnesses have been called on both sides. As I have considered the onus of proving what the terms included in "usual terms" were lay on the defendants, I compelled them to call their evidence first. I will, therefore, now deal with their oral evidence. Defendants' first witness was Gidumal Lekhraj. He is president of the Indian Merchant Association and one of the public men of the city. His firm is Tahilram Wadhumal and he says they have done business in sugar for fifty years. They are guarantee brokers to Messrs. Ewart Ryrie and Co. After describing the origin of acceptance memos. he says (line 32) "they are on 'usual terms' *i.e.*, same as 'office Dhara' before. The terms are as contained in the European offices' printed contracts, so far as they can be applied. In office contracts there are terms regarding late shipment for war, etc. They would apply to the bazar contracts. Indian merchants cannot do any business on any other terms because we buy from the offices and sell on the same terms." This is significant corroboration of the natural inference that local sellers would not undertake the risks which the offices guard against by the printed clauses in the indents. Later on at line 82 he says: "If a delivery order of a particular office be given, the buyer is bound by the particular terms of that office." Later on at line 232 he says in cross-examination "all contracts in bazar are on office Dhara terms," and then at line 250 he points out that a contract for a Chiti on a particular office would not be followed by the words 'office Dhara,' because of course the terms incorporated would be the terms of the particular office. I summarize this evidence to be that all contracts in the bazar on "usual terms" are made on "office Dhara" terms, *i. e.*, the general terms, of the offices so far as they are applicable, and that of a delivery order of a particular office. If the delivery order of any office is given, the buyer is bound by the terms of that office, *i. e.*, if the delivery order be a good tender by the terms of that office he must accept it. The purport of this evidence shows that plaintiffs have, by contracting on usual terms, agreed that shipments impressed with the description of July shipment under the terms of the office contracts shall be so accepted by them and when the delivery order of any one firm is tendered, the question as to whether that delivery order is July shipment goods will depend on the terms of that office's indent. On that will depend the question whether defendants have committed breach or not. If no such goods could arrive after plaintiffs filed their suit, then plaintiffs have a good cause of action; but if there were such goods which could arrive, defendants might still perform and plaintiffs must wait till the arrival of such goods to see whether defendants would perform. It is objected by plaintiffs that this witness is defendants' partner, but the evi-

(3) 19 Ind. Cas. 925; 6 S. L. R. 278 at p. 283.

dence shows (line 90 onwards) that it is only in certain cases they have entered into transactions in partnership. On the other hand, they are partners with defendants in the guarantee brokerage business to Ewart Ryrie and Co., who are concerned in similar disputes. Moreover this witness has sold more July shipments than he has bought. I have regard to all this in estimating the value of his evidence.

Defendants' next witness is Oodharam Tarachand, who is the broker to David Sassoon's, Ralli's and E. D. Sassoon's and claims to be one of the largest buyers in Karachi. He says, line 10, that before acceptance memos. the broker used to note the contracts as being on office Dhara terms, *i. e.*, the terms of the importing firm's written agreement. He says that the acceptance memos. are made on the same terms and produces entries of contracts in which the words are 'Bunder delivery, office Dhara' (Exhibits 63-4), plaintiffs being one of the parties to Exhibit 64. At line 51 he says "if the contract is made according to the office Dhara, the buyer is bound by the terms of the delivery orders of the office tendered. Sellers can give delivery orders of any office, that is to say, the parties agree that they will be bound by the terms of the offices and it is left to the local seller to select a particular office later on." It is clear when he says the buyer is bound by the terms of the delivery orders of the office, he means the terms of the office whose delivery order is tendered. Later on, line 200, he says "office Dhara" means that seller can bind his buyer by the terms of any particular office. He can exercise this option up to any time the steamer arrives. If he does not exercise this option, he must pay damages according to the market. The plaintiffs contend that this is a case not set up in the delivery order and as I have pointed out it is; because when the contract is made, the seller cannot say, unless he has already bought the goods, which firm's delivery orders he will tender and the agreement, therefore, is that the terms of the importing firm's indents shall apply and it is left to the seller to select the particular indent when he tenders performance. This case also has throughout been put forward in the evidence and the plaintiffs are not taken by surprise. The sincerity of this witness's view as to the meaning of 'office Dhara' in the trade is corroborated by the fact that he produces entries of forward contracts for July shipment, effected by him on 23rd August 1917 after the S.S. "Dogra's" arrival, which he was not likely to have done if no July shipment could be tendered after that steamer's arrival (Exhibits 65-6).

Defendants' 3rd witness is Luxmandas, who is Vice President of the Sugar Society and has done business in Karachi for the last 20 years. He says at line 13 "office Dhara" means to take delivery at Bunder on payment at office, not to accept goods damaged by sweat or sea-water, and the other terms of the agreement of the importing firms. At line 30 he says the seller can give delivery order of any office. Certain objections have been urged against this witness's evidence by the plaintiffs. They say he has sold more than he has bought both for July and for August-September shipments and, therefore, it is to his interest to support defendants' contention and secondly he says (line 24) that contracts go off if the last steamer be sunk. As regards the first objection I find that nearly all the witnesses on both sides are interested one way or the other, but the point I have to decide is whether this interest is sufficient to justify me in discarding their evidence. How far has their evidence been corroborated by their conduct? It appears this witness was present at the meeting on 22nd August 1917 of the Sugar Association at which certain persons were selected to find out from David Sassoon's whether they had still goods to arrive. The plaintiff Teckchand was at that meeting. It is unlikely Luxmandas could have attended a meeting for that purpose if he had believed that the S. S. "Dogra" had brought the last lot of July shipment sugar. I think this corroborates his evidence. I am aware plaintiffs contend the meeting was only to see whether the contracts of those who had bought from David Sassoon should remain open and that the contracts of the others should be settled or closed, but I cannot see any object in the meeting unless there had been a dispute as to whether the last July shipment had arrived and as Luxmandas had not bought from Sassoon, I cannot see why he should go to the meeting unless he

considers July shipment might still arrive. The objection to this witness's evidence refers to his answer to hypothetical questions as to what would be the result if the last steamer carrying July shipment goods was sunk and questions of a similar nature. I do not value his replies to those questions very highly, because they are really questions which it would be for a lawyer to answer and to which, unless there were an actual proved instance, a merchant could only give his opinion. These observations apply equally to similar questions asked of other witnesses.

Defendants' next witness is Ralli's salesman, Nusserwanji. He says that Ralli did not import any July shipment goods but sold locally. He says (line 7) "usual terms" are same as office terms and that a contract in 'office Dhara' means the buyer and seller are bound by the terms of the indent under which the seller has bought or may buy from an importing firm. The seller decides what importing firm's goods he will tender. Ralli's themselves paid differences on the S. S. "Dogra's" arrival expecting her to be the last steamer. They had paid up on all their cross-contracts by 28th August 1917, but they settled some half dozen contracts after the arrival of S. S. "Kanjean". In this instance they were intermediaries (line 122 and line 243—60). Some suits were filed against Ralli for August September shipments but all except two of those have been withdrawn, as the market went high and the plaintiffs took delivery (line 417). It is, therefore, suggested there salesman's evidence is prejudiced. Ralli's local purchase form (Exhibit 75) is the same as their indent form, except that the names of the sellers and buyers are transferred. That at any rate shows that Rallis incorporate their indent terms when purchasing locally, and to hold that other local sellers and buyers do not intend to incorporate the terms of the 'Force Majeure' clause in the indents in their contracts could mean that Rallis adopt a form which is inconsistent with the general practice in the bazar. I think this corroborates the witnesse's view of what the meaning of usual terms is. Plaintiffs have cross-examined this witness regarding an arbitration in 1915. Exhibit 68 is the award under which Rallis had to pay a claim for goods short delivered, although David Sassoon whose delivery order was tendered to them tendered short delivery. It appears, however, that Rallis had given notice of arrival of the whole quantity and Nusserwanji says that was why the award went against Rallis. Nusserwanji also says (line 156) that an award passed between the importing firm and its buyer holds good between subsequent sellers and buyers. If such an award determines the shipment and, therefore, the description of the goods, it may be binding on later buyers as constituting the goods of that particular shipment. It may be, however, that if the local seller and buyer are not bound by the arbitration clause in the offices' indents, the Court would have to say whether as between such local seller and his buyer the goods were tenderable under the terms of indent as contract goods. That is not a point which I have to decide in the present case, and I therefore, refrain from discussing it. Some confusion has, however, been introduced. Plaintiffs seem to think that the defendants' case is that the arbitration clause in the indent means that the local seller and buyer must go to arbitration. That is not so and has been held out to be so in *Lenz* v. *Lalchand* (3). Defendents' case is that the award between the importing firm and its buyer determining the character of the goods determines it likewise between the local seller who tenders a delivery order of that firm and his buyer.

The defendents' next witness on this point is Mohamedali Hussainbhai (Crimji) whose firm has done sugar business for the last 30 years. At line 9 he says "acceptance memos." are exchanged. They contain words "usual terms". That means 'office Dhara'. At line 35 he says "office Dhara" is the term of the office whose delivery order seller gives him. Now what does this mean? It is stated, no doubt, generally, but there is the same idea running through all the answers and that is that if the goods are a proper shipment by the terms of the office, the local buyer must accept them from his local seller. This witness has some suits pending regarding July shipments for large amounts and no doubt it is to his interest to support defendants

contention. Unfortunately, nearly every witness in the case is mixed up in the decision of the question in this suit and this objection can consequently be hurled at the witnesses indiscriminately by both parties. Moreover like most of the witnesses on both sides, when he received notices from his buyers claiming damages he adopted their contentions against his sellers not because he believed they were substantial objections but in order to safeguard himself, if the Court should hold they were. Thus he says he bought from Forbes, Forbes, Campbell and Co. July shipment and they tendered 50 tons S. S. "Kanjean" but he declined to accept, as the plaintiffs who were the last holders of the D/O. refused to take delivery. This witness, besides entering into cross contracts on 20th August 1917, 8th September 1917, 30th August 1917, 17th September 1917 and 21st September 1917 with various merchants, all except the first being dates subsequent to the arrival of the S. S. "Dogra", made forward contracts on 17th September 1917, 22nd August 1917, and 8th September 1917 with various other merchants for July or July-September shipments (see his evidence, lines 44—66 and line 122—43). This constitutes his evidence as showing that he did not regard the date of the arrival of the S. S. "Dogra" as the last date when July shipment goods could be tendered. The D./Os. in respect of the forward contracts made after that date were subsequently tendered to plaintiffs who refused to accept them (Mohomedalli, line 148). On 10th September 1917 the witness appears to have sold to his relation Yusufalli who is plaintiffs' witness 725 tons August-September shipment. Defendants rely on this, saying that as August shipment had to be shipped by 10th September, it is unlikely witness would have made this contrrot unless he and Yusufalli knew that August shipment goods could still be tendered under the indents, although shipped late, by virtue of the Force Majeure clause.

Defendants' next witness is the defendant Changomal Khushaldas himself. It seems to me he should have been called earlier and his evidence must be taken subject to the objection that he had the opportunity of knowing what his witnesses had to say before he gave evidence himself. He says at line 11 of his evidence "usual terms" in the acceptance memos. mean "office Dhara." "Office Dhara" means the terms in the contracts of the European offices. There is a slight difference in the contracts of the European offices. Delivery is to be taken of late shipments if due to reasons beyond man's power. This term is common to all European offices. Later at line 310 the witness says "shipment is what the offices declare to be a shipment of those goods." He, therefore, clearly states his case, *viz.*, that the fact that the offices' contracts make the shipments though late on account of "Force Majeure" a good tender makes the tender also a good tender between local sellers and buyers contracting on "office Dhara" or "usual terms." It appears that his firm made two forward contracts for July shipment after the S. S. "Dogra's" arrival *viz*, 10 tons sold to Oshiram Chethandas on 15th September 1917 and 5 tons sold to Aratmal Satramdas on the same date. He says (line 43) they were not cross contracts; so his evidence is corroborated by his conduct for, of course, he would not make forward contracts for July shipment if he believed that the last July shipment that could be tendered had arrived.

Moreover defendants gave delivery of 100 tons from the S. S. "Kanjean" under a forward contract with David Sassoon. The D./Os. for these 100 tons travelled from David Sassoon and Gobindram Murlidnar through the hands of local buyers to defendants who handed them to David Sassoon. (See line 57 onwards) Similarly, defendants had a forward contract with Forbes, Forbes for 100 tons but as to 75 tons that firm would not accept the D./Os. Ex "Kanjean" as their buyers would not accept. So also as to the contracts in this suit defendants made *miti khari* on plaintiffs after "Kanjean's" arrival but plaintiffs would not accept the notices. So far as any firm accepted these D./Os. Ex S. S. "Kanjean", that of course goes to show that the buyers regarded the goods Ex "Kanjean" as July shipment goods. Of course defendants had sold much more than they had purchased—2,170 tons more—so this suit means a great deal to them, but, as I have said, there is a fact in support of these contentions that they entered into 9 forward contracts for July

shipment after the S. S. "Dogra's arrival." Still it might be contended that as these two contracts were made after the plaintiffs' letter Exhibit 5, the defendants made these contracts to create evidence. I note this possibility in estimating the value of Changomal's testimony. The defendants will also be losers on their August-September shipments if their contention in this suit be decided against them.

Plaintiffs have put in certain correspondence between defendants and Forbes, Forbes and Co., to show the position taken up by both of them, (Exhibit 93 and letters Exhibit 94, Exhibits 95-96) but a perusal of that correspondence shows that Forbes, Forbes and Co, were merely protecting themselves against the claims made by their buyers on them, and indeed in their letter Exhibit 97D, dated 2nd April 1918. Forbes, Forbes and Co., practically admit the defendants' contention and only asked to be satisfied that the goods (though arriving so late as February 1918) were of July shipment. This witness has also been asked several hypothetical questions as to what would be the result in the bazar contracts if the last shipment carrying the shipment was sunk and whether the arbitration clause in the indents applies to the contracts between local sellers and buyers. I have already pointed out that these are really questions of law, and as to the arbitration clause the question probably is not whether local sellers and buyers must go to arbitration but whether the result of arbitration between the office and its buyer decides the goods are of proper shipment or not.

The next witness called for defendants is Hormusji, salesman of David Sassoon (W. No. 9). It is urged by plaintiffs against his evidence that as David Sassoon's 300 tons Ex S. S. "Kanjean" are in dispute, his evidence will naturally favour defendants. The same objection is taken to Mr. Sawyer's evidence. Hormusji produces David Sassoon's local contract forms (Exhibits 89-90). Exhibit 89 is their local purchase form. "Ex Bunder Karachi, including duty" usually suggests that "usual terms" are, as plaintiffs say, confined to delivery. Moreover Hormusji swears that the expression means "usual office Dhara". He says (line 7). under this term we are bound to accept sugar of any importing firm. Office Dhara means the term of the European offices' contracts. If goods are shipped late and that is provided for in the office's contract, it applies to the contracts on 'usual terms'." For cross-contracts David Sassoons use the form Exhibit 90 in which the words used are "the same that you had purchased from us on.....at Rs.....per cwt. against contract No....".

Hormusji's oral evidence, therefore, corroborates that of the other witnesses for the defendants on this point. Hormusji also corroborates defendants' evidence about the purchase of 100 tons for which defendants tendered them after the arrival of S. S. "Kanjean" their (defendants') D/O. for 75 tons and one from Govindram Murlidhar for 25 tons (line 41). He also says David Sassoons were receiving quotations for July shipment up to 27th December 1917 and that inquiries were made at their office after S. S. "Dogra's" arrival as to whether they still had any goods to arrive. This refers to the irquiry made by the Sugar Association on 22nd August 1917. Lines 110—128 of his evidence give a very clear exposition of the terms of these contracts on "usual terms." So also at lines 138-141 David Sassoons had still 400 tons outstanding to deliver after S. S. "Dogra's" arrival. They effected delivery by accepting two delivery orders from defendants for 75 tons and 25 tons respectively Ex-S.S. "Kanjean" and D/Os. for the balance of 300 tons, which their buyers accepted under protest. (Exhibit 92.) This shows that David Sassoon acted up to the construction of the expression "usual terms" given by their salesman Hormusji in his evidence.

The next witness on this point is Oodharam Tarachand for defendants, the manager of Manubhai and Co., sugar merchants. At line 10 he says "office Dhara" means the terms of the contracts of sugar importing firms. 'Usual terms' and 'office Dhara' mean the same thing.

Abdul Hussain Tayabbhai (W. No. 13) has done business in sugar for the last 20 years. At line 27 he says "seller may give delivery from any steamer he wishes. He can deliver from any office he chooses." At line 94 he says 'office Dhara' means the terms of the agreements of European offices, *i. e.* those that are common in every office agreement. Terms of the office whose delivery order is given apply. If, therefore, the shipment is

a good shipment according to the terms of the offices whose D/O. is tendered, that is a good shipment between the local seller who tenders the firm's D/O. and his buyer. This witness appears to have made *miti khari* when the S. S. "Kanjean" arrived on his buyers, but as the plaintiffs were the alternative buyers the witness's buyers refused to take delivery. The witness, therefore, adopted the same attitude towards the sellers.

He appears to have claimed damages from his seller in September and November 1917 (see Exhibits 197 8) and at the same time told his buyer he was bound to wait. This witness is a "bear."

The next witness Khubchand Uttamchand (W. No. 14) is a broker who has carried on that business for the last 20 or 22 years and has during that time acted as broker for Forbes, Forbes and Co., Volkarts, David Sassoons and Chotirmal Hiranand. He says (line 6) "'office Dhara" means terms of the agreements of the European offices." Again at line 11 "Bazar merchants are bound to take delivery of late shipment on account of war or circumstances beyond one's control." At line 19 "when 3 or 4 steamers bring the same shipment seller has option to say from which steamer he will give delivery." This witness is attacked as being broker to Chotirmal Hiranand, a "bear." The witness himself has invested to a small extent for July and August September shipments.

Mr. Swayer, manager of David Sassoon who is defendants' 15th witness, says (line 15) that "usual terms" means the application of the terms of the various import houses whose goods sellers may ultimately tender to us either by buying directly or indirectly themselves at any time until the arrival of last steamer carrying the shipment of the goods in question. It is same as 'office Dhara.'" At line 48 he says "parties must wait oven though only 50 tons were shut out." He explains that in Exhibit 90 "usual terms' means the same terms on which they had sold under contract of sale, and this would be so because Exhibit 90 is a repurchase form. At line 91 he says "usual terms" is not confined to delivery. I think it is pretty clear that Mr. Sawyer has the same idea in his head that the other witnesses for the defendants have. It is in effect that if the shipment is a good shipment according to the terms of the office whose D./O. is tendered, that is a good shipment between the local seller who tenders that delivery order and his buyer.

Similarly, the witness Mulchand Chellaram (W. No. 16) says at line 16 "Seller can give delivery order of any importing firm. Terms of that firm then apply. D/Os. are sold after the steamer arrives." At line 13 he says: "Buyer must wait till last steamer. Damages are paid and received after arrival of last steamer." This witness sent notices to both his sellers and his buyers. Like most of the offices he was "hedging." He further explains the position of seller and buyer at line 75 onwards. Plaintiffs' contention is that this witness assists defendants in this case.

Mr. Lenz, manager of Volkarts, who is witness No. 17 for the defendants, says he has no personal knowledge about the bazar terms. He had not bought any July shipment locally. He says line 136: "If we buy locally independently we alter our own form by a transferring buyer and seller. If we buy back our own sugar we attach a slip to say the goods have been bought back on original contract terms." It is clear from this that when Volkarts repurchase their own sugar, they do not do so on terms which would only govern the method of delivery but by incorporating their indent terms in their repurchase contract.

Bhojraj (W. No. 21) for the defence has been a sugar merchant for last 10 or 12 years and a guarantee broker for 5 years. He says (line 2) that sugar contracts in the bazar are made on "office Dhara," *i. e.* the terms in the contracts of the different European firms; at line 12 he says "seller can give delivery from whatever steamer bringing the shipment of whatever importing firm he wishes. If sugar arrive late owing to some unavoidable cause the buyer must accept delivery."

I must say that after the defendants had called all their evidence, I intimated that in my opinion it was no use multiplying witnesses and that if the defendants had not convinced me by the evidence of the witnesses they had already called, it was for defendants' Counsel to consider whether he would be likely to convince me by calling further witnesses, and Mr, Elphinston accordingly decided to rest his case on this point on the witnesses he had called.

I think I am not summing up the evidence of defendants' witnesses on this point incorrectly when I say that on the whole they all

estify to one fact, *viz*, that if the goods are a good July shipment under the terms of the indent of the office whose D./O the local seller tenders, his buyer must accept them as such goods and consequently if any goods are still to arrive which by the indent of the office importing them will pass as July shipment goods, the local buyer must wait till the arrival of such goods before he can contend his local seller has comitted a breach of the contract. The quantity of goods late shipped does not affect the question in the present case, because it is in evidence that there were 300 tons of David Sassoon's goods late shipped and as defendants had to tender only 200 tons and the evidence shows, and indeed it is a matter of common knowledge, that D /Os. go round and round in a circle with great rapidity and can wipe off contracts for many times the quantity stated in them there is no doubt that if defendants' contention be correct, they had a reasonable probability of performing their contract when the S. S. "Kanjean" arrived. Moreover defendants allege there were in addition goods of Govindram Murlidhar of July shipment aboard the 'Kanjean," although it is true plaintiffs say there is no satisfactory proof of this in the evidence.

Let us now see how the plaintiffs say they understand the contracts between the parties. Plaintiffs' contention is that "office Dhara," whether with or without the addition of the words "Bunder delivery," refers only to the method of delivery which is borrowed from the contracts of the importing firm. "Usual terms" they also say refers to the method of delivery. Mr. Rupchand in his summing up amplified what his witnesses had said. He says that the terms borrowed from the offices are 'if a delivery order be given, the buyer must pay and go to the Bunder and take delivery by weight and if he goes late he gets out and torn bags. He is not bound to take goods damaged by sea water, and whoever is responsible for delay must pay the interest and demurrage to the extent of the delay due to him." He says these are the practices of the offices though not necessarily in their indents.

Plaintiff. Teckchand Chellaram says at line 153: "I do not understand the meaning of the words 'office Dhara.' I don't use the words. I have heard the words mean delivery is to be given in the same manner as the office gives it." At line 300 he says more positively: 'In these contracts 'office Dhara' means delivery is to be given in the same manner as delivery is given by the European firms." At line 197 he says "Buyers from the European offices sell the sugar on 'usual terms.' Their buyers do not send acceptances on 'office Dhara.'" Now this is not correct, for it appears from Exhibits 11 and 12 that plaintiffs themselves have issued an acceptance memo. in respect of a '*kutcha*' chit mentioning "office dhara." Moreover, it can scarcely be believed that when plaintiffs received that *kutcha* chit Exhibit 11 from their branch firm at Shikarpur, they did not know what the words in it "office Dhara" meant. There is nothing to suggest in that contract that 'office Dhara' was restricted to the method of giving delivery. Again Exhibit 27 is an acceptance memo. dated 18th July 1917 passed by Chandumal Chellaram to plaintiffs on "usual office agreement terms". Plaintiff Teckchand's only explanation of this is that he did not understand what Chandumal was writing in English. Exhibit 28 is another acceptance memo. by one Gangaram Chaturbhuj to Chotirmal Hiranand subject to "usual office agreement terms." It is dated 31st March 1917. Both these acceptance memos. as well as Exhibits 11 and 12 show that Teckchand's evidence on this point cannot be believed. Let us see what his witnesses say.

His witness No. 5 Hemandas, after saying at line 10: "People in bazar make contracts on a Bunder delivery office Dhara. That means the delivery is in terms of the office contracts *i.e*, the goods should be taken delivery of and removed within 7 days. Otherwise demurage, etc., in terms of office contracts will ensure," goes on at line 69 to say: "I know the expression 'usual terms.' It is the same as 'office Dhara.'" The plaintiffs have suggested at line 197 that there is a difference in saying that acceptance memos. are not sent on 'office Dhara' terms. The conflict of opinion is hightened by plaintiffs' witness No. 3 Premchand, who at line 113 says "'words' usual terms' are different from 'office Dhara' Bunder delivery.' There are more terms in the latter." This is in direct conflict with Hemendas's evidence, at line 69. Plaintiffs' witness No. 6 Lakhamsi says at line 57 "'usual terms' is not

the same as 'offise Dhara.' Usual terms means merchants' Dhara. I can't say what the difference between the merchants' and offise Dhara is. Premchand, plaintiff's witness No. 3, also had written a letter dated 7th November 19.7 (Exhibit 50) to one of his buyers saying July shipment is still to come. He says he did this as his buyers sent similar notices. Like some of the defendants' witnesses he appears to have been safeguarding himself also. But his evidence that 'usual terms' refer only to delivery is contradicted by the fact that he has entered into contracts for July-September shipments from 23rd August 1917 to 4th October 1917 (see Exhibit 154), which he would not have done if the period for performing July shipment were not extended under the offise indents.

I have pointed out how the evidence of plaintiffs' witness Hemandas as to the meaning of the 'usual terms' varies from that of the plaintiffs and Premchand. At line 52 Hemandas says that the term of 10 days of grace before and after the month of shipment is a term in contracts made on 'offise Dhara' terms. Yet this term does not relate to delivery. He goes on to say at line 58 "all the shipments terms except the 'Force Majeure' clause are incorporated in a bazar contract. 'Offise Dhara' or 'offise Dhara Bunder delivery' refers only to delivery.

Lakhamsi (plaintiffs' witness No. 6) stands to win a large sum if plaintiffs' contention in this suit be upheld. He says at line 7 "contracts are made on 'offise Dhara Bunder delivery' terms. By that I understand after the goods are landed payment of demurrage and other port trust charges are to be made according to 'offise Dhara.' It means nothing else." Presumably, therefore, as he says at line 57 that usual terms are not the same as offise Dhara, he means that usual terms is the same as 'offise Dhara, Bunder delivery' and, therefore, 'offise Dhara' and 'offise Dhara Bunder delivery' are different which is plaintiffs' case. Plaintiffs' witness No. 2 Parasram says at the beginning of his evidence "I know of the acceptance memos Before they were introduced the brokers used to note the contracts in the Sonda Noondh as 'Ex Bunder delivery, offise Dhara,' that meant if the goods of the proper shipment arrive at the proper time and *miti khari* is made, then payment must be made and delivery taken. In case of delay in taking delivery demurrage and interest will be paid by the man responsible for delay. 'Offise Dhara' did not include any terms beyond those." Then at line 19: "By usual terms I understand ordinary terms." But in cross-examination at line 80 he says: "If shipment is delayed by 'Force Majeure' clause in the acceptance memo." It is noticeable that he is not prepared to say the 'Force Majeure' clause does not apply. Perhaps he was thinking of his letter Exhibit 140, dated 15th September 1917 in which he intimates to his buyer that owing to Government requisitioning the steamers, sugar shipments will be late and that delayed shipments will be treated under 'Force Majeure.' He says he issued the notice as he received similar notices from his buyers. It appears that this witness's firm has entered into contracts after the arrival of S. S. "Dogra" for July and September shipments (see correspondence Exhibit 148 dated 10th September 1917 also his evidence at line 340), which does not look as if he believed that 'offise Dhara' referred to the method of or terms relating to delivery in the offises' contracts.

Plaintiffs' witness No. 7 Madhavdas of the firm of Tejbhandas Jethanand says at line 15 "by 'usual terms' I understand if delivery is taken late demurrage and interest is paid. The man responsible for the delay pays them." This witness has bought about 935 tons more than he sold for July-December 17 shipments.

Plaintiffs' witness No. 8 Sobhraj, who has dealt in sugar for the last 15 or 16 years, at line 4 says: "Dealings are on 'usual terms' in the town, *i. e.*, after European firms, make *miti khari* on arrival of steamer the bazar makes it within 3 days. If the European firm makes it on third day the local merchant issues it same day. Goods come to the Bunder and some European firm requires payment to be made and delivery taken within 7 or 10 days. If it be not then the person who takes delivery late is responsible for demurrage. The man who pays money late is liable to pay interest." At line 25 he says: "Before the war sugar was sold on 'offise Dhara' terms. Since that it is on 'usual terms' which are different. Till arrival of the goods there is a difference between 'offise Dhara' and 'usual terms.' 'Offise Dhara' are the terms of the offise contracts. 'Usual terms' are the terms of the bazar. They are the usual terms in respect of

giving and taking delivery." Here we have a new version altogether. Firstly, this witness contradicts the witnesses who say 'office Dhara' and 'usual terms' are the same and secondly, he says 'usual terms' are not the terms relating to delivery in the *office contracts* but the terms of the bazar. Moreover, it is suggested that since the war the terms of the contract have changed, but plaintiffs' case has been that office Dhara' or 'office Dhara Bunder delivery' before the war is the equivalent of 'usual terms' after the war and both relate only to the delivery terms in the office contracts or the practice as to delivery of the offices. At line 61 the witness practically admits the defendants' case, although he is made to qualify this in his re examination at line 78.

Plaintiffs' witness No. 9, Tharomal, the sugar broker, says at line 2: "Bazar contracts are made on 'bazar Dhara' terms *i. e*, after goods arrive at Bunder. *Miti khari* notices issue from seller and payment is made by buyer and delivery taken if it be a proper shipment. If buyer goes late to take delivery at Bunder he is liable to pay demurrage and interest." In his cross-examination this witness says there has been no change in the bazar, which state ment contradicts Sobhraj who says there has been a change since the war. Plaintiff was this witness's commission agent. He also says in his examination in chief there is no period fixed for taking delivery from the Bunder in 'bazar Dhara' and the person taking delivery late pays demurrage and interest. As to this it is only necessary to remark that it is ridiculous to say that the last buyer can take delivery at his convenience.

Plaintiffs' 10th witness, Hassanald Jangaldas, at line 7 says: "Brokers wrote before the acceptance memos 'Bunder delivery office Dhara.' 'Usual terms' means *miti khari* is made in 3 days and thereafter delivery is taken from the Bunder. Demurrage and interest is also paid if delivery taken late." In his cross examination at line 73 he says: "Terms 'office Dhara' apply only to Bunder delivery. The terms of the firm which issued the delivery order will apply as to delivery". It is difficult to see whether from these statements the witness intends to say there is a difference between 'usual terms' and 'office Dhara'. Apparently he lies, because he suggests that office Dhara is the Dhara of the particular office whose delivery order is tendered. At line 191 he says "godown delivery contracts are mostly made on 'usual terms' in the acceptance memos.....If the contract is made on the terms of a European firm's contract it is also made on 'usual terms.'" This is a hopeless jumble because, firstly if 'usual terms' refers to taking delivery, then one of those terms is taking delivery at the Bunder, which godown delivery is not; and secondly, the witness is confusing a contract on 'Sidhi Chiti' or European office terms with a contract on usual terms. The witness appears to have brought about two or three contracts for July and July-September shipments after arrival of the S S. 'Dogra' (see his evidence, lines 118 and 123).

Plaintiffs' 12th witness Dharamdas Sobhraj, a partner in the firm of Topandas Hurbhagwandas, has written letters to his buyers saying he is not responsible for late shipment or any other case of 'Force Majeure' (see letter Exhibit 172). He also allowed Rallis to extend the time for shipment to October (Exhibit 173).

We now come to a very important witness. This is the witness Tayebally Allibhai who has traded in Java sugar for a long time and whose firm's name is Currimji & Co. He says at line 2: "By 'usual terms' I understand 'Bunder delivery,' delivery within three days, otherwise demurrage to be paid by buyer. If he takes delivery later on he takes the chance of getting torn bags. If he delays to pay money he has to pay interest also." At line 23 he goes on: "Before acceptance memos. brokers made entries in books. They wrote 'office Dhara Bunder delivery'. I understand by that the same thing as 'usual terms'." He, therefore, says 'usual terms' and 'office Dhara Bunder delivery' are the same." At line 121 he says, there is no such thing as 'bazar Dhara'. In this respect he contradicts the plaintiffs' witness who says that "usual terms" means the terms of the bazar (see Sobhraj's evidence, lines 25 onward). Unfortunately for Yusufalli's evidence a list of contracts made by him after the arrival of S. S. 'Dogra" for July and July September shipments has been

put in (Exhibit 168), which shows he expected July shipment still to arrive and he could only entertain such expectation on the assumption of the application of the 'Force Majeure' clause in the offices' indents. It will be noted that the words "usual terms" are to be found in the contract. However, the most important piece of evidence to discredit and show he is not saying what he believes to be the real terms of these bazar contracts is his letter Exhibit 178, dated 19th October 1917, written to the solicitors of one of his constituents. The contents of that letter show that it was not written because buyers were putting forward the same contention to him but it expresses in clear and unequivocal terms what the terms of the contracts of the bazar are It is exactly the case set forward by the defendants and whether the defendants can rely on it or not in support of their case, it at any rate entirely repudiates the oral testimony of Yusufalli. After this letter was produced the plaintiffs declined to recall Yusufalli to explain it.

There is only one other witness whose evidence needs consideration on this point and he was called by the Court, both sides showing a reluctance to call him. The Court thought he should be called. He is the Secretary of the Sugar Association, Hassanand Jethanand At the end of his cross-examination he says "the terms with offices are practically the same as the terms between the local sellers and buyers."

To sum up this oral evidence on the meaning of the expression "usual terms" or "office Dhara", I have no hesitation in coming to the conclusion that not only is there no ground for saying that the expression "office Dhara" implied anything different to the expression "usual terms," but also that the various versions given by plaintiffs' witnesses of both expressions have failed to establish that either of those expressions was restricted only to terms for taking delivery according to the office contracts or according to the practice of the offices.

Let us now see how the bazar construed those terms in practice. I think it furnishes an argument to the defendants if they can show that after the arrival of the S. S. "Dogra" Indian merchants still entered into forward contracts for July shipment. They could have only done so on the assumption that the terms of the offices' indents excusing delay in shipment governed their contracts. The plaintiff himself on 4th September 1917 bought 150 tons July September shipment from Nevandaram Toleram (plaintiff's evidence line 370). His explanation is that this contract was for goods Ex S. S. "Dogra", but this is not stated in the contract and I do not believe it. The S. S. "Dogra" completed discharging on 25th August 1917. On 30th August 1917 there were about 43 tons only lying in the Import Yard. On 5th September 1917, one day after plaintiff's contract with Nevandram, only about 15 tons were in the yard. It is, therefore, impossible that plaintiff would have contracted on 4th September 1917 for 150 tons from the yard. Thus plaintiff's conduct certainly does not suggest he believed the goods Ex S. S. "Dogra" to be the last July shipment to arrive. Again I find it proved from the evidence that plaintiff was present at the meeting of the Association on 22nd August 1917 and 24th August 1917 where the question of July shipment was considered. He knew that David Sassoon's 300 tons had been shut out and that no further tonnage was available at Java and yet on 4th September 1917 he made a further contract of sale of 500 tons of August-September shipment with Bhojraj Jethanand (plaintiff's evidence, lines 469). The latest date for August shipment would be 10th September; so with the knowledge he possessed it would be unlike he would contract for August shipment unless he believed that such shipment would be made later under the indents of the importing firms.

Plaintiffs' witness Purasram (line 339) admits on 4th September 1917 he sold 50 tons shipment July-September 3 equal lots to Haji Mohomed Haji Abdulla. Of this he says 30 tons was a cross-contract and that he intended to make '*pich pichao*' for the remaining 40 tons July shipment. He does not appear to have done so and says that was because suits were filed. There is no entry to show '*pich pichao*' was to be effected. The fact, however, remains that one does not make a forward contract for July shipment after July shipment has arrived in order to fulfil it by a subsequent *pich pichao* arrangement. Moreover, this witness was present at the

meeting of 24th August 1917 (line 30:) and knew that August shipment, at any rate, would on account of the inability of Java shippers to secure tonnage be delayed. Again at line 426 onwards he says his last sale for August-September shipment was on 25th September 1917, which would be more than a fortnight after August shipment could be shipped unless excused by a Force Majeure clause. On 7th or 8th September he sold 150 tons July September shipment to Yusufalli and witness says Yusufalli said he could effect "*pich pichao*" for the 50 tons of July shipment in that contract. There is nothing in the entry relating to this contract to corroborate this; it was admittedly not a cross-contract and Yusufalli in Exhibit 168 has entered this contract as on 'usual terms.' This witness's transactions, therefore, do not lead one to believe the oral evidence he has given on the meaning of the words 'usual terms'.

Plaintiffs' witness Premchand has made a series of contracts for July and July-September shipments after the arrival of the S. S. "Dogra" (in Exhibit 154). He says they were cross-contracts (line 233), but as to two of them, *viz.*, one on 24th August 1917 with Mithamal Dowlatram for 30 tons July-September shipment and another with Rupchand Rughnath for 10 tons, he says as to the former, there was a previous contract for August-September shipment for 20 tons and the broker said he would make "*pich pichao*" as to the remaining 10 tons and as to the latter 5 out of 10 tons was "*pich pichao*". There is nothing beyond his statement that "*pich pichao*" was to be made of the balance of ten tons out of the former contract, and admittedly, 5 tons out of the latter are uncovered (see his evidence, lines 235 and 293). I would say on this evidence that this witness had not also much belief in the account he gives of transactions in 'usual terms' in the bazar, P. 41. Evidence has also been given as to the date when cross-contracts were made. Plaintiffs' witness No. 7 says at line 40 that cross contracts are made so long as goods of proper shipment are still to arrive, otherwise they are only made whilst goods are lying on Bunder (see also evidence of plaintiffs' witness No. 9 Narumal, line 19). We know from the note of Rambhai (defendants' witness No. 6), the Port Trust clerk, that on 15th September 1917 only 2 bags of July shipment were remaining in the Import Yard. So if we find cross contracts are effected after that date, they can only have been effected in anticipation of further goods to arrive. Those cross contracts in Exhibit 154 after that date would on plaintiffs' own case, therefore, only have been made in anticipation of further July shipment to arrive. This remark applies generally to all cross-contracts made by the witnesses in the case. Another thing is to be observed, and that is that cross-contracts would ordinarily be made at the rate when goods in the Import Yard of July shipment would still be deliverable ex-Bunder and if we find cross contracts made at the rate of a subsequent date, that suggests that the parties until that subsequent date, at any rate believed July shipment goods were still to arrive.

The list of his contracts (Exhibit 168) put in by plaintiffs' witness Yusufalli speaks for itself. It shows he has made forward and cross-contracts up to 7th Septmber 1917 for July-September shipments. The last two with Kodumal Kallumal and Raghnath Kallianji were admittedly not cross contracts (see Yusufalli's evidence, line 78) and they were on "usual terms". Yusufalli says he thought there was still time for July shipment to come and he heard a steamer with proper shipment was coming. This I do not believe, because the last date for July shipment from Java would be 10th August 1917 which would bring the steamer here on or about 30th August 1 17, and his contracts are dated 7th September 19.7. Besides he and everybody else in the bazar knew from the meetings of the Association held in August that with the exception of certain goods which were late shipped no other July shipment goods shipped from 20th June to 10th August were due to arrive. Moreover, Pursram of Kodumal Kallumal, the seller, admits that the European offices issued notices in August and the beginning of September saying that owing to the requisitioning by Government of steamers shipment would be delayed. Yusufalli must have known this. The salesman of Rallis, Nusserwanji, says that upto the beginning of September, it was thought that S. S. "Ranee" was loading at Java but she could only have loaded July ship-

ment goods which were shut out (see his evidence, line 110 onwards). Moreover, Purseram says that as to the 50 tons of July shipment Yusufalli said he would effect "*pich pichao*" which is not the version Yusufalli puts forward. Last Yusufalli's letter Exhibit 17*c*, dated 18th October 1917, shows that the story he puts forward in his evidence is false.

There is also evidence of deliveries actually taken from the S. S. "Kanjean." Rallis took delivery and transferred the delivery orders to their buyers (evidence of Odhavdas line 108). Rallis appear to have settled some half dozen of their contracts after the arrival of S.S. "Kanjean" (evidence of Nusserwanji, line 260).

Defendants' witness Mohamedalli made both cross-contracts and forward contracts after the arrival of S. S. "Dogra". Thus on 17th September 1917 he bought 300 tons from Sobhraj Dulamull to whom he had sold, on 22nd August 1917 and 23rd August 1917, 25 and 125 tons respectively. This left a balance of 150 tons. On 8th September 1917 he sold 75 tons July-September to Nevendram Tolaram. The cross contracts were on 20th August 1917, 8th September 1917, 23rd August 1917 (100 tons to Nebhandass Jethanand), 30th August 917, 7th September 1917 and 21st September 1917 (see Mahomedalli's evidence, line 44 onwards).

Defendants' witness Changomal made two forward contracts on 15th September 1917 of 10 tons and 5 tons (line 44 of his evidence,)

David Sassoon's salesman Hormusji says (line 65) that his firm was receiving quotations for July shipment up to 27th December 1917.

Defendants' witness Dhanji brought about several contracts from 24th August 1917 to 13th October 1917. Of these only one was a cross contract, one was on 13th October 1917 of sale of 50 tons July September shipment by Nurbhai Jafferbhai to Assumal Rajaharam (see Dhanji's evidence, line 60).

Similerly defendants' witness the broker Khatan says he brought about some 8 to 12 forward contracts after the S. S. "Dogra's" arrival (see Exhibit 105), but he cannot say if ary of them were cross contracts.

It is, therefore, clear from all this evidence that most of the witnesses on both sides expected further July shipment goods to arrive after the arrival of the S.S. "Dogra" on 20th August 1917. The dates of the contracts made by them after that date show these contracts would not have been made in the expectation that any steamer could still arrive which had left Java by the 10th August 1917, the latest date for July shipment. The "Ranee" was expected in the beginning of September 1917, but a great many of these contracts are made after that date when it must have been known the "Ranee" was requisitioned. On what assumption could such contracts be entered into in the bazar save that goods shipped late on account of 'Force Majeure' would still under the offices' contracts be tenderable as July shipment goods? The plaintiffs' witnesses have by their actions belied the evidence they have given as to the terms of these local contracts. In my opinion their acts support the defendants' case.

Is it conceivable in the face of all these transactions for July shipment entered into after the S. S. "Dogra's" arrival—some of them effected by the plaintiff himself—that he did not know that the time for performance of his contracts with the defendants still remained open? The European offices began issuing notices in August and the beginning of September 1917 that owing to Government requisitioning steamers shipment would be late. Is it likely plaintiff would be ignorant of this fact in the bazar? If he knew the time of performance was still oper, his suit launched on 1st October 1917 is premature. That the time for performance was extended to the arrival of the S. S. "Kanjean" is, I think, clear. It is proved that "office Dhara" does not refer only to delivery as plaintiff contends. I have shown how his witnesses have broken down on this point and how the defendant's witnesses have given a consistent version of those words. It is also shown that in the documents used by some offices in their local purchase forms there is an unrestricted reference to the terms of the agreements of the offices. It is finally shown that nearly all the witnesses have by entering into contracts after the S. S. "Dogra's" arrival shown the words 'office Dhara' or 'usual terms' could not refer

only to delivery. If the words 'office Dhara' were used before the war and the words 'usual terms' were introduced since the acceptance memos. came into force, what reason can the plaintiffs assign that the substitution should involve a change of meaning? The acceptance memos. were only introduced because the merchants repudiated the authority of the brokers to make the contracts and as a precaution to prevent any merchant denying the contract. No reason for restricting 'usual terms' to delivery only, when the words formerly used, 'office Dhara,' were not so restricted, can be found and indeed plaintiff's case is that 'office Dhara' also is restricted to the delivery. I have no hesitation in holding that there is no ground for restricting the expressions 'office Dhara' or 'usual terms' to delivery. If, therefore, 'office Dhara' means what it literally would when translated *viz.*, the practice of the offices, then the practice is shown from the offices' indent forms. 'Usual terms,' therefore, implies the same thing.

Now let us turn to the meetings of the Sugar Association and see from the records of them how far they still further show plaintiff understood July shipment was still to arrive after the S. S. "Dogra's arrival and also what the Association themselves thought about the matter. The defendants did not attend those meetings, so the plea of estoppel raised has very properly been abandoned. I mean that the plaintiff by attending the meetings at which defendants were not present did nothing to induce defendants to adopt a course of action they would not otherwise have adopted. Nor was there any agreement between plaintiffs and defendants arrived at those meetings.

The Association seems to be the only body which calls the indian sugar merchants together to discuss matters. It has no printed rules and contracts are not made subject to any such recorded rules. Its Secretary is Mr. Hassanand Jethanand, who was called by the Court to throw some light on these contracts and also on the proceedings of the Association. Both sides were apparently shy of calling him. He was a good deal harassed by being called twice and kept dancing attendance on the Court. As soon as I discovered this latter fact, I did my best to have his evidence taken at once—I think he gave his evidence satisfactorily. From the records of the Association which he produces it appears that on the 21st August 1917, a day after the arrival of the S. S. "Dogra," the Association issued notices (Exhibit 130) for a meeting on 22nd August 1917 to decide the question of July shipment. On 22nd August 1917 the meeting appointed a committee to settle the question of July shipment. Plaintiff was present and was appointed on the committee. At the same time five persons were detailed to go to David Sassoons to enquire if any July shipment goods were still to arrive and were told that 300 tons had been shut out. I hold this proved on the evidence which I really do not think it necessary to set out. I refer to the evidence of David Sassoon's salesman Hormusji on this point. See also the evidence of Hassanand, lines 77—83 and Laxmandas, line 66 On 24th August 1917 the committee met and Exhibit 126 was arrived at. That decision cancelled all notices that had passed between the merchants relating to the July shipment and provided that delivery orders of any office proving a shipment to arrive to be July shipment should be utilized for July 'Bhugtan', *i. e.*, for performance. Exhibit 26 also appointed a date for effecting '*pich pichao*' and "Bhugtan" for wiping off as much of the July shipment as possible. It then went on to state "whatever notices with regard to the July shipment have been issued by the merchants have been cancelled." This resolution is signed by plaintiff, so presumably he agreed to it. Now the plaintiffs say that this resolution intended only that contracts in which sellers had bought from David Sassoon to remain outstanding and closed all other contracts. Paragraph 1 of the resolution leaves this in some doubt, but I think paragraph 3 clears the point up. If it were intended to cause all other contracts to be closed, then the resolution would not say in paragraph 3 that the notices given by merchants should be considered as cancelled. They would be valid notices.

Plaintiff says no "*pich pichao*" was effected in consequence of this resolution (see line 129), but his witness Purseram at line 78 says the merchants who had not attended did not make '*pich pichao*' saying July goods were still to arrive. The truth

of the matter is that the merchants were still disputing the matter and it does not appear that they all accepted the decision of the 24th August 1917.

The next meeting was on 14th September 1917. It was a meeting of the special committee and reported to confirm the resolution of 24th August 1917 and to cancel the fresh notices issued (see Exhibit 137). Plaintiffs say they were not present and that they said they would not be present. Defendants have suggested plaintiff was present, but this appears to be doubtful. I cannot say on the evidence he was. It seems to me this meeting does not carry the case much further, as probably there were some merchants who like plaintiffs were insisting the date for preformance had passed and others who like defendants were attempting to create a decision that the time for performance should remain open. At this time it all depended on whether a merchant had oversold or overbought which view he took. Whatever he really thought was the meaning of 'usual terms' or 'office Dhara' he subordinated his view to his own int rests.

The same state of affairs was in existence when the next meeting of 20th September 1917 (Exhibit 28) took place. It was a general meeting and purported to cancel notices given. At the next meeting on 23rd September 1917 Hassanand says certain Tejiwalas were present but they wrote letters cancelling their signatures. Plaintiff was not present and until I am satisfied the whole bazar agreed to abide by these two resolutions, I cannot say they are of much service in support of defendants' case.

The deduction which I draw, therefore, from the evidence of these meetings is that only the meeting of 24th August 1917 can furnish evidence against plaintiff's case, because he was present at it and that meeting purported to cancel the notices already given. It appears plaintiffs did not abide by the resolution passed at that meeting because they subsequently issued fresh notices demanding frieght and damages. An important point, however, is that by attending that meeting plaintiffs knew further July shipment was due. They knew that David Sassoon had 300 tons shut out and they also knew that S. S. "Ranee" was expected to load at Java and as that vessel could not possibly bring July goods shipped before 10th August, they knew, if defendants' contention as to the terms of the contract is correct, that the time of performance was still open until July goods late shipped arrived. This is material on the question how long plaintiffs would in law be expected to wait for performance, assuming defendants' contention to be correct. The plaintiffs cannot ask whether they were to wait indefinitely in case July shipment goods were shut out and were still to arrive. They would, therefore, have to wait till such goods arrived or until it was shown they could not come before they could say defendants must be taken to have committed breach of the contracts.

I have already said the attitude of many merchants towards these bazar contracts was influenced by the question whether they had oversold or not. The defendants have, however, referred to one instance which, I think, calls for special attention. Rallis on 23rd August 1917 sent a circular letter (Exhibit 174) to some of their buyers for signature and by the terms of it they extended the time of July shipment. These signatories had sold to Yusufalli, plaintiffs' witness, and they would scarcely have extended the period of Yusufalli if Yusufalli in his turn had not agreed to accept. This shows that Yusufalli's conduct was scarcely consistent with the view he gives in his evidence of the meaning of "usual terms".

It appears that this question of late shipment had been raised under the terms of a contract on 'office Dhara' terms and was litigated between 3rd parties in the Small Cause Court in 1913, and the contention the defendants now put forward was upheld (see Exhibit 147). It must, however, be noted that in this case the goods were a proper May shipment, the Bill of Lading being dated 6th June 1913. The Small Cause Court Judge decreeing the claim allowed the item of interest, demurrage, insurance and commission as provided for in the importing firms' contract. This shows at any rate how the Small Cause Court construed the words "office Dhara' in 1913.

Evidence of a few other instances in which it is said the construction put upon the words by the defendants has been followed have been given.

The first of these instances occurred "many years ago" according to Nusserwanji Meherji,

Ralli Brothers' salesman who gives evidence about it. He says his firm had forward goods coming from a particular factory in Austria C. C.or C. C E. The factory was burnt down and Rallis cancelled under the 'Force Majeure' clause. This instance is not in point, because we do not know whether Ralli's goods were sold specifically between the sub-vendors and purchasers and if that were so, the cancellation would come under the principle of law of the distinctive of the subject matter of the Court (*sic*). Moreover, there was not the speculation then that is now and *bona fide* contracts for the goods were made then.

Nusserwanji also speaks to the next instance, lines 140—165 of his evidence. In October 1914 Rallis had bought from David Sassoons and sold to Shumshudin Imamdin. David Sassoon's lighter sank and they delivered some bags short to Shamshudin. Rallis went to arbitration with Shamshudin and lost, but it appears they lost because they had sent a notice of arrival of the full quantity and had not given their buyer notice of short shipment. This instance does not help either side much. The award (Exhibit 68) says nothing about the reason why it was in favour of Shamshudin. This instance gave rise to a series of questions in the evidence as to whatever an arbitration or award binds sub vendors and sub-purchasers. So far as an agreement to go to arbitration is concerned, it has already been held in *Lenz* v. *Lalchand* (3) that it is not incorporated in the local contracts by the words 'office Dhara'. Whether an award between an importing office and its buyer declaring the goods of a particular shipment would not stamp the goods as of that shipment between sub vendors and sub purchasers, is another question altogether and not to my mind material for the decision of this case. The resolution of the committee (Exhibit 169) on this incident said the purchaser was to bear the loss. It may be noted that this was a case of short delivery and not one of the extension of the time for performance. It may be contended that if A, a local seller, sells to B, a local buyer, without having bought goods and A expects to perform when, say, Ralli's goods are latest due to arrive and delays performance till then and Ralli's goods are destroyed A has taken the risk of performing late and is liable for breach if he finds he cannot deliver goods. When Ralli's goods are destroyed no buyer can perform. I do not enter into a consideration of that question.

A 3rd instance is cited by Nusserwanji at line 283 of his evidence. Certain goods of February-March 1915 shipment reached Karachi between 12th and 16th June 1915 by three different steamers. The sub-purchasers took delivery. But it appears that these goods were shipped on 25th March 1915 and were therefore, a good March shipment at any rate. This is, therefore, merely a case of delay on the voyage.

I think I have now dealt with all the material evidence on this point and I have no hesitation in holding on it, for the reasons I have given, that the contracts between the parties were on the terms of the office agreements, meaning by that, so far as this case is concerned, that the defendants were at liberty to deliver sugar of any office if deliverable under a contract for July 1917 shipment according to the terms of that firm's indent. I hold the words 'usual terms' in the contracts have the same effect as the words 'office Dhara' and that means the agreements of the importing offices. See also *Ruxchand Ramchand* v. *Hukumatrai* (2). That is what the words 'usual terms' or 'office Dhara' mean and what they would ordinarily mean. The plaintiffs have contended that defendants are trying to introduce a custom of the trade into the contracts and have cited a great many authorities to show what are the attributes of a valid mercantile custom, that it must be shown to be reasonable, certain, not illegal, uniform, universally adopted, etc, etc.

Now it seems to me this is hardly a case of custom at all. Where a trade usage is sought to be incorporated in a commercial contract, the contract as a rule contains only certain stipulations but the parties to it or one of them seek to add some incident to it as being a provision which was not mentioned because all the parties understood or sought to have understood that it was, according to the custom of the trade, a part and parcel of the contract. "Merchants and traders with a multiplicity of transactions pressing upon them and moving in a narrow circle and meeting each

other daily desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they still continue to do so" [per Campbell, C J., in *Humfrey* v. *Dale* (4)]. Here, however, what I am faced with is the mercantile meaning of certain words in the contract, *viz.* "usual terms". Now in a mercantile contract, subject to the rule that the whole document should be looked at, it has been laid down that the Court should regard the subject-matter with which the parties are dealing and take the words in their natural and ordinary meaning and then construe the contract [*Tatham Bromage & Co.* v. *Eurr* (5)]. Here the parties were contracting as to goods to be imported by others and, therefore, the seller would be likely to protect himself against contingencies preventing the arrival of the goods just as the importing office does and this is in favour of defendant's contention. It has been proved that 'usual terms' and 'office Dhara' mean the same thing. "Office Dhara" means "what the offices do". What the offices do is seen from their printed forms of contract. The "Force Majeure' clause in the offices' indents is to be found, in one form or another, in every single office's indent and the fact that it is so makes it clearly one of the terms of "office Dhara". But even if the contract be regarded as one to which it is sought to attach a particular custom, I am of opinion that the "Force Majeure" clause, being common to all office contracts, is a custom of the offices and, therefore, incorporated by the words 'office Dhara', or 'usual terms' in the contracts between the plaintiffs and defendants. It fulfils all the requisites of a valid mercantile custom. It is certain, for it means influences over which the party has no control. It is uniform, because it is found in every office indent. It is reasonable beyond doubt, not illegal and in general use by offices (see Exhibit 30, clause 31; Exhibit 31, clause 51; Exhibit 32, clause 8; Exhibit 33, clause 10; Exhibit 34, clause 12; Exhibit 35, clause 14; Exhibit 36, clause 6; Exhibit 37, clause 12; Exhibit 38, clause 14; Exhibit 39, clause 14 and Exhibit 6 , clause 1).

If, therefore, by virtue of the "Force Majeure" clause in the indents the shipment of a particular office is tenderable as July shipment the sub-purchaser must regard it as such.

Now these 300 tons Ex-S. S. "Kanjean" were David Sassoon's goods. By clause 13 of David Sassoon's indents they are not responsible for delay in shipment beyond the stipulated time through war or any other cause over which they have no control, nor can their contract be cancelled for any delay arising from any such cause. It has not been urged that the words in clause 13 "or any other cause over which David Sassoon, Limited, have no control" mean any other cause "*ejusdem generis*" with the preceding words. If this had been contended, the answer to the argument would be that not only is there no common "genus" in the preceding words and subsequent words are, therefore, general, but also that if there be a common "genus" it is very doubtful whether the cause beyond David Sassoon's control *viz.*, Government requisitioning all steamers due to the war, would not be considered as "*ejusdem generis*" with the preceding words. I am also by no means certain that this particular cause was not one due to war [See *Tillmanns & Co.* v. *Knutsford Limited* (6), *Thames and Mersey Marine Insurance Co*, *Limited* v. *Hamilton Fraser & Co.* (7)]. David Sassoon's buyer, therefore, cannot cance the contract for any such cause. He must accept the goods Nor is this a State prevention of shipment as provided for in the last sentence of clause 13. By State prevention of shipment is meant, *e. g.*, an embargo, prohibition of export or other cause. According to the defendants the cause here beyond David Sassoon's control was the fact that owing to Government requisitioning steamers no tonnage was available. They say David Sassoon had done everything they could and their Java shippers had got the space for the consignment but the S. S. Company shut the goods out and no other ships were available. I shall consider that presently.

The answer to the first issue is, therefore, that the contract between the parties was

(4) (1857) 26 L. J. Q. B. 137; 7 El. & Bl. 266; 3 Jur. (N. S.) 213; 110 R. R. 587; 119 E. R. 1246.

(5) (1898) A. C. 382 at p. 386; 67 L. J. P. 61; 78 L. T. 473; 46 W. R. 520; 8 Asp. M. C. 401; 14 T. L. R. 269.

(6) (1908) 2 K. B. 385 at pp. 402, 403; affirmed in (1908) A. C. 406; 77 L. J. K. B. 977; 99 L. T. 399; 13 Com. Cas. 334; 11 Asp. M. C. 105; 24 T. L. R. 786.

(7) (1887) 12 A. C. 484 at p. 493; 56 L. J. Q. B. 626; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. [illegible].

on the terms of the office contracts with their buyers, meaning by that that the parties were bound by the terms of those contracts as to whether the goods tendered were such as could be tendered as July shipment goods. Under David Sassoon's indent the 300 tons were tenderable as July shipment goods and were, therefore, so tenderable between plaintiffs and defendants. Each particular office's indent was left to decide whether the goods were tenderable as July shipment.

The 2nd issue is "When did the last steamer of July shipment arrive ?" Now we know that David Sassoon's 300 tons arrived Ex S. S. "Kanjean". Were these July shipment goods tenderable under the contracts between plaintiffs and defendants? That depends on whether David Sassoon could tender them as such to their buyer. This depends on the terms of David Sassoon's indent. I have already pointed out how by entering into forward contracts for July shipment after the arrival of S. S. "Dogra" the bazar showed its opinion that there were still July shipment goods to come and that these transactions in the bazar were entered into on the information that David Sassoon's and Govindram Murlidhar's goods were still to arrive first by S. S. "Ranee" and later by S. S. "Kanjean". Sawyer, manager of David Sassoon, has produced the correspondence and cables relating to this consignment (Exhibits 110—113).

The sugar was purchased from Messrs. Hundal Mij Kian Gwan of Samarang on 15th June 1917, 900 tons superior white July-September equal monthly shipments at Rs 20 per cwt. *C. I. F.* Karachi war risk included. On 14th August 1917 David Sassoon's London office communicated to the firm out here in the following terms: "White your purchase 20th June 900 tons July-September Kian Gwan wire July portion waiting steamer," a cable received by the London office from the Java sellers. On 16th August 1917 David Sassoons here wrote to the sellers asking them to have the parcel shipped by the first available opportunity "duly sending us along with S. documents an authenticated certificate showing that the sugar in question was ready for shipment within the contract time but the shipment delayed owing to shortage of frieght occasioned by war or Force Majeure". On 23rd August 1917 David Sassoons wrote again, saying they were having considerable trouble with their buyers on account of the Java people's failure to ship the July portion and asking them to lose no time in posting an authenticated certificate, showing that the sugar was deliverable for shipment within contract time and the shipment was delayed through the Government requisitioning tonnage owing to there being no other frieght available.

On 25th September 1917 Hundal Mij Kian Gwan replied saying they would send the "Force Majeure" certificate as soon as possible. On 23rd January 1918 Kian Gawn cabled to David Sassoon here "Kanjean contract on July 300 tons." David Sassoon cabled back "Steamer carrying 300 tons July Have you despatched certificate? If not, post immediately". The reply cable ran: "July. portion steamer Kanjean, certificates attached documents." The certificates are Exhibits 111-113. Exhibit 111 is a declaration by the Asiatic Steam Navigation Company dated 18th December 1917, to the effect that shipment for the 300 tons was duly booked for July 1917 shipment but owing to the refusal of the Indian Government to allow sufficient of the company's tonnage shipment to proceed to Java shipment was impracticable. Exhibit 112 is a declaration by shipping agents before the British Vice Consul at Samarang (Java), dated 6th February 1918, to the effect that no tonnage was available from 31st July 1917 to the time the 'Kanjean' was loaded. Exhibit 113 is another declaration dated 19th January 1918 before the British Vice Consul that no steamers either of the company's line or owned by outside companies were available to load sugar from Java to Karachi till January 1918, when the Dutch S.S. companies offered tonnage. The declarant also declares that from September 1917 he has used all his endeavours in Java and in Holland to induce the Dutch S.S. companies to carry sugar to Karachi and says that the reason efforts have not proved successful sooner is due to the fact that telegraphic communication with Holland was impossible since the beginning of October last.

Now these and similar documents are all documents which by the practice of merchants are accepted as evidence very much on the same principle on which account sales of a foreign agent are accepted as *prima facie* correct. I cannot do better than

refer to the remarks of Macleod, J., In *Nissim Isaac Behhor* v. *Haji Sultanalli Shustary* (8) on the futility of issuing commissions to prove facts which are proveable amongst merchants by the production of well-recognised publications, and which remarks aptly apply to a case like the present. The absurdity in a commercial cause of issuing a commission to Java, which would possibly have to be transmitted through Government here to the Dutch Government with a translation of all material documents into Dutch, to say nothing of the delay, is manifest to every one. Wisely the parties came to an arrangement by which this kind of evidence might be admitted.

The Secretary to the Karachi Chamber of Commerce, Mr. Rogers, has produced two cables, copies of which have been put in as Exhibit 76, addressed to the Controller of Shipping and the Batavia Chamber of Commerce, dated 5th Feburary 1918 and 2nd Feburary 1918 respectively, and their replies. That from the Controller shows that all British India and Asiatic Steam Navigation Companies' steamers engaged in India, Australia and Indian coastal trade were requisitioned by the Controller's letter dated 5th May 1917 and that the requisition operated from first completion of discharge after receipt of the letter. The Batavian Chamber of Commerce sent a declaration dated 7th Feburary 1918 by its president and secretary before the British Vice Consul that no tonnage from Java ports to Karachi has been available since the S. S. "Rajah" in July 1917 till the S. S. 'Kanjean".

Further the witness Nusserwanji says that Rallis received two orders dated 25th June 1917 and 3rd July 1917 for July shipment but their London office could not place them. That it was impossible to get tonnage is also clear from correspondence and cables produced between Rallis and their Java sellers Butterworth and Co. This correspondence and these cables are dated July-December 1917 (Exhibit 70). The difficulty of despatching sugar *via* Calcutta is also shown by Exhibit 69, dated 24th November 1917, even if transhipment were permissible by David Sassoon's indent, which it is not. It was only on 10th January 1918 Rallis were informed by their Java sellers that they expected to obtain the necessary tonnage (see Exhibit 73). There is a mass of other correspondence of a similar character, which Mr. Elphinston has referred to in his summing up but which I do not really propose to set out in detail. Both Mr. Lenz and Nusserwanji say sugar always comes here on a through bill of lading. Mr. Lenz has also produced a large number of documents showing the S. S. "Pundit" and S. S. "Risaldar" which were fixed to load for Karachi in August were requisitioned in July 1917 and the S. S "Ranee" and "Rajah" fixed to load in September were also requisitioned, Exhibits 116 and 117. Volkart Bros. are the agents of the Asiatic Steam Navigation Company; so Mr. Lenz is in a position to say if any of that S. S. Company's ships were available. The first intimation Messrs. Volkart Bros. had that no more July-September freight was available was by wire of their Java sellers on 3rd July 1917 (Exhibit 118). Then there are a number of certificates, sworn to before the British Vice-Consul, of shipping agents and Volkart's suppliers to the effect that no steamers have been available since the S. S. "Rajah" and "Dogra" left Java (Exhibit 119). Volkarts were also the agents for the Dutch companies whose shipping agents have subscribed to those certificates. It was only in January 1918 that the Dutch S. S. companies were able to offer tonnage and the S. S. "Kanjean" which first was to call at Colombo to repair her boilers was available.

Plaintiffs suggest that sugar could have been sent to Calcutta and transhipped there for Karachi. But David Sassoon's indent does not provide for transhipment, and it further provides for delivery at the Bunder. Moreover sugar transhipped at Calcutta is likely to be damaged and we have Mr. Lenz's evidence that sugar from Java has to be sent here on a through bill of lading. (Lenz's evidence, line 36).

Continuing with the question of impossibility of obtaining tonnage, correspondence between Messrs. Volkart and Messrs. Butterworth and Co., their Java, suppliers shows that up to October 1917 no space was available (see Exhibits 143—5). Further correspondence between the importing firms and the dealers here shows that the former intimated the lack of tonnage through Government requisitioning steamers. (Exhibit 141).

(8) 28 Ind. Cas. 433; 17 Bom. L. R. 249 at p. 257; 40 B. 11.

Plaintiffs say that the Java shippers could have shipped by "outside" steamers, *i.e*, steamers belonging to other S. S. companies than the British India and Asiatic Steam Navigation Companies and that they did not do so because there was a combine by which the Java people agreed to ship only by those two S. S. Companies in consideration of a rebate.

The evidence, however, shows that the Java suppliers were trying to secure steamers from any company including the Dutch lines and were unable to do so. I think the documentary evidence, I have already referred to, clearly shows this.

I wish to add that this documentary evidence has all gone in without objection, it being recognized that it would be absurd to issue commission to various places to secure the evidence on oath of the agents of the different S. S. companies and of the Java suppliers.

I have no hesitation in holding that it was a physical impossibility to secure steamers for Karachi at Java after the departure of the S. S. "Dogra" and "Raja" until the S. S. "Kanjean" began to load.

Another argument advanced for the plaintiffs requires to be dealt with. Plaintiffs say that there was space on the S. S. "Dogra" and "Rajah" for those 300 tons of David Sassoon's and that they should not have been shut out. The point is, was it beyond David Sassoon's control that these goods were not shipped on board those two steamers? I cannot see how David Sassoon could have done more than they did. Ordinarily, 2 to 3 steamers left every month from Java for Karachi. David Sassoon had ordered these goods on 15th June 1917 and the Asiatic Steam Navigation Company's certificate (Exhibit 111) shows that the Java suppliers had booked ship room for the consignment for July shipment. If the shipping company shut out these goods how could David Sassoon in Karachi stop them? To begin with, David Sassoon would not know when the ships would begin to load and in the next place they could not tell till the steamers had sailed that the goods were shut out. They had done everything they could by ordering July shipment goods and obtained space for it. The rest remained with the S. S. Co. Even if they could have known the consignement was going to be shut out, how could they have forced the S. S. Co. to take the goods on board those steamers? The contention that cargo for Bombay should have been shut out in favour of cargo for Karachi scarcely needs an answer. It was not David Sassoon who could direct the disposal of the cargo on board the steamers. Nor could they direct their suppliers to transfer some of their Bombay cargo to Karachi. Moreover, David Sassoons were not the agents of the buyers here to ship the cargo but principals selling to principals (see their indent form Exhibit 30 and clause 18 of that indent). It seems to me futile for the plaintiffs to raise contentions of this kind and ask the Court to pass its time in deciding them.

I, therefore, answer Issue No. 2 by saying that the last steamer of July shipment was the S.S. "Kanjean" and the date of her arrival at Karachi was the date of the arrival of the last steamer of July shipment. That was the 25th February 1918.

Issue No. 3. On the foregoing facts it is clear that at the date of the suit, 1st October 1918 there had been no breach by the defendants of the contract in suit. I go further and hold that as defendants sent plaintiffs a *miti khari* notice on the arrival of the S. S. "Kanjean" which plaintiffs refused to recognize, the defendants have at no time been guilty of breach.

Issue No. 4 was very properly abandoned by the defendants.

Issue No. 5. I have held that the contracts were possible of performance when the S. S. "Kanjean" arrived. It cannot be said the contracts were void for impossibility of performance because July shipment goods arrived not only by the S S "Bahadur", 'Rajab' and 'Dogra' but also by the S. S. "Kanjean." The fact that it was impossible to obtain steamers after the "Rajah" left Java till the S. S. "Kanjean" arrived would not relieve the defendants of their obligation to deliver July shipment goods merely because David Sassoon's 300 tons and Govindram Murlidhar's goods had been shut out or late shipped. In consequence it is useless to discuss all the authorities that have been cited on the question of what is such impossibility as makes a contract void. If no July shipment goods at all could have been shipped, it would have been a different matter. Nor did the parties contract for any particular July shipment goods, nor were the contracts on 'Sidhi Chiti' a particular European office or a particular indent form.

The defendants could not, as plaintiffs suggest, perform by buying July shipment goods locally ex-godown, because the contracts were for delivery of imported goods at Bunder. Nor were the defendants bound to buy locally or to tender before the S S. "Kanjean" arrived.

Issue No. 6. Defendants were entitled to wait till the arrival of the S. S. "Kanjean," because there was a "Force Majeure" clause in David Sassoon's indent of which they could take advantage and which had the effect of making the 300 tons tenderable as July shipment goods under the indent.

Issue No. 7. The plaintiffs' suit was premature and must be dismissed with costs.

Suit dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2472 OF 1916.

May 20, 1920.

Present:—Mr. Justice Chevis and Mr. Justice Dundas.

SHAH MUHAMMAD AND ANOTHER —DEFENDANTS—APPELLANTS

versus

FAZL ILAHI AND OTHERS— PLAINTIFFS, UMAR AND OTHERS— DEFENDANTS—RESPONDENTS.

Custom, proof of—Burden of proof—Gift to khanadamad*—Reversion of gifted property, when takes place—Succession—Daughter entitled to succeed, whether can pass succession to sons.*

Any person, who relies on an alleged custom, has to prove that the custom exists and applies to the circumstances of the case. [p. 914, col. 1.]

Gifted land reverts to the donor or his collaterals only when the line of descendants of the donee, both male and female, has entirely died out. [p. 914, cols. 1 & 2.]

Shahanchi Khan v. *Begam Jan*, 20 Ind. Cas. 451; 13 P. R. 1914; 236 P. L. R. 1913; 191 P. W. R. 1913, followed.

The same rule applies where property is gifted to a *khanadamad* [p 914, col 2.]

Fateh Ali v *Muhammad Hayat*, 18 Ind. Cas. 818; 197 P. L. R. 1913; 63 P. W. R. 1913, overruled.

Except in the case of a daughter who succeeds to her father's property only as an unmarried daughter, entitled to hold it until her marriage, there is no custom whereby a daughter who is entitled to succeed is not also entitled to pass succession on to her sons. [p. 914, col. 2.]

Second appeal from the decree of the District Judge, Jhelum, dated the 8th June 1916, affirming that of the Subordinate Judge, 2nd class, Gujrat, dated the 27th April 1916.

Lala *Bishen Nath*, for the Appellants.

Mr. *Zafrulla Khan*, for the Plaintiffs-Respondents.

JUDGMENT.—This suit relates to land which belonged to Abdullah who gifted it to his *khanadamad* Sharf Din, son of Qutb Din. As will be seen from the genealogical tree on page 7 of the paper book, Sharf Din was also his brother's son, Abdullah. Qutb Din and Nur Din being brothers, Sharf Din died and the property was mutated in the name of his widow *Musammat* Karam Bhari. Later on she died leaving two daughters, *Musammat* Zainab Bibi and *Musamma* Begam Bibi, who like their mother married first cousins. On the death of *Musammat* Karam Bhari the property was mutated not in the names of her daughters but in the names of Sharf Din's brothers including the husbands of the daughters. Two of the grandsons of Nur Din then sued the descendants of Qutb Din for one fourth share of the property on the ground that Sharf Din had got the land not from his father Qutb Din but from his uncle Abdullah. One of the pleas of the defendants in that suit was that the descendants of Nur Din could not succeed until the line of Sharf Din, male and female, was extinct. This plea was unsuccessful, though the case was fought up to the Chief Court, see *Fateh Ali* v. *Muhammad Hyat* (1). The present suit is brought by *Musammat* Begam Bibi, one of Sharf Din's daughters, and the three sons of *Musammat* Zainab Bibi, the other daughter of Sharf Din, for possession of the land. The lower Courts have decreed the claim. Armed with a certificate from the learned District Judge, the defendants Hyat Muhammad and Shah Muhammad, who were plaintiffs in the former suit, appeal to this Court.

The only question, which has been argued before us, is whether the daughter or the

(1) 18 Ind Cas. 813; 197 P. L. R. 1913; 63 P. W. R. 1913.

KALADAN SURATEE BAZAAR CO. LTD., *In re.*

daughters' sons of Sharf Din can succeed to the property which was gifted to their father as *khanadamad*. The other points raised in the grounds of appeal have not been argued. The learned District Judge was himself doubtful as to the correct answer to the question of custom involved in this case, and in his judgment he points out that in an ordinary case of inheritance married daughters as a rule do not succeed to ancestral property and so, if Sharf Din's daughters are allowed to succeed in this case, they are placed on a better footing than if their father had been the son of Abdullah instead of being only his son-in-law. Thus the daughter's daughter is placed in a better position than a son's daughter would be in. This is true, but it must be remembered that this is not a case of Sharf Din having succeeded by ordinary succession. He succeeded by gift, and usually a man to whom property is gifted becomes the absolute owner thereof, though no doubt in the case of persons governed by the Customary Law of the Punjab there is a custom by which the donee cannot dispose of the property at his own sweet will and in certain events the land reverts to the donor or his collaterals. If the donee's line of descendants dies out entirely, then undoubtedly the land reverts to the collaterals of the donor and does not go to the collaterals of the donee. On the other hand, the custom is clearly established that there is no such reversion to the collaterals of the donor so long as any male descendants of the donee are still alive. The question in the present case is whether the land reverts in the presence of daughters of the donee who has died sonless. Any person, who relies on an alleged custom, has to prove that the custom exists and applies to the circumstances of the case. Here the collaterals allege that the custom of gifted land reverting to the donor's family applies to the present case in which the donee has left daughters but no sons. It is for the collaterals to prove their assertion. The learned Vakil for the appellants is unable to point out to us any case in which the collaterals have successfully asserted their right to oust the daughters of the donee. *Shahanchi Khan* v. *Begam Jan* (2) is a clear authority for holding that gifted land only reverts when the line of descendants of the donee, both male and female, has entirely died out, and we have no hesitation in following that ruling. The ruling already referred to, *viz.*, *Fateh Ali* v. *Muhammad Hayat* (1) is to the contrary, but it is a ruling of a single Judge and is based on a remark in Rattigan's Digest which is to the effect that the Full Bench ruling, *Sita Ram* v. *Raja Ram* (3), has laid down the general principle that the property gifted to a *khanadamad* reverts to the original owner's family in all cases where donor's daughter's male descendants have died out. This remark has, however, been corrected in the latest edition of the Digest and now stands to the effect that the property reverts only where the daughter's direct descendants, both male and female, have died out.

Then it is urged that even if the daughters of a *khanadamad* can succeed, still they cannot pass succession on to their sons. But except in the case of a daughter, who succeeds to her father's property only as an unmarried daughter entitled to hold it until her marriage, we are unaware of any custom whereby a daughter, who is entitled to succeed, is not also entitled to pass succession on to her sons.

We uphold the decree of the lower Courts and dismiss this appeal with costs.

Appeal dismissed.

(2) 20 Ind. Cas 451; 13 P. R. 1914; 286 P. L. R. 1913; 191 P. W. R. 1913.

(3) 12 P. R. 1892.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCES NOS. 3 AND 4 OF 1920.

May 26, 1920.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

In re KALADAN SURATEE BAZAAR CO, LTD., AND SURATEE BURRA BAZAAR CO., LTD.—APPLICANTS,

Excess Profits Duty Act (X of 1919), s. 2—'Business', meaning of—Company owning house property and carrying on business of letting tenements and stalls—Company, whether liable to taxation.

The term 'business' in section 2 of the Excess Profits Duty Act has the same meaning which is assigned to it in the Income Tax Act, and the former Act does not contemplate an extension of that

meaning or justify the introduction of anything which, according to the scheme of the Income Tax Act, is wholly dissimilar. [p. 915, col. 2; p. 916, col. 1; p. 917, col. 1.]

A person who has invested his capital in house property and who keeps a rent office, and a staff of rent collectors, clerks, etc., for the purpose of letting out his houses and collecting the rents, is not carrying on a 'business' within the meaning of the Excess Profits Duty Act. Similarly, a Company which holds house property, and distributes the rents therefrom in the form of dividends to share-holders, is not carrying on a 'business' within the meaning of that Act, as, although it is an association for acquiring gain, yet the method of acquiring gain is passive by owning property and not by the active carrying on of business. [p. 918, cols. 1 & 2.]

Mr. *Giles* (with him Mr. *Das*), for the Appellants

Mr. *Rutledge*, for the Respondent.

JUDGMENT.—The Financial Commissioner under section 51 of the Incom Tax Act, read with section 15 of the Excess Profits Duty Act, refers for our decision the question whether the Kaladan Soorate Bazar Co, Ltd., at Moulmein is liable to assessment to excess profits duty, and the same question is raised with regard to the Sooratee Bazar Co., Ltd., at Rangoon. The Companies contended that they were not liable as their income was derived solely from rents of houses and Bazar stalls belonging to them, but the Financial Commissioner held that as these Companies exist for the purpose of owning houses and buildings to be divided into tenements and stalls and to be let out, they "carry on business" for the purpose of letting tenements and stalls. In his order the Financial Commissioner pointed out that the definition of business in section 2 of the Act is not exhaustive. It merely says that business includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. Section 3 goes on to say that the Act applies to every business carried on in British India not specified in the schedule of "excepted businesses," and the schedule excepts *inter alia* 'offices and employments' and any profession not being the profession of a commission broker. It seems, therefore, *prima facie* to imply that an office of employment could be treated as a business under the Act if it were not excepted by the schedule. The Financial Commissioner then argues that if a person practising a profession requires specific exemption in order to escape the excess profits duty as a business, much more would companies like these Bazar Companies require such exemption. It was argued on behalf of the Companies that income derived from house property is clearly distinguished in the Income Tax Act from income derived from business, but the Financial Commissioner pointed out that income derived from professions is also distinguished in the Income Tax Act from income derived from business. Nevertheless he would apparently hold that professions come under the head of businesses in the Excess Profits Duty Act and would be assessable to excess profits duty but for the exemption in the schedule. These Bazar Companies are admittedly not businesses for the purposes of the Income Tax Act any more than professions are businesses for the purposes of that Act. They are assessed to income tax as house property and not as businesses. Nevertheless according to the Financial Commissioner's view they are businesses for the purposes of the Excess Profits Duty Act because they are not exempted in the schedule of that Act, as professions are.

Mr. Giles on behalf of the Companies concerned urges strongly that the contents of the term "business" are the same in the Income Tax Act and the Excess Profits Duty Act, that a person or a company drawing its income from house property is clearly not contemplated in the Income Tax Act as carrying on a business and that, therefore, these Companies do not "carry on a business" for the purposes of the Excess Profits Duty Act either and that the Financial Commissioner has given undue weight to the fact that offices, employments and professions are specifically excepted in the schedule of the latter Act. There seem to be serious difficulties in giving the term "business" a wider meaning under the Excess Profits Duty Act than under the Income Tax Act. The Income Tax Act was passed in 1918 and it was clearly the basis on which the Legislature worked in framing the Excess Profits Duty Act, 1919. Many of the sections of the former are incorporated in the latter with only slight modifications and the definition of business in the Income Tax Act is produced *verbatim* in the Excess Profits Duty Act. Accordingly, in spite of the wide language used in section 3, it is difficult to hold that the Act contemplates any extension of the

word 'business' beyond the meaning assigned to it in the Income Tax Act. In framing the Excess Profits Duty Act the Legislature had before them the Incom Tax Act with its clear distinction between income derived from house property and income derived from business, and yet we find that they impose the excess profits duty only on "excess profits arising out of certain businesses" (*vide* the preamble of the Act), not on "certain sources of income" as we might, I think, expect if it was really intended to throw the net wider and bring under assessment to excess profits duty sources of income other than those lassed as businesses in the Income Tax Act.

It is instructive to compare the English legislation on the subject with the Indian enactments. In the Income Tax Act of 1842 (5 & 6 Vic., Ch. 35) income is classified according as it is derived from property in land (Schedule A), occupation of land (Schedule B), dividends (Schedule C), professional and trade profits (Schedule D). The "first case" in Schedule D deals with duties on trade profits. It is headed "Duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade not contained in any other schedule of this Act." The first case in Schedule D is evidently the source from which the definition of business in the two Indian enactments comes. Turning now to the English provisions for excess profits duty which are contained in Part III of the Finance Act (No. 2) of 1915, section 39, we find that "excess profits duty" applies to all trades and businesses of any description excepting—

(*a*) husbandry in the United Kingdom ; and

(*b*) offices or employments ; and

(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount; but including the business of any person taking commissions in respect of any transactions or services rendered, and of any description (not being a commercial traveller, or any agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency).

This is clearly the foundation of the excepted businesses schedule (Schedule I) of our Indian Excess Profits Duty Act, X of 1919. In a very recent case, *Commissioners of Inland Revenue* v. *Sangster* (1), Mr. Justice Rowlatt ramarked: "It looks as if in the use of the vague word 'business' the Legislature was not glancing at anything more than what is taxable under case 1 of Schedule D of the Income Tax Act, 1842. However, I do not decide that." The same remark may be applied to 'business' in the Indian Act. We may conjecture that when they were imposing this duty the Indian Legislature was not was merely glancing at what was taxable under the head of business in the Income Tax Act of the previous year but had their eyes firmly fixed on it. Otherwise it is hard to conceive why they should have repeated the same definition of business as in the Income Tax Act. We should not, in my opinion, attach any great weight to the schedule of "excepted businesses" as throwing any light on this point. That schedule simply reproduces the corresponding provisions in the English Finance Act of 1915, section 39 (see above). Mr. Giles suggests that 'offices or employments' and 'professions' generally are expressly excepted in Schedule I of the Indian Act merely *ex majore cautela*. The true explanation, I think, is that the exceptions were taken bodily from the English Enactment of 1915 and incorporated in our Excess Profits Duty Act schedule without a clear apprehension of the reason why these exceptions were made in the English enactment. Offices, employments and professions appear to have been expressly excepted in section 39 of the English Act, because there was some risk of these sources of income being confused with income derived from businesses, seeing that business income and income from offices, employments and professions are all assessed under the same schedule (Schedule D) in the English Act, 1842. There was no such risk in the case of the Indian calssification, for income from business is clearly distinguished in the Income Tax Act from "professional earnings,"

(1) (1920) 1 K. B.587.

and moreover the term "business" itself is separately defined in the Income Tax Act, the definition corresponding to the first case, 'trading profits', in Schadule D of the English Act. Although the definition of 'business' in the two Indian Acts is not exhaustive, its looseness will not justify the introduction of things which according to the scheme of the Income Tax Act are wholly dissimilar. An examination of the two Indian Acts does not in my opinion support the Financial Commissioner's order in these cases.

Moreover on general considerations also I think it would be difficult to hold that these Bazaar Companies are "carrying on a business."

We must not be misled by the undoubted fact that a very large amount of business of various kinds is carried on in the Companies' Bazaars by their tenants. What we have to decide is whether the Company itself is 'carrying on a business.' The business which these Companies carry on, according to the Financial Commissioner, is the business of letting tenements and stalls, but if that is carrying on a business within the meaning of the Act, then every person who has invested his capital in house property is liable to excess profits duty when his income rises above the minimum limit. It is not contended, however, that any individual owner of house property has been actually assessed as such to excess profits duty, and we can take it that they are not in practice assessed, it being recognised no doubt that they are not liable to assessment as carrying on businesses but are only liable to assessment to ordinary income tax as owners of house property. Does it make any difference then that the assessees here are Companies and not individuals? Such a contention was put forward in another recent case under the English Excess Profits Duty Law Finance (No. 2) Act, 1915, in *Commissioners of Inland Revenue* v. *Korean Syndicate Ltd.* (2).

The Korean Syndicate merely received interest on money which they had in deposit at a Bank and received royalties from another company to whom the Korean Company had leased a certain concession in Korea. Mr. Justice Rowlatt said: "In my opinion the contention of the Crown, that the Company in this case was carrying on a business, fails. If what the Company is doing, namely, receiving interest and royalties, was done by an individual, no one would say that that individual was carrying on a business, and it does not become a business merely because it is done by an artificial body like a company and not by an individual." A similar contention was raised in the earlier case of *Smith* v. *Anderson* (3). That was a case tried by the Master of the Rolls, Sir George Jessel. It was under the English Companies Act, 1862. The case was one in which it was sought to have a certain trust, called the Submarine Cables' Trust, wound up as an illegal association as it was not registered under the Companies Act. The chief question under consideration in the case was whether the trustees concerned or the share-holders carried on a business, and the Master of the Rolls held that there was an association of more than 20 persons formed for the purpose of carrying on a business having for its object the acquisition of gain and that as the association was not registered as a Company, it was illegal. The Appeal Court did not accept this view. They held that the deed of settlement did not authorise the carrying on of a business but merely provided for the management of a trust fund. In the course of his judgment the Master of the Rolls said: "There are many things which in common colloquial English would not be called a business, even when carried on by a single person, which would be so called when carried on by a number of persons. That is a distinction not to be forgotten, even if we were trying the question by the ordinary use of the English language. For instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes, would not be said to carry on a business because he let the offices as such; but suppose a Company was formed for the purpose of buying a building, or leasing a house, to be divided into offices,

(2) (1920) 1 K. B. 598.

(3) (1880) 15 Ch. D. 247; 50 L. J. Ch. 39; 43 L. T. 329; 29 W. R. 21.

MUHAMMAD SHAH v. ABDULLAH SHAH.

and to be let out, should not we say, if that was the object of the Company, that the Company was carrying on business for the purpose of letting offices, or was an office-letting company, trying it by the use of ordinary colloquial language?" It is evident from the report of the case that the Lords of Appeal did not accept the view that what would not be a business if carried on by one person may be a business if carried on by a large number of persons (*vide* page 271 of the report). The Master of the Rolls gave a very wide meaning to the term "business." He said: "You cannot acquire gain by means of a company except by carrying on some business or other, and I have no doubt if any one formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained." These views were not accepted by the Court of Appeal. They pointed out that to come within the Companies Act it would be necessary that the association should be formed not merely for the purpose of acquiring gain but for the purpose of carrying on a business by which gain is to be acquired. They held that the Submarine Cables' Trust did not carry on a business, though they were associated for the purpose of acquiring gain by investing certain money once for all and receiving the proceeds thereof. The fact that they were authorised in certain circumstances to sell out securities and buy others instead, would not bring them within the Companies Act for that was merely a subsidiary matter subordinate to the main purpose of the association.

We are now dealing with an entirely different enactment, but the decision of the Court of Appeal in *Smith* v. *Anderson* (3) is a useful guide in considering whether these Bazaar Companies are carrying on a business. The mere fact that they have each a place of business and that they have registered under the Companies Act is not material. A man who has invested his capital in house property and who keeps a rent office and a staff of rent collectors, clerks, etc., for the purpose of setting out his houses and collecting the rents is not carrying on a business. He is merely taking the ordinary steps necessary for enjoying the income from his property. If he bought and sold house property continually he would then no doubt be carrying on a business, he would be trading in house property, but not if he only bought a house or sold one from time to time as incidental to his position as owner of house property. And this is apparently the position of the companies now under consideration. They may add to their property by purchase or by sale of a particular part of their property from time to time, but this is only incidental to their main purpose which is to hold property and distribute the rents in the form of dividends to the shareholders. They are no doubt an association for acquiring gain, but the method of acquiring gain is passive by owning property and not by the active carrying on of a business. I would, therefore, decide that these two Companies are not liable to excess profits duty.

The assessees in both cases are allowed their costs of the reference in this Court, Advocate's fee being fixed at five gold *mohurs*.

References accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 670 OF 1920.

June 1, 1920.

Present:—Mr. Justice Scott Smith.

MUHAMMAD SHAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABDULLAH SHAH—PLAINTIFF—RESPONDENT.

Suits Valuation Act (VII of 1887), s. 11, applicability of—Undervaluation of relief as to injunction—Value fixed by rules—Jurisdiction.

Section 11 of the Suits Valuation Act applies only where the valuation of the suit depends on the discretion of the parties or the Court and is not applicable when the valuation is fixed by rules having the force of law. [p 9 9, col. 2]

Gunga Sahai v *Sheo Lal*, 132 P R. 1894, *Khuda Yar* v. *Wahab Din*, 35 P. R 1901; 47 P.L R. 1901, *Sanga* v. *Mali*, 8 Ind. Cas 1043; 2 4 P. L. R. 1910, followed.

Plaintiff sued for possession of a vacant site and for perpetual injunction, to the effect that the defendants should not prevent him from building a house thereon. He valued his relief for possession at Rs. 50 and that for injunction at Rs. 10. The Munsif,

2nd Class, having decreed the claim in part, both parties appealed to the Senior Subordinate Judge, who modified the decree without any objection being raised as to jurisdiction. Defendants filed a second appeal to the High Court on the ground of undervaluation of the relief as to injunction and of the want of jurisdiction of the Senior Subordinate Judge:

Held, (1) that section 11 of the Suits Valuation Act did not cure the defect, as the valuation of the suit did not depend entirely on the discretion of the defendants but was fixed by the rules of the Court;

(2) that the order of the lower Appellate Court was defective, having been passed without jurisdiction.

Second appeal from the decree of the Senior Subordinate Judge, Hoshiarpur, dated the 25th November 1919, modifying that of the Munsif, 2nd Class, Hoshiarpur, dated the 2nd July 1919.

Sheikh *Niaz Muhammad*, for the Appellants.

Lala *Fakir Chand*, for the Respondent.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiff-respondent sued for possession of a vacant site and for perpetual injunction to the effect that the defendants-appellants should not prevent him from building a house thereon. Those reliefs he valued as follows:—

(1) That for possession of site at Rs. 50, and

(2) that for injunction at ... Rs. 10.

Total ... Rs. 60.

The first Court having decreed the claim, both the parties appealed to the Senior Subordinate Judge who decided the appeals without any objection being raised as to jurisdiction.

Defendants have filed a second appeal in this Court, and it is urged that the plaintiff undervalued the relief for injunction. It is urged that under the rules framed by this Court a suit in which a right to build, with or without an injunction, is claimed must be valued at such a sum exceeding Rs. 100 and not exceeding Rs. 500 as the plaintiff may state in the plaint. Had the second relief claimed been properly valued, the total value of the reliefs claimed would have exceeded Rs. 100 and as the suit was an unclassed one the appeal would have lain to the District Judge and not to the Senior Subordinate Judge. It is clear that the relief was undervalued in the plaint, but Lala Fakir Chand on behalf of the respondent says that the defect is cured by section 11 of the Suits Valuation Act and that no objection having been taken in the Court of first instance or in the lower Appellate Court, this Court should not interfere unless it considers that the undervaluation has prejudicially affected the disposal of the appeal on its merits.

In *Gunga Sahai* v. *Sheo Lal* (1) it was held that inasmuch as the valuation of a suit for perpetual injunction has, for the purposes of jurisdiction, been fixed by the rules of the Chief Court, sanctioned by Government, at a sum between Rs. 100 and Rs. 500. the 3rd Class Munsif, who tried the suit, had no jurisdiction to try it and that the defect of jurisdiction was not cured by section 11 of the Suits Valuation Act, 1887, which is limited to cases of "over-valuation or undervaluation," in which the valuation depends on the discretion of the parties or the Court.

In the present case the valuation of the second relief did not depend entirely on the discretion of the defendants at all, but was fixed by the rules at a sum exceeding Rs. 100 and not exceeding Rs. 500. The above ruling was followed in a Division Bench case reported as *Khuda Yar* v. *Wahab Din* (2) and in the case reported in 8 Ind. Cas. 1043 [*Sanga* v. *Mali* (3)] corresponding to 214 P. L. R. 1910.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, direct that the record be returned to that Court, which will return the memoranda of appeal to the respective parties and they, if so advised, will re file their appeals in the Court of the District Judge. The latter officer will take the necessary steps for having valuation for the purposes of jurisdiction corrected and the Court-fee made up to the correct sum. The stamp in this Court will be refunded and other costs will be costs in the case.

Appeal accepted.

(1) 132 P. R. 1894.
(2) 35 P. R. 1901; 47 P. L. R. 1901.
(3) 8 Ind. Cas 1043; 214 P. L. R. 1910.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 79 OF 1919.

April 30, 1920.

Present :—Mr. Justice Jwala Prasad.

FIRM RAM KUMAR SHEO CHAND RAI—DEFENDANTS—APPLICANTS

versus

FIRM TULA RAM NATHU RAM—PLAINTIFF - OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 22—Transfer of case, application for—Jurisdiction of Court, whether can be questioned - High Court, power of, to determine whether suit shall be tried by Court subordinate to another High Court—Order, whether final.

A defendant cannot raise an issue as to the jurisdiction of the Court in which the suit is pending and at the same time apply for transfer of the case under section 22 of the Civil Procedure Code, which contemplates that the suit may be properly instituted in the Court in which it is pending as well as in some other Court. [p. 921, col. 2.]

Under section 22 of the Civil Procedure Code a High Court has power to determine whether a suit shall proceed in a Court subordinate to itself or in some Court subordinate to another High Court, and an order by a High Court that a suit shall proceed in a Court subordinate to another High Court will be final and it will not be open to the latter Court to refuse the suit being tried in the Court subordinate to it having jurisdiction to try it. [p. 922, col. 2.]

Application for transfer from the Court of the 1st Sub-Judge, Purulia, to the Bombay High Court.

Messrs. *P. C. Manuk*, *P. K. Sen* and *G. C. Pal*, for the Petitioners.

Messrs. *S. A. Ashgar* and *A. N. Das*, for the Opposite Party.

JUDGMENT.—This is an application by the defendants for transfer of Suit No. 1 of 1919 pending in the Court of the Subordinate Judge of Purulia. The circumstances under which this application has been made are as follows :—

The plaintiffs are a firm carrying on business at Calcutta and Purulia. The defendants are also a firm carrying on business as merchants and commission agents at Bombay. The plaintiffs employed the defendants as their agents for the purchase and sale of piecegoods and cotton in the Bombay market.

The plaintiffs have brought the present suit in the Court of the Subordinate Judge of Purulia against the defendants for rendition of accounts, for returning the papers belonging to them and for recovery of Rs. 1,100 or such further amount as may be found due to them on account being taken and on payment of additional Court-fee.

The reason for bringing the suit in Purulia is stated in paragraph 5 of the plaint, to be that the defendants agreed to state and settle their accounts and submit all papers to the plaintiffs' firm at Purulia and that the cause of action arose at Purulia. The plaint in the present suit at Purulia was filed on the 3rd of January 1919.

On the 4th of May 1919 the defendants in the present case likewise brought a suit in the Bombay High Court on its original side against the plaintiffs for account and for recovery of Rs. 26,736 odd as the amount due to them from the plaintiffs.

The plaintiffs, who are defendants in the suit at Bombay applied to the Bombay High Court for stay of that suit until the present suit at Purulia was decided. That application was opposed by the defendants in the present case, and the High Court of Bombay on the 12th July 1919 made an order that the suit and all proceedings in the Bombay Court be stayed until the disposal of the present suit at Purulia.

In the meantime on the 11th July 1919 the defendants in the Purulia case made an application to this Court, alleging that they were not aware of the suit at Purulia and came to know of it during the pendency of the motion at Bombay.

In support of this application two grounds have been urged in paragraphs 6 to 8:—

(1) That all the witnesses of the petitioners, about 30 in number, are traders and brokers of Bombay. They reside and carry on their business at Bombay beyond the jurisdiction of the Purulia Court and will not be available for examination at Purulia and will have to be necessarily examined by commission. The defendants, who are residents of Bombay, will be put to great inconvenience and expense and will be seriously prejudiced in their defence in the event of the case being tried at Purulia.

(2) Both the suits at Bombay and at Purulia arise out of the same transaction and relate to accounts between the parties, the former covering all the issues that will arise in the Purulia suit which has been

instituted with the *mala fide* intention of delaying the disposal of the case at Bombay.

The petitioners also challenge in paragraph 5 of their petition the competency of the Purulia Court to entertain the present suit, on the ground that the contract between the parties was entered into and the moneys due thereunder were payable at Bombay, where they were employed as agents by the plaintiffs. In other words, it is stated that the cause of action did not arise at Purulia and the suit could not be instituted there.

The petitioners repeated the aforesaid grounds in their sworn affidavit of the 11th March, disclosing the names of some of their witnesses at Bombay and stating more definitely and clearly their objection as to the jurisdiction of the Purulia Court to try the suit.

On the other hand, the plaintiffs opposite party have filed counter-affidavits, dated the 10th March and the 9th April 1920. In the latter it is stated that it will be necessary for them (the plaintiffs) to adduce, besides documentary evidence, oral evidence of witnesses from Purulia and Calcutta; that the proprietors of the defendants' firm live in Calcutta and have their office in Calcutta, as is shown by the correspondence between the Attorneys of the defendants' firm, Messrs. Marwangi Kola and Company, Bombay, and the plaintiffs' Attorneys, Messrs. Pugh and Co., Calcutta, dated the 10th December 1918 and 13th June 1919. The allegation as to the cause of action having arisen in Bombay is also refuted.

Both the suits relate to accounts between the parties who are at variance with regard to the two important points which arise for consideration in connection with this application:

(1) Whether the cause of action for the suit arose at Purulia within the jurisdiction of this Court, or at Bombay, and

(2) Whether the balance of convenience lies in trying the suit at Purulia or at Bombay.

If the first question is decided in favour of the defendants, then the application for transfer would become unnecessary, and unless that question is decided against the plaintiffs and it is held that the case has been properly instituted in the Purulia Court, the application for transfer is incompetent, inasmuch as under section 22 of the Code of Civil Procedure such an application can only lie "Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts." If the cause of action did not arise at Purulia, the suit could not be instituted in that Court and any application under sections 23 and 24 would be incompetent. This is an issue in bar and has to be determined by the Purulia Court where the suit has been filed. This issue has not yet been tried and in fact the defendants have not filed their written statement even. Mr. Manuk says that his clients could not delay the filing of this application and await the decision of that issue, inasmuch as an application under section 22 has to be made "at the earliest possible opportunity and in all cases where issues are settled at or before such settlement." But in a case of this kind where the defendants contemplated an application for transfer and also thought that the Purulia Court had no jurisdiction to try the case, the proper course to my mind was to file a written statement and to apply to the Purulia Court to try in the first instance the question as to the jurisdiction of that Court to entertain the suit and at the same time intimating that, if the decision was against them, they intended to apply for the transfer of the case to the Bombay High Court. It was, to my mind, also open to them to ask this Court to have the issue as to jurisdiction tried by the Purulia Court in the first instance and then to take up this application for transfer in case that issue was decided against them. In any case the petitioners cannot raise an issue as to jurisdiction of the Purulia Court and at the same time apply for transfer of the case under section 22 of the Code, which contemplates that the suit may be properly instituted in the Purulia Court as well as in some other Court. In this view the present application for transfer is incompetent as was held in cases similar to the present one, *Sachendra Nath Mitra* v.

Muhammad Habibullah (1) and *Askaran Baid* v. *Bhola Nath* (2).

In order to decide the second question, I shall assume that the case has been properly instituted in the Purulia Court and that the present application for transfer is competent.

The prayer in the application is that the suit in question be transferred to Bombay. I understand from Mr. Manuk that the application is under sections 22 and 23 of the Code, although, probably by inadvertence, section 24 has been mentioned in place of section 23 in the petition to this Court. Section 22 provides for an application for transfer and empowers the Court, to which such application is made, after considering the objections of the other parties to the suit, to "determine in which of the several Courts having jurisdiction the suit shall proceed." Section 23 indicates the Court to which an application under section 22 should be made. Clauses (1) and (2) do not apply to this case, as they relate to cases where the several Courts having jurisdiction to try the suit are subordinate to the same Appellate Court or to the same High Court. The application of the defendants, therefore, comes under clause (3) of section 23, which provides that where the several Courts are subordinate to different High Courts, the application under section 22 shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

The question is whether this Court can transfer the suit from the Purulia Court to any Court subordinate to the High Court at Bombay. Section 24 of the Code deals with transfer and withdrawal of suits on application having been made under clauses (1) and (2) of section 23, and does not, therefore, apply to the present application. By that section express power of transfer has been given to the High Court or the District Court, as the case may be, but for cases which may be instituted in Courts subordinate to different High Courts, no such special provision has been made, so that this Court has no power by any express provision of the Court to transfer a case from the Court subordinate to it to any other Court subordinate to the Bombay High Court, or to the Bombay High Court itself. The Court can only dispose of the present application for transfer in the manner prescribed by section 22, under which it can only "determine in which of the several Courts having jurisdiction the suit shall proceed." The power of the Court is, therefore, limited to the determination as to where the suit shall proceed, at Bombay or at Purulia, assuming that the Courts at both the places have jurisdiction to try it. I do not agree with the view taken by Mr. Stanyon in *Abu Bakar Abdul Rahiman & Co.* v. *Rambux* (3) that a High Court has no such power of determination and that such a determination will in any way create anomaly or difficulty. An order of a High Court under section 22, that a suit shall proceed in a Court subordinate to another High Court, will be final and it will not be open to another High Court to refuse the suit being tried in the Court subordinate to it having jurisdiction to try it.

The petitioners urge that the suit at Purulia should not proceed inasmuch as the suit in the Bombay High Court is more comprehensive and covers the issues involved in the Purulia Court (*vide* paragraph 12 of the petition). But the suit in Bombay has already been stayed, by an order of the Bombay High Court, until the disposal of the suit at Purulia. The order of the Bombay High Court is final and the Bombay suit, therefore, cannot proceed. The present suit at Purulia must, therefore, proceed.

Mr. Manuk, however, contends that although the suit at Bombay has been stayed and the order cannot be re-opened in this Court, he is still entitled to a determination that the present suit should be tried at Bombay. This he will be entitled to, only upon showing either that he will not have an impartial trial at Purulia, or that the manifest preponderance of convenience in the present case is in favour of the present suit being tried at Bombay. There is no suggestion as to the existence of the former ground in the present case, namely, that there will not be an impartial trial of the suit at Purulia.

(1) 24 Ind. Cas. 707.
(2) 48 Ind. Cas. 105; 21 O. C. 217.
(3) 46 Ind. Cas. 393; 13 N. L. R. 81.

Now as to whether there is manifest preponderance of convenience in the present suit being tried at Bombay rather than at Purulia, Mr. Manuk says that on behalf of the petitioners 30 witnesses will have to be examined in the case, all of Bombay and men of great wealth and position, and that it would not be possible to bring them to Purulia and in fact under the law they cannot be compelled to come to Purulia, inasmuch as the place of their residence is beyond the jurisdiction of the Purulia Court. Further it is said that it will cause great inconvenience to bring on record huge account books from Bombay either in the applicants' own possession or in the possession of their witnesses.

Mr. Asbgar, on the other hand, asserts that his witnesses live in Calcutta and Purulia, and contends that no such voluminous documents, as has been stated on behalf of the petitioners, will be required in the case. Upon the affidavit in this case filed on behalf of the clients of Mr. Asbgar it appears that the defendants' firm have also some office in Calcutta and that they were willing to show their account books to the plaintiffs in the present case in Calcutta. Whereas the witnesses on behalf of the defendants are said to reside in Bombay, the plaintiffs themselves reside within the jurisdiction of the Purulia Court; and whereas the evidence of the witnesses can be had by commission, the evidence of the plaintiffs themselves, if they want to examine themselves in the case, must necessarily be taken in Court, for parties can seldom examine themselves by commission. While looking to the convenience of the defendants, one cannot overlook the inconvenience of the witnesses on behalf of the plaintiffs or the plaintiffs themselves, particularly when they have in the first instance the right to choose the venue in which they would prosecute their suit.

I am not satisfied upon the affidavit in this case that the balance of convenience preponderates in favour of the defendants. Much stronger grounds, than in the present case, were alleged in the case of *Helliwell* v. *Hobson* (4) and still the Court did not allow the change of venue. No doubt in the case of *Harendra Lall Roy* v. *Sarvamangala Dabee* (5) the balance of convenience was held to lie in the Court other than the Court in which the suit was instituted; but the defendant in that case was a lady whose evidence was essential in the case and who, the Court held, could not go to Dinagepur without much inconvenience and expense which she was not able to afford. The circumstances of that case might have been sufficient to entitle the defendant to have his case transferred to Calcutta. But the circumstances of each case differ. The majority of the Judges have in the circumstances more or less similar to those in the present case, or even under stronger circumstances, declined to change the venue and to deprive the plaintiff of the right to choose his own venue. The facts of this case are similar to those of *Askaran Baid* v. *Bhola Nath* (2), *Abu Bakar Abdul Rahiman & Co.* v. *Rambux* (3), *Sachendra Nath Mitra* v. *Muhammad Habibullah* (1), where applications for transfer, similar to the present one, were refused, *vide* also *Muthia Chetty* v. *Arunachallam Chetty* (6).

The fact that the Bombay High Court has already stayed the suit pending there, strengthens the position of the plaintiffs in the present case.

Considering all the circumstances I do not see my way to accede to the request of the defendants-petitioners and dismiss the application and direct that the case at Purulia do proceed.

The application is rejected with costs. Hearing fee five gold *mohurs*.

Application rejected.

(4) (1858) 3 C. B. (N. S.) 761; 140 E. R. 942; 111 R. R. 829.

(5) 24 C. 183; 12 Ind Dec. (N. S) 788.

(6) 23 Ind. Cas 345; 7 Bur. L. T. 1; 7 L. B. R. 129

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 3070 OF 1915.

November 19, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

IBRAHIM ALI KHAN—PLAINTIFF—APPELLANT

versus

Musammat MUBARAK BEGAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Succession—Marriage—Slave

IBRAHIM ALI KHAN *v.* MUBARAK BEGAM.

girl—Acknowledgment that issue of slave girl entitled to succeed, effect of—Illegitimacy—Burden of proof.

Although according to strict Muhammadan Law, no marriage is necessary between a slave girl and her master, yet an acknowledgment by the master that he has a son born by the slave girl, with whom he has gone through a ceremony of marriage, coupled with the assertion that on the failure of issue from his real wife the issue of the slave girl would be entitled to his succession, would invest the son with a legitimate status with all the consequences which that imports. In the absence of positive evidence that the marriage did not take place, the law will refuse to declare the son a bastard and so disentitled to inherit [p. 925, cols. 1 & 2.]

Appeal from the decree of the Senior Subordinate Judge, Karnal, dated the 4th June 1915.

The Hon'ble Mian *Fazil-i-Husain* and Dr. *Shuja ul Din*, for the Appellant.

Lala *Hargopal* for Sheikh *Niaz Ali*, for the Respondents.

NAWAB NAJABAT ALI KHAN
|
Nawab Daler Khan
|
Nawab Muhammad Gulsher Khan
|
Nawab Rahmat Khan — *Nawab* Muhi-ud-Din
Nawab Bahadur Jang Khan (childless) — *Nawab* Ghulam Ali Khan — Muhamad Yar Khan
Nawab Muhammad Ali Khan
Hon'ble *Nawab* Muhammad Ibrahim Ali Khan.
Ahmad Hassan Khan =*Musammat* Muhammadi Begam. — Mubarak Begum = Muhamad Hasan Khan = Nau Bahar
Shadi Khan.

JUDGMENT.—The foregoing pedigree table displays the relationship existing between the parties to this case. The appellant-plaintiff came into Court, alleging that Ahmad Hassan Khan and Muhammad Hassan Khan had held the property in dispute as mere *guzara khwars* or tenants for life and that the real proprietary right was vested in the plaintiff. Ahmad Hassan Khan died in 1886 and Muhammad Hassan Khan in September, 1907. Ahmad Hassan Khan left a widow, *Musammat* Muhammadi Begum, and Muhammad Hassan Khan a widow, *Musammat* Mubarak Begum, both of whom were alive at the time of the institution of the suit. The plaintiff's suit was for possession of the property of Muhammad Hassan Khan on the ground that widows had no right to succeed and were entitled merely to maintenance, that *Musammat* Muhammadi Begum had surrendered her husband's estate and had accepted an annuity of Rs. 300 as maintenance whilst the second defendant Shadi Khan, who set up a claim to be the son of Muhammad Hassan Khan, is not his son and is entitled neither to succession nor to maintenance. On the death of Muhammad Hassan Khan in 1907 mutation of his estate was effected in favour of his widow, *Musammat* Mubarak Begum, and Shadi Khan, defendant No. 2, in equal shares.

The trial Court gave the plaintiff a decree in respect of *Musammat* Muhammadi Begum's share in the property in suit, but dismissed his claim in respect of Muhammad Hassan Khan's share on the ground that Shadi Khan's mother was married to Muhammad Hassan Khan and that Shadi Khan as the legitimate son of Muhammad Hassan Khan was entitled to succession.

The plaintiff has appealed to this Court in respect of that portion of his claim which was dismissed, and before us the only point which has been contested is whether Shadi Khan is the legitimate son of Muhammad Hassan Khan. It is no longer contended that Muhammad Hassan Khan in respect of the arrears now in dispute was entitled merely to a life-interest by way of maintenance. It is quite clear from the evidence on both sides that *Musammat* Nau Bahar Begum, the mother of Shadi Khan, was a *kanizak* or female slave purchased by Muhammad Yar Khan and that she gave birth to defendant No. 2. We have carefully considered the evidence of the alleged marriage ceremony between *Musammat* Nau Bahar Begum and Muhammad Hassan Khan and are unable to avoid the conclusion that it is highly unsatisfactory and unconvincing and would be quite insufficient to justify a positive finding that the marriage did in fact take place.

Shadi Khan deposes that the marriage between *Musammat* Nau Bahar Begum and Muhammad Hassan Khan took place some few years before Muhammed Hassan Khan's marriage with *Musammat* Mubarak Begum; but some of his witnesses allege that the marriage with *Musammat* Mubarak Begum took place before the marriage with *Musammat* Nau Bahar Begum. The *Nikah Khwan* who performed the marriage is indeed mentioned by name, but he is said to be dead and he does not appear to have been the ordinary *Nikah Khwan* of the family, if indeed a *Nikah Khwan* of that name existed at all. Moreover having regard to the fact that *Musammat* Nau Bahar Begum was a purchased slave and that at the time of the alleged marriage Muhammad Hassan Khan must have been a mere boy, we hold it extremely improbable that his father would have sanctioned a regular marriage between his son and a mere slave girl, especially when we know that according to the strict Muhammedan Law no marriage is necessary between a slave girl and her master. Our conclusion then is that the marriage between Muhammad Hassan Khan and *Musammat* Nau Bahar Begum is not proved by the specific evidence on that issue. But as against this there is an acknowledgment made on the 14th March 1907 by Muhammad Hassan Khan before the District Judge of Karnal that he had a son born not of his real wife but of a female slave with whom Muhammad Hassan Khan had gone through a ceremony of marriage, and he proceeded to assert that on the failure of issue from his real wife the issue of the aforesaid female slave would be entitled to his succession. Now, it is admitted before us on behalf of the plaintiff that Shadi Khan is the son of Muhammad Hassan Khan by *Musammat* Nau Bahar Begum and at page 170 of Wilson's Digest of Anglo-Muhammadan Law we find that if a man has acknowledged another as his legitimate child, the presumption of paternity arising therefrom can be rebutted only by the establishment of certain conditions which the learned commentator sets forth. None of these conditions are satisfied in this case. It has, however, been argued before us that such an acknowledgment is merely an estoppel and does not prejudice the right of third persons, and we have been referred to *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan* (1). We are unable to accept this contention, for it seems to us clear that the result of such an acknowledgment is to invest the son with a legitimate status with all the consequences which that imports, and this view was taken by the Privy Council in *Sadik Husain Khan* v. *Hashim Ali Khan* (2). We have already said that Muhammad Hassan Khan's marriage with *Musammat* Nau Bahar Begum has not been proved, and we even go so far as to say that the fact of that marriage is extremely improbable; at the same time the question for us to decide is whether the marriage has been disproved and we must answer this question in the negative. The law refuses to declare a man a bastard except on the clearest and most positive proof of his illegitimacy, and before we can find that the marriage between Muhammad Hassan Khan and *Musammat* Nau Bahar Begum is disproved, we must be in possession of positive evidence that the marriage did not take place. Such evidence in this case is lacking, and in the absence of such disproof we must attach to the acknowledgment made by Muhammad Hassan Khan its full value and hold that Shadi Khan is not a bastard. Consequently Shadi Khan is entitled to Muhammad Hassan Khan's succession and the plaintiff's suit against him must fail.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 10 A. 289; 6 Ind. Dec. (N. S.) 193.

(2) 36 Ind. Cas. 104; 38 A. 627 at p 651; 31 M. L. J. 607; 14 A. L. J. 1248; 19 O C. 192; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 577; 21 M. L. T. 40; 1 P. L. W. 157; 4 O. L. J. 22; 25 C. L. J. 363; 6 L. W. 378; 10 Bur. L. T. 140; 43 I A. 212 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 286 OF 1919.

April 30, 1920.

Present:—Mr. Batten, Offg. J. C.

TEKCHAND—PLAINTIFF—APPLICANT

versus

Musammat PATTO AND ANOTHER—DEFENDANTS—NON-APPLICANTS.

Limitation Act (IX of 1908), s. 4—Civil Procedure Code (Act V of 1908), O. VII, r. 6—Plaint filed on day Court re-opened after vacation—Limitation, expiry of, during vacation—Plaint omitting to state cause of delay—Plaint, whether liable to be rejected—Evidence Act (I of 1872), s. 57 (9)—Judicial notice—Holidays notified—Duty of Court.

Although under rule 6, Order VII, of the Civil Procedure Code the plaint in a suit filed after expiry of the period of limitation should show on what ground exemption is claimed, yet an omission to do so in respect of a suit filed on the day the Court re-opened after its summer vacation, the period of limitation for bringing which had expired during the vacation, would not entail dismissal of the suit, because under section 57 (9) of the Evidence Act the Court is bound to take judicial notice of any public holidays notified in the Official Gazette, and the plaintiff is entitled to presume that the Court would take such judicial notice. The proper course for the Court in such a case is not to dismiss the suit but to require the plaint to be amended [p. 927, col. 1.]

Revision of the order of the Judge, Small Cause Court, Hoshangabad, in Civil Suit No. 581 of 1919, decided on 30th August 1919.

Mr. *J. C. Ghosh*, for the Applicant.

Mr. *B. R. Pendharkar*, for the Non-Applicants.

JUDGMENT.—In this case the suit is admittedly one governed by Article 66 of the First Schedule of the Limitation Act. In the ordinary course the plaint would have to be presented within three years from the date of the cause of action. In paragraph 5 of the plaint it is stated that the cause of action accrued on the 17th May 1916. In the last paragraph of the plaint it is stated that the plaint was presented on the 16th June 1919, and it was presented. The 16th of June 1919 was the first day after the annual Court vacation. The fact that the Civil Courts would be closed had been notified in the Gazette under the signature of the Registrar of the Judicial Commissioner's Court with the previous sanction of the Chief Commissioner. The plaint was presented to the Clerk of Court who, under the Judicial Commissioner's Civil Circular No. I 1, paragraph 2, made an endorsement on the plaint that it had been presented on the 16th of June. The endorsement also recited that it had been presented within time. In due course the Small Cause Court Judge, under the Judicial Commissioner's Civil Circular No. III 4, paragraph 2, passed an order on the trial-sheet under date 21st June 1919 that the plaint is admitted and registered and ordered summonses to be issued to the defendants for final disposal. The Clerk of Court and the Small Cause Court Judge thus treated the plaint as *prima facie* being within time and it was not rejected under rule 11 (*a*), Order VII, Civil Procedure Code. Both the Clerk of Court and the Small Cause Court Judge himself, therefore, considered that if the statement in the plaint were correct, the suit was *prima facie* within time.

At the hearing the defendants' Pleader pleaded that the claim, as stated in the plaint, was time-barred and the plaintiff's Pleader replied that the claim was not time-barred "owing to vacation." The following preliminary issue was framed:—

"Can plaintiff now rely upon the exemption on the grounds alleged when the plaint is silent upon it?"

The exemption meant was that embodied in section 4 of the Indian Limitation Act, IX of 1908, which runs as follows:—

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens."

The Small Cause Court Judge delivered the following judgment:—

"Preliminary issue:—I find this issue in favour of defendant. Rule 6 of Order VII, Civil Procedure Code, is imperative. According to this rule plaintiff is bound to show on the face of the plaint that the cause of action accrued within the period of limitation and cannot take advantage of any ground of exemption from limitation which he has not pleaded in the plaint.

Jageshwar Roy v. *Raj Narain Mitter* (1),

(1) 31 C. 1951 8 C. W. N. 168.

Gulam Hussein v. *Mahamadally Ibrahimji* (2), *Gobinda Mal* v. *Santa* (3.)

I, therefore, find no alternative but to dismiss the suit. I order that the suit of plaintiff be dismissed. Plaintiff shall pay the costs of defendant."

Rule 6 of Order VII, First Schedule, Civil Procedure Code, runs as follows:—

"Where the suit is instituted after the expiration of the period prescribed by the law of limitation the plaint shall show the ground upon which exemption from such law is claimed."

In the three cases cited by the learned Small Cause Court Judge, the plaintiff wanted to have the limitation extended on account of an acknowledgment made by the defendant or on account of interest paid by him. These were grounds within the special knowledge of the plaintiff and could not possibly be within the acknowledge of the Court, as they had not been stated in the plaint as originally presented. Even in such circumstances as these it has been ruled in *Gunnaji Bhaiaji* v. *Makanji Khushalchand* (4) that where the plaint has not been rejected, the plaint may be amended at the hearing. Even on the view taken by the Small Cause Court Judge this might well have been done in the present case. Under section 57, subsection (9), of the Evidence Act the Court is bound to take judicial notice of any public holidays which have been notified in the Official Gazette and the plaintiff was entitled to presume that the Court would take such judicial notice. The wording of the plaint assumed that the Court would understand why the plaint had been presented on the 16th of June and not during the vacation. The Clerk of Court accepted the plaint as being within time as a matter of course and the Small Cause Court Judge tacitly adopted the same view. The plaint may not have in so many words shown the ground upon which exemption was claimed, but it was assumed that this would be understood and it was in fact understood. If the view of the learned Judge were to prevail, then in every case where limitation expires on a Sunday the plaint would have to be rejected if the plaint presented on the succeeding Monday did not expressly state that the previous day was a Sunday. For these reasons I think that the grounds given for dismissing the suit are wrong.

The order of the Small Cause Court Judge is set aside. He will restore the suit to file and dispose of it according to law. Costs will be costs in the suit. I fix Rs 15 as Pleader's fee in this Court.

Order set aside.

(2) 7 Ind. Cas. 455; 12 Bom. L. R. 531; 34 B. 540.
(3) 26 Ind. Cas. 441; 83 P. R. 1914; 232 P. L. R. 1915; 192 P. W. R. 1914.
(4) 3 Ind. Cas. 159; 34 B. 250; 11 Bom. L. R. 498; 6 M. L. T. 234.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 702 OF 1916.

May 26, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

FATTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SIKANDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), O. XXII, rr. 4, 9—Failure to bring legal representatives of deceased respondent on record within time prescribed by law—Ignorance of law, whether sufficient cause—Joint interests of several respondents—Abatement of appeal in toto.

Mere ignorance of law is not a sufficient cause for not applying within time to bring the legal representatives of a deceased respondent on the record. [p. 928, col. 1.]

Hadu v. *Lala*, 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914, followed.

Where the interests of defendants-respondents are joint and a decree cannot be reversed without the representatives of a deceased respondent being brought on the record, the whole appeal must abate. [p. 928, col. 2.]

Second appeal from the decree of the District Judge, Jhelum, dated the 30th November 1915, reversing that of the Senior Subordinate Judge, 1st Class, Jhelum, dated the 30th November 1914.

Mr. *Nanak Chand*, for the Appellants.

The Hon'ble Mian *Fazl-i Husain*, for Respondents Nos. 1 to 10.

JUDGMENT.—Mr. Fazl-i-Husain, who represents the chief respondents-defendants Nos. 1 to 10, raises a preliminary objection that this appeal has abated, Sikandar, respondent No. 1, having died and no application

to bring his legal representatives upon the record having been made within the period prescribed by law. The application for impleading his representatives was made in June 1919. It asked for the impleading of representatives of no less than six of the plaintiffs-appellants and of Sikandar and Bata respondents. In not a single case was an application made within six months of the death of any of the deceased parties, and the only excuse made was that the appellants were ignorant of the law and did not know that they had to make any application.

It was held in *Hadu* v. *Lala* (1) that mere ignorance of law was not sufficient cause for not applying within time to bring the legal representative of a deceased respondent on the record. It is clear, therefore, that the appeal has abated as regards Sikandar, and the only question which we have to decide is whether it has abated as a whole.

In 1858 the ancestors of the plaintiffs made over proprietary rights in certain land to the ancestors of defendants Nos. 1 to 10. The ancestors of defendants brought a suit for a declaration that they were owners of the said land and obtained a decree on the 18th June 1887. The plaintiffs assert in the present suit that these defendants have no right to a share in the *shamilat* appertaining to the proprietary land held by them as owners under the aforesiad agreement and decree. The first Court held that the defendants were not entitled to any share in the *shamilat* and give the plaintiffs a decree accordingly. The learned District Judge on appeal held that the defendants were entitled to a share in the *shamilat*, and dismissed the plaintiffs' suit. The proprietary land which came to the defendants Nos. 1 to 10 from their ancestors, under the agreement aforesaid, appears to be still joint and any share in the *shamilat* to which they are entitled is a joint share. In support of his argument that the appeal has abated as a whole, Mr. Fazl-i-Husain has referred to *Khuda Bakhsh* v. *Mathra Das* (2), *Hadu* v. *Lala* (1), *Inayat* v. *Ganga* (3) and *Fateh* v. *Bhanu Ram* (4). These authorities support the proposition that where the interests of defendants-respondents are joint and a decree could not be reversed without the representative of a deceased respondent being brought on the record, the whole appeal must abate. The defendants respondents' right to the *shamilat* is a joint right. The decree in their favour amounts to a declaration that they are entitled to a share in the *shamilat* corresponding to a specified area of the proprietary land owned by them. This decree could not be set aside without the heirs of Sikandar being before the Court and, therefore, the abatement of appeal as against him involves the abatement of the appeal as a whole. *Khuda Bakhsh* v. *Mathra Dass* (2) is particularly in point. In that case the father of the plaintiff had sold the land in suit to one *M. D.* who re sold it to seven persons by one deed of sale, which specified the area each of the vendees was to take but not the proportion in which the sale money was to be paid by vendees. Plaintiff sued for possession after his father's death on the ground that the sale was not binding on him. The first Court decreed his claim, but the Divisional Judge reversed this decree on appeal. Plaintiff then appealed to the Chief Court. One of the vendees-respondents subsequently died and as no application was made to bring his representatives on the record, the appeal abated as far as he was concerned. It was held that as the land was still joint in the hands of the vendees the appeal, having abated against one of them, could not proceed against any of the respondents and must be dismissed. In *Hadu* v. *Lala* (1) it was stated that a useful test in such cases was, could the suit *ab initio* have been instituted and prosecuted with the deceased respondent left out? We are clear that the present suit could not have proceeded as laid with Sikandar left out. We are, therefore, of opinion that Mr. Fazl-i-Husain's preliminary objection must prevail and we hold that the appeal has abated and we direct the appellants to pay the respondents' costs in this Court.

Appeal rejected.

(1) 21 Ind. Cas. 951; 41 P. R ; 15 P. L . R 1914; 16 P. W. R. 1914.

(2) 18 Ind. Cas. 182; 62 P. R. 1913; 85 P. L. R 1913; 89 P. W. R. 1913.

(3) 32 Ind. Cas. 829; 3 P. R. 1916; 200 P. W. R 1915.

(4) 41 Ind. Cas. 730; 96 P. R. 1917; 49 P. W R 1917.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 259 OF 1919.

March 2, 1920.

Present:—Mr. Mittra, Offg. J. C.

Musammat GAJIBAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Babu NILKANTH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 140, 144 *—Devised property, suit for possession of—Devisee in possession—Limitation applicable.*

Where the purchaser of the rights of a devisee sues to obtain possession of the devised property, the period of limitation applicable, if the devisee or his transferee has once obtained possession, is prescribed by Article 144 of Schedule I to the Limitation Act. If the devisee has not obtained possession, the suit must be brought within the period prescribed by Article 140 of that Schedule. [p. 929, col. 2; p. 930, col. 1.]

Mr. *V. D. Sathaye*, for the Appellants.

The Hon'ble Mr. *M. R. Dixit*, for the Respondent.

JUDGMENT.—One Ranu Jamadar made two Wills, the first dated the 12th February 1893 and the second dated the 12th December of the same year. Ranu died on the 30th October 1900 leaving a daughter Sakhia Bai and two grand daughters Tani and Tai. Tani's husband Harba is defendant No. 5 in the suit. Tani died on the 28th July 1902 leaving a minor son Krishna, who died shortly after her. Harba sold his rights which he claims to have inherited from his wife, who in her turn derived her title under the Will of Ranu. The present suit is by the purchaser for partition and possession of the houses bequeathed to Tani by the Will of Ranu. The lower Court has passed a decree for partition and possession. This appeal has been filed by the defendants.

There are three grounds taken. The third has been given up. The second ground is one which cannot be raised in view of the decision of this Court in Second Appeal No. 501 of 1916. The sole question left for decision is whether the suit is barred by limitation.

The suit was instituted in the year 1914. It is argued that the case is governed by Article 140 of the Limitation Schedule. In support of this reliance is placed upon the Privy Council decision in *Mylapore Iyaswamy* v. *Yeo Kay* (1). That case would have been applicable if at any time prior to the suit the plaintiff had not been in possession. It would appear that Sakhia Bai made a gift in 1901 to her elder daughter Tani of the property which she had inherited from her father. I should mention here that by the first Will certain houses were given to Sakhia Bai and Tani jointly. By the second Will, as it has been interpreted in the previous remand judgment certain *chasmas* were taken away from Tani and given to her younger sister Tai. Tani, after her marriage, lived with her husband Harba at Khandwa, but there is no reason to doubt that up to the year 1906 or thereabouts the mother and daughter were on good terms and if the management, as held by the lower Court, was in the hands of the husband of Sakhia Bai, that management was not adverse to Tani. There is reason to believe that Babu Nilkanth, the present plaintiff, had actually obtained possession of the whole of the houses after the deed of gift. Suit No. 880 of 1903 was filed by Sakhia Bai stating that she was a lunatic and claiming possession of the houses gifted by her from Harba and his transferee Nilkanth. That suit ultimately succeeded on the ground that Sakhia Bai was not mentally competent to make the gift, *vide* Exhibit D-3, though the decision of the Court of first instance (Exhibit D-1) is based upon wider grounds. What was decreed may fairly be taken to be possession of the houses gifted by Sakhia Bai, that is her undivided share in the two houses. The present plaintiff's title, so far as it is derived from Tani under the Will of Ranu, was not disputed, and could not be disputed in that suit.

I think there is a clear admission in the previous suit that the present plaintiff was in possession not only of Tani's undivided share, but also of the undivided share of Sakhia Bai gifted to her. If a devisee or his transferee once obtains possession within 12 years of the estate falling into possession, the limitation would be governed by Article 144. If no possession had ever been obtained by Tani, or Harba, or Babu

(1) 14 C. 801 (P. C.); 14 I. A. 163; 11 Ind. Jur. 397; 5 Sar. P. C. J. 50; 7 Ind. Doc. (N. s.) 531.

Nilkanth, the suit would have been barred by Article 140; but since there was possession within 12 years, the suit is not barred and as I have already said, to such a suit Article 144 would apply.

The decision of the lower Appellate Court appears to be correct and the appeal is, therefore, dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 1 OF 1919.
July 29, 1919.
Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.
Shaik ISMAIL—APPELLANT
versus
S. EZEKIEL—RESPONDENT.

Paper Currency Act (II of 1910), s. 26—Promissory note—Endorsement in blank, effect of—Holder, right of, to recover.

The endorsement in blank of a promissory note has the effect of making the note payable to bearer on demand. Such endorsement does not contravene the provisions of section 26 of the Paper Currency Act, as that section only prohibits the original making or issuing of promissory notes payable to bearer on demand, and the holder of a note so endorsed is not prevented from recovering on it.

Mr. *Barnabas*, for the Appellant.

Mr. *N. M. Cowasji*, for the Respondent.

JUDGMENT.—The promissory notes in suit were, made by the defendant on 21st May 1915 and 5th August 1915 in favour of a Chetty who transferred them to plaintiff for valuable consideration by endorsing them in blank and banding them over to the plaintiff's agent on 17th October 1916. The plaintiff in this case sues the maker of the notes for the full amount, Rs. 5,120-4 0, principal and interest, due on them.

The defendant pleaded part-payment to the Chetty to the extent of Rs. 2,700 in various instalments from August 1915 to October 1916 inclusive. We are not much impressed by the evidence as to these payments, and there is nothing to show that if they were made they were made towards satisfaction of the promissory notes in suit and not to some other account.

No endorsements of payment were made on the notes, and there is nothing to show that, if these payments were made, the plaintiff had any knowledge of them. In these circumstances the plaintiff would be entitled to recover the full amount due on the notes. See *Vithaldas Khandas* v. *Indravellu* (1).

The principal defence, however, is that the promissory notes having been endorsed in blank have thereby become notes payable to bearer, and that, therefore, they contravene the provisions of section 26 of the Paper Currency Act of 1910. It is true that by endorsement in blank the notes do become payable to bearer on demand. But it appears to us that the mischief which the section was intended to stop was the original making or issuing of promissory notes payable to bearer on demand, and if the Legislature had intended to prevent the endorsement of promissory notes so as to have this legal effect, they surely would have said so expressly. This question has already been dealt with in *Sana Eman Saib* v. *Mooma Ena Mahomed Meera Saib* (2) in our opinion the decision in that case is correct. Various sections of the Negotiable Instruments Act clearly contemplate the endorsement of negotiable instruments in blank, and the effect of such endorsements is to render them payable to bearer on demand. There is nothing to prevent the holder of a note endorsed in this manner from recovering on it. For these reasons we are of opinion that the learned Judge on the Original Side has decided the case correctly, and we dismiss the appeal with costs.

Appeal dismissed.

(1) 29 Ind. Cas. 936; 8 Bur. L. T. 161; 8 L. B. R. 202.
(2) 22 Ind. Cas. 77; 7 Bur. L. T. 96; 7 L. B. R. 70.

KHUSHAL SINGH *v.* KANDA.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 797 OF 1916.

May 8, 1920.

Present:—Mr. Justice Leslie Jones and Mr. Justice Abdul Raoof.

KHUSHAL SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KANDA AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation—Adoption, right to challenge, barred by limitation—Gift to adopted son, whether can be impeached by reversioners.

Where an adoption remains unchallenged, and the right to impeach it is barred by limitation, a gift made subsequently in favour of the adopted son does not give the reversioners a fresh cause of action, in that it does not involve any further denial of their rights than was involved in the adoption. [p. 932, col. 2.]

Second appeal from the decree of the District Judge, Jullundur, dated the 11th January 1916, affirming that of the Subordinate Judge, 1st Class, Jullundur, dated the 4th June 1915.

Mr. *Des Raj Sawhney* for Mr. *Abdul Rashid*, Lala *Mehr Chand Mahajan* and Lala *Jaggan Nath* for Bakhshi *Tek Chand*, for the Appellants.

Lala *Fakir Chand*, for Labh Singh and Amar Singh, Respondents.

JUDGMENT.—This is a suit by the nephew and grand-nephew of Kanda Singh, a Hindu Jat of Liddar in the Jullundur Tahsil, for a declaration to set aside an oral gift made by him in 1913 of 177 *kanals* 5 *marlas* of land in favour of Labh Singh and Amar Singh, his daughter's sons.

The Senior Sub-Judge found that a small portion of the area was the self-acquired property of Kanda Singh, and as regards that area the suit must necessarily fail. The bulk of the property, however, was ancestral and it was on a finding that the defendants had established a custom under which Kanda Singh was empowered to make a gift to the sons of his daughter that the Senior Sub Judge dismissed the suit. The District Judge took the same view and dismissed the appeal but granted a certificate on which second appeal has been filed in this Court.

The onus of proof lay upon the defendants, *vide Ralla* v. *Budha* (1), and in his discussion of the case the District Judge admitted that the judicial decisions, at all events those later than 1893, were against the custom which the defendants set up. He thought, however, that the trend of public opinion had set in favour of the custom of gift and that this was evidenced by a number of undisputed mutations which had occurred in villages in the neighbourhood of Liddar where the parties reside.

There were in all nine comparatively recent mutations on which reliance was placed. Of these Exhibit D-1 was a gift in 1903 in favour of a daughter. The character of the land is unknown and the consent of the nearest reversioner was obtained. Exhibit D 2 relates to a case afterwards decided in *Rulia* v. *Wariam Singh* (2). Exhibits D 3 and D-4 are mutations of 1898, but the relationship of the donee, the character of the land and the existence of collaterals are unknown factors. Exhibit D-5 is a mutation of 1892 in favour of a daughter's son, but here again we know nothing about the collaterals or the character of the land and the gift was, of course, prior to the Full Bench ruling. Exhibit D 6 is a mutation in 1890 of ancestral land in favour of a daughter which was disputed by the collaterals whose suit was ultimately dismissed by the Chief Court, no doubt following the view then taken as regards the power of gift. Exhibit D-7 is a mutation in 1888 of a gift in favour of daughters. It is not known whether the land was ancestral. Exhibit D 8 is a mutation in 1888 of a gift by a widow of one half of her property in favour of her daughter's son, but the consent of the collaterals was obtained and they at the same time obtained a gift of one-third of her property with reversion to the remaining one-sixth when the widow died. Exhibit D-9 is a mutation of 1886 in favour of a daughter. This is one of the cases from Pindori Nijran referred to in *Jamiat Singh* v. *Ujagar Singh* (3). The only other instance taken from the record of the second settlement relating to Marza Liddar in the Phillour Tahsil appears to have been really a case of a gift to a *khanadamad*.

Of the judicial decisions, that on which

(1) 50 P. R. 1893.

(2) 20 Ind. Cas. 454; 94 P. R. 1913; 287 P. L. R. 1913; 177 P. W. R. 1913.

(3) 55 Ind. Cas. 838; 1 L. 15.

the District Judge mainly relied was his own judgment, which was reversed in *Jamiat Singh* v. *Udgar Singh* (3).

It may be true that there is a movement of public opinion in favour of such gifts, but their validity has certainly not been established by the evidence produced in this case, and Counsel for the respondents, who has not discussed his own instances, has hardly attempted to argue this point.

In their written statements the defendants alleged that Kanda Singh had brought up both the donees as his sons from their infancy. They afterwards amplified this by saying that Kanda Singh had adopted Labh Singh when the latter was a baby, and in support of this contention they asked to be allowed to produce a registered Will of 1892 and for the framing of a further issue regarding limitation, their contention being that as Labh Singh was adopted, and the suit was for a declaration, it was barred by time under Article 118. The Senior Sub-Judge, though he framed the desired issue, appears to have considered that the plea of adoption was an afterthought, and he refused to allow to admit the Will in evidence. He then disposed of the plea of adoption by saying that if Kanda Singh had adopted Labh Singh, he would not afterwards have made a joint gift to both of his daughter's sons. On the question of adoption the District Judge did not go further than quoting arguments of Counsel on either side.

It appears to us that in the circumstances of the case the Will of 1892, which goes to the root of the case, should have been admitted in evidence, and as it is a registered document and the execution of it is admitted by Counsel for the appellants, we have admitted it now. We note that before it was produced in Court, numerous witnesses for the defendants had stated that Labh Singh was adopted by Kanda Singh in about 1885 and that it is quite impossible that the story of the adoption was a mere afterthought prepared for the purposes of this case during its pendency. There is ample evidence of long continued treatment, and it further appears that in 1905 Kanda Singh had purchased land in the name of Labh Singh, who was even then described as his adopted son. In his evidence in the present case Kanda Singh has again sworn to his adoption of Labh Singh.

There appears to us to be no doubt that this adoption is a well established fact. According to custom it would be no more valid than a gift, but there was obviously no effort at concealment and the fact of it was clearly well known to the plaintiffs.

Having once allowed their suit for a declaration against the adoption of Labh Singh to become barred by time under Article 118, the plaintiffs are not entitled to sue for a declaration that the subsequent gift by Kanda Singh is not binding on them because that gift does not give them a fresh cause of action, in that it does not involve any further denial of the rights of reversioners than was involved in setting up the adoption in the first place. The gift of 1913 to both the daughter's sons is tantamount to a gift with the consent of the adopted son.

On these grounds we hold that the present suit is barred by time and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2683 OF 1916.

February 6, 1920.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

Raja PROMOTHA BHUSAN DEB ROY BAHADUR—PLAINTIFF—APPELLANT

versus

NARENDRA BHUSAN ROY, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, KHAGENDRA BHUSAN ROY AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1903), s. 11, O. IX, r. 9—Landlord and tenant—Suit for possession by tenant, dismissal of, for default—Abatement of rent on ground of dispossession, claim for, whether barred in subsequent suit for rent—Res judicata—*Munsif's decision, whether operates as* res judicata *in subsequent suit brought in Subordinate Judge's Court.*

The dismissal for default of a suit against his landlord for recovery of possession of certain property comprised in the plaintiff's *dar-mourashi* tenure does not preclude him, in a subsequent suit for rent brought by the landlord, from claiming abatement of rent owing to dispossession by the landlord. [p. 934, col. 2.]

PROMOTHA BHUSAN DEB ROY v. NARENDRA BHUSAN ROY.

The decision on a question in the Court of a Munsif does not operate as *res judicata* on the same question in a subsequent suit between the same parties brought in the Court of a Subordinate Judge. [p. 935, col. 1.]

Appeal against the decree of the District Judge, Jessore, dated the 19th of August 1916, modifying that of the Subordinate Judge, 1st Court of that district, dated the 31st of July 1915.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Satis Chandra Ghatak*), for the Appellant.—I am the *patnidar* of Lot Harishpur within which Hat Salika is included. A *dar-patni* lease in respect of Harishpur was granted to the father of defendant No. 1. The *dar patni*, however, was re-conveyed to the *patnidar*. Hat Salika was covered by the *dar-patni* lease and, therefore, after the re-conveyance of the *dar-patni* to the *patnidar*, the defendant cannot claim Hat Salika. My next contention is that the suit of defendant No. 1 for possession of Hat Salika having been dismissed for default on the 25th of November 1908, he is precluded by the provisions of Order IX, rule 9, of the Code of Civil Procedure from bringing another suit for possession of Hat Salika and that, therefore, his right to claim abatement of rent is also barred. The defendants Nos. 2 and 3 are only claiming through defendant No. 1. The cause of action in the previous suit of defendant No. 1 was not merely dispossession but the right claimed by defendant No. 1 and infraction of that right. Again in 1909 there was a rent suit against defendant No. 1 for the years 1313 to 1315. The District Judge gave a decree for the full rent claimed by the plaintiff and the objection of the defendant regarding abatement of rent on account of Hat Salika was overruled. This judgment, therefore, operates as *res judicata* and the claim for abatement of rent cannot be again raised in the present suit.

Babu *Pravash Chandra Mitter* (with him Babu *Manmohan Bose* and Babu *Biraj Mohan Mojumdar*, for the Deputy Registrar), for the Respondents.—The *dar-mourashi* lease executed by the plaintiff's father comprises six properties, one of them being the *jama* of Rs. 16 and described as Hat Salika and appertaining to Gourmani's *jama*. The *dar-patni* of Lot Harishpur could not, therefore, include Hat Salika. In reply to the second contention of my learned friend, I submit that my previous suit for possession having been dismissed for default I may not be able to sue again for Hat Salika. But it does not follow that because we cannot maintain a suit for possession of Hat Salika, we are not entitled to claim abatement of rent—a claim which is based upon the result of the dispossession by the plaintiff. See *Chand Kour* v. *Partab Singh* (1). As regards the third argument advanced by my learned friend, I submit that the suit for rent in the year 1909 was brought in the Munsif's Court while the present suit is brought in the Court of the Subordinate Judge. The decision of the Munsif, therefore, cannot operate as *res judicata* in the present suit.

Babu *Jogesh Chandra Roy*, in reply.—The plaintiff in the present suit could have brought a separate suit for rent for each of the four years claimed and then the suit would have been cognizable by the Munsif and, therefore, there is no bar to the decision of the Munsif in the rent suit of 1909 from operating as *res judicata*. Finally I submit that the Courts below ought to have come to a definite finding as to whether the land on which Hat Salika now stands and of which the plaintiff is in possession did form part of Gourmani's *jama*. Hat Salika might have been formerly held in Gourmanis's *jama* and since then the site might have been abandoned.

JUDGMENT.—This appeal arises out of a suit for rent of a *dar mourashi* tenure, the rent being claimed at Rs. 238 annas 12 a year.

The main defence was that there was dispossession of a portion of the tenancy and that, therefore, there should be a suspension of the rent.

It appears that a *dar mourashi* lease was executed by the plaintiff's father in favour of the father of the defendant No. 1 on the 15th June 1865. The lease comprised six properties, one of them being a *jama* of Rs. 16 and described as Hat Salika appertaining to Gourmani's *jama*. The plaintiff's father was the *putnidar* of Lot Harishpur within which Hat Salika was

(1) 16 C. 98: 15 I. A. 156; 5 Sar. P. C. J. 243; 12 Ind. Jur 331; 8 Ind. Dec. (N. S.) 65.

included. On the same day, 15th June 1865, the plaintiff's father gave a *dar-patni* lease in respect of Harishpur to the father of the defendant No. 1. This *dar-patni* right, however, was re-conveyed to the plaintiff on the 9th August 1905. On the 7th April 1909, the *dar-maurashi* interest was conveyed by the defendant No. 1 to the defendants Nos. 2 and 3.

It appears that on the 3rd June 1908, that is, after the re-transfer of the *dar-patni* right to the plaintiff's father, the defendant No. 1 instituted a suit (No 846 of 1908) against the plaintiff for recovery of Hat Salika. It was dismissed for default on the 25th November 1908. The matter came up to the High Court and ultimately the Rule was discharged on the 27th July 1909. Then it appears that on the 31st March 1909 a rent suit was instituted in the Munsif's Court for rent of the *dar-maurashi* against the defendant No. 1 for the years 1313 to 1315. It is unnecessary to refer to the proceedings in that suit at its various stages. Ultimately the District Judge gave a decree for the full rent claimed by the plaintiff, overruling the objection of the defendant with respect to the *jama* of Rs. 16 on account of Hat Salika.

It appears that the plaint in the rent suit instituted on the 31st March 1909 was returned for presentation to another Munsif and was re-filed on the 14th April 1909. The defendants Nos. 2 and 3 purchased the *dar-maurashi* in the interval, namely, on the 7th April 1909. They were no parties to that rent suit.

In the present suit the defendants Nos. 2 and 3 set up the plea that the plaintiff was not entitled to get rent in respect of Hat Salika and that there should be a suspension of the entire rent. The Courts below have given a decree for rent at the rate claimed after deducting Rs. 16, the *jama* of Hat Salika.

The plaintiff has appealed to this Court.

The first contention raised on behalf of the appellant is that the defendants had, after the conveyance dated the 9th August 1905, no right to Hat Salika.

Now, as stated above, Hat Salika is situated within Lot Harishpur, and was dealt with separately along with some other Hats in the *dar-maurashi* settlement. It was treated as a properly separate from the *dar patni* and we agree with the Court below in holding that although the usual words "Hat", etc., appear both in the *dar patni* lease and in the deed of conveyance of the *dar-patni*, they did not include Hat Salika, and that by the conveyance of 9th August 1905 the plaintiff did not acquire any right which had not been granted to the defendants' father by the *dar-patni* lease. We think that the Courts below have properly construed the document.

The next contention is that the suit of defendant No. 1 for possession of Hat Salika having been dismissed for default on the 25th November 1908, he was precluded by the provision of Order IX, rule 9, from bringing another suit for possession of Hat Salika and that, therefore, his right to claim abatement of rent is also barred.

There is no doubt that the defendant No. 1 or defendants Nos. 2 and 3 claiming under him are not entitled to bring a fresh suit in respect of the same cause of action, in other words, they cannot sue for possession of Hat Salika. But it does not follow that because they cannot maintain a suit for possession of Hat Salika, therefore, they are not entitled to claim abatement of rent, a claim which is based upon the result of the dispossession by the plaintiff.

As pointed out by the Judicial Committee in *Chand Kour* v. *Partab Singh* (1), "the dismissal of a suit in terms of section 102, Civil Procedure Code, is not intended to operate in favour of the defendant as *res judicata*. When read with section 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favour."

It has been contended that the cause of action in that case was not merely dispossession but the right claimed by the defendant No. 1 and infraction of that right.

But the present defence really arises upon the result of the previous suit and the mere fact that the defendant is precluded from bringing a suit for possession does not prevent him from setting up the claim for abatement of rent. For instance if

the defendant had been out of possession or 12 years and his right to get a decree for possession had been barred, he would still have been entitled to claim abatement of rent.

Then it is contended that the judgment in the rent suit operates as *res judicata*. But the decree upon which reliance is placed was passed in a suit decided by the Munsif's Court and the present suit had been instituted in the Subordinate Judge's Court. The decision in the Munsif's Court, therefore, does not operate as *res judicata*.

It is next contended that the plaintiff could have brought a separate suit for rent for each of the 4 years claimed; the suit would have been cognizable by the Munsif. That may be so, but it was the plaintiff who brought one suit for rent for the 4 years and other amounts which exceeded the pecuniary jurisdiction of the Munsif.

The last contention is that the Courts below ought to have come to a definite finding whether the land on which Hat Salika now stands and of which the plaintiff is in possession did form part of Gourmani's *jama*. It is said that Hat Salika might have been formerly held on Gourmani's *jama* and that site might have been abandoned.

But in the first place there was no suggestion of it in the Court of first instance and apart from that, it was admitted that Hat Salika was in the *jama* in suit. The learned Subordinate Judge says: 'The plaintiffs admitted that they remained in possession of Hat Salika within the present *jama* but they contended that the defendant No. 1 sold Hat Salika to the plaintiff together with Lot Harishpur." The case of the plaintiff, therefore, was not that there was any dispute as to the identity of Hat Salika but that Hat Salika had passed to the plaintiff under the conveyance of 1905.

We think, therefore, that the appeal must be dismissed with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 266 OF 1918.

May 27, 1918.

Present:—Mr. Justice Maung Kin.

TUN AUNG—APPELLANT

versus

MA HTEE—RESPONDENT.

Trespassers, rival, on Government land—Revenue, payment of, effect of—Title, superiority of.

As between two trespassers upon land which is the property of Government, the one who pays the Government revenue and is allowed to stay on the land has a title superior to the one who has made no such payment.

Mr. *Hay*, for the Appellant.

Mr. *Doctor*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises relates to a piece of land which is described by the parties as "Myanukyun baw" land. It is now described in the revenue maps as holding No. 87 of 1910-11. This land came into existence some seven years ago. It either adjoins the plaintiff's holding No. 77 or is some distance away from it. It is common ground that the land belongs to Govenment. It appears the plaintiff went into occupation of the land in dispute and for three years planted Dhani trees on it. It appears her efforts did not meet with success, for every year the young plants were washed away when the land became submerged during the rains. The defendant entered upon the land in 1914 and planted Dhani plants while it appears the plaintiff was doing the same, and this led to a dispute between the parties. The plantiff applied to the Revenue uthorities to have the defendant evicted from the land. The Revenue Authorities, however, referred the parties to a civil suit. Hence this suit by the plaintiff for the recovery of possession of the land from the defendant who is alleged to have trespassed upon her land. It is admitted that the plaintiff was never assessed to revenue in respect of her occupation of the land at any time. The defendant, however, entered upon occupation of the land either with the permission of the revenue surveyor in whose jurisdiction the land is or he paid revenue on the land shortly after he went on it. For the subsequent years also he has paid revenue in respect of the land. In my judgment the defendant has a better right to the land. The real owner of the land is the Government and the

Government had by accepting revenue from the defendant allowed him to take possession of it. Thus so far as the Government were concerned, the defendant was not a trespasser at the time he entered upon the land in 1914 but the plaintiff, though she was the first comer, had been a trespasser all along. That being the case, the defendant's possession was derived from the real owner and the law justifies him to hold the land as against anybody who comes upon the land without the owner's permission. The lower Courts held both the parties to be trespassers. If that view were correct, their decision should be upheld. But the point that really matters in this case does not seem to have occurred to them, namely, the fact that the defendant had been allowed by the Government to stay on the land by paying revenue to it. The appeal is allowed with costs.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3012 OF 1915.

July 21, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Dundas.

THE FIRM KATASI SINGH-KAHAN SINGH THROUGH KAHAN SINGH—DEFENDANT—APPELLANT

versus

THE FIRM DAULAT RAM-KIRPA RAM, THROUGH KIRPA RAM—PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 105—Presentation, time for—Reasonableness of time, whether question of law—Appeal, second.

The question of the reasonableness of the time for presenting a bill of exchange for payment is a mixed question of law and fact. [p. 936, col. 2.]

East Indian and Anglo-Indian Deposit and Loan Society Limited v. *Dr. T. M. Nair*, 31 M. 364; 4 M. L. T. 89, dissented from.

Second appeal from the decree of the District Judge, Rawalpindi, dated the 10th July 1915, affirming that of the Senior Subordinate Judge, Rawalpindi, dated the 9th November 1914.

The Hon'ble Pandit *Sheo Narain* and Mr. *Sewa Ram Singh*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The facts of this case are briefly as follows. The defendant firm wanted to remit money to Bombay, and they accordingly purchased a draft on the 10th September 1913 from the plaintiffs for a sum of Rs. 1,100 which was debited by the plaintiffs to the defendants in the accounts. The draft consisted of a bill of exchange drawn by the Rawalpindi branch of the People's Bank on the Bombay branch of the People's Bank in favour of the plaintiffs, who endorsed it on the 10th of September 1913 in favour of the defendants. The present suit is for the recovery of the money on account of the price of the draft.

The Courts below have concurred in holding that the defendants or their endorsees did not present the instrument for payment to the drawees up to the 19th September 1913 when the latter suspended payment, and that the period from the 10th of September to the 19th of September was a reasonable time for presentation. Mr. Nand Lal for the respondents raises a preliminary objection that the question of reasonable time is one of fact and not of law and that the finding of the learned District Judge cannot, therefore, be assailed. There is no doubt that this is the view taken by the Madras High Court in a judgment, *East Indian and Anglo Indian Deposit and Loan Society Limited* v. *Dr. T. M. Nair* (1). This view, however, is not quite in accordance with the decided cases in England, where the rule as stated by Chitty is to the following effect:—

"The Jury ought to find the facts such as the distance at which the persons live from each other, the course of post, and all other circumstances applicable to the case. But when these facts have been ascertained, the reasonableness of the time becomes a question of law which is to be determined by the Court and not by the Jury."

The better view, therefore, seems to be that the question is not purely one of fact but is a mixed question of law and fact. The learned District Judge has not considered all the circumstances laid down in section 105 of the Negotiable Instruments Act for the determination of the question of reasonable time, *e. g.*, the nature of the instrument and the usual course of dealing

(1) 31 M. 364; 4 M. L. T. 89.

with respect to similar instruments. We have, however, given our due consideration to such evidence as exists with respect to these matters and are not prepared to dissent from the view that the delay was in the circumstances of this case not a reasonable one. It is to be observed that the defendants put forward the plea that their endorsees, Messrs. Jokh Ram of Bombay, had presented the bill on the 15th September and again on the 16th September; but the Courts below have rejected this defence and come to the conclusion that no presentation was ever made. It was probably due to this false defence that all the circumstances having a bearing on the question of reasonable time were not investigated by the lower Courts and the defendants have only themselves to thank if the lower Courts recorded their opinion against them.

For the aforesaid reasons we confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 184 OF 1919.

May 10, 1920.

Present :—Mr. Justice Sultan Ahmed.

SASIBALA DASI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHANDRA MOHAN DUTTA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Property given to two widows for maintenance—Tenancy-in-common—Property acquired under grant from Government, whether self-acquired.

Where property is given to two widows for their maintenance, they enjoy it as tenants-in-common and not as joint tenants [p 938, col 1]

Property acquired under a grant from Government is self-acquired, unless it is merely restoration of a confiscated grant intended for the benefit of the family. [p 938, col 1]

Appeal from a decision of the District Judge, Manbhum.

Mr. *Susil Madhab Mullick*, for the Appellants.

Mr. *Abani Bhusan Mukherji*, for the Respondents.

JUDGMENT.—This was a suit instituted by the plaintiffs for recovery of *khas* possession of the entire share of the properties mentioned in Schedules *ka* and *ga* and of half share of the property mentioned in Schedule *kha*, by ejecting defendant No. 1 who is in wrongful possession of the same, and for mesne profits and costs. The plaintiffs say that in 1902 plaintiff No. 1 instituted a suit for recovery of possession by metes and bounds of two-annas share in Mouza Ranguni, alleging that the said two-annas share belonged to her husband Sristidhar and that she became entitled to it on the death of her husband. That suit was compromised and the property in suit was divided into three equal parts covered by Schedules *ka*, *kha* and *ga* and it was arranged that plaintiff No. 1 would get plot *ka* and that Sunaina and plaintiff No. 1 would get jointly the land of Schedule *ga*, and that Sunaina and Sumitra would get the *kha* lands for their maintenance. It was further agreed that on the death of Sunaina and Sumitra the plaintiff No. 1 would get the *kha* lands. Sunaina sometime after died. The plaintiff No. 1's case is that she had been in possession until 1914, when she was dispossessed by virtue of the order of the Court giving possession to defendant No. 1. The trial Court gave a decree to the plaintiff, but on appeal the learned Subordinate Judge gave a decree for possession of the lands described in Schedules *ka* and *ga* in the plaint but dismissed her claim with respect to the possession of half of *kha*. The Subordinate Judge also reduced the amount of mesne profits to Rs. 200. In my opinion it is impossible to support the decision of the lower Appellate Court. The relevant portion of the compromise decree runs as follows:—"Defendant No. 2 Srimaty Sunaina Dasi and the widow of late Prasanna Kumar Dutta will take into possession the lands of Schedule *kha* for maintenance for life. The defendants Nos. 1 and 3 will have no objection to this. After the death of both of them the plaintiff will take possession of the lands, to which defendants Nos. 1 and 3 will have no objection" Upon a proper construction of this compromise the plaintiff No. 1 was, in my opinion, entitled to a moiety of the land of Schedule *kha* after the death of Sunaina. It is to be borne

in mind that Schedule *kha* lands were given to Sunaina and Sumitra as maintenance, and as such Schedule *kha* lands were enjoyed by them not as joint tenants but as tenants in-common. The cases reported as *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1), *Hirabai* v. *Lakshmibai* (2) and *Bai Diwali* v. *Patel Bechardas* (3) are ample authorities for the view that I have taken. The learned Vakil for the respondents, however, has drawn my attention to the decision of the Privy Council in *Narpat Singh* v. *Mahomed Ali* (4). Before I deal with that case, it must be pointed out that property acquired under a grant from Government is undoubtedly self-acquired, as was laid down in the *Shivagunga's case* [*Katama Natchiar* v. *Rajah of Shivagunga* (5)], unless it is merely restoration of a confiscated grant intended for the benefit of the family. See *Kedar Nath* v. *Ratan Singh* (6). It will be noticed that the grant in the case of *Narpat Singh* v. *Mahomed Ali* (4) was merely restoration of confiscated property by the Government and the grant which was for the benefit of the family created a joint tenancy. It has also to be borne in mind that the grantor, that is, the Government, did not claim to resume the land. In my opinion, therefore, that case is not very helpful in the determination of the present case. Apart from that, if it is true, as was pointed out in the case of *Muthumeenakshi Ammal* v. *Chendra Sekhara Ayyar* (7), that there is not much distinction in principle between the judgment of the Privy Council in *Narpat Singh* v. *Mahomed Ali* (4) from that in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1), then, as was held in that case, we are bound by the later decision of the Privy Council.

There are two other points on which the plaintiff, in my opinion, must succeed. It was distinctly alleged in the plaint that the plaintiff actually came into possession of half the *kha* lands on the death of Sunaina and this fact has not been controverted in the written statement. The plaintiff had been recorded in the landlord's Sherista. so the landlord obtained a decree of rent against her and in execution of the decree the land was put up for sale, and defendant No. 1 paid the amount and as such became the statutory usufructuary mortgagee under section 6 of Regulation XX (1830) and actually got delivery of possession of the property on the 15th January 1914 by dispossessing the plaintiff. This right of the defendant to remain in possession exists only as long as Rs. 37 which he deposited in Court has not been paid off, and as it has been found by both Courts that more than Rs. 37 has been realised by him, he is not entitled to retain possession, *vide Haradhan Mandal* v. *Iswar Das Marwari* (8) and *Sahodra Kuer* v. *Gobardhan Tiwari* (9). There is absolutely no proof and no finding that the defendant No. 1 has better title than the plaintiff and, therefore, on the authorities quoted above the plaintiff is entitled to get back the possession of the property. From whatever view we look at the case of the plaintiff, in my opinion, she is entitled to recover *khas* possession of a moiety of the *kha* lands.

Whatever may be the position of Sumitra under the compromise, defendant No. 1 cannot succeed unless he shows a better title than that of the plaintiff. The contention that this being a suit in ejectment, the plaintiff must succeed on the strength of her own title, will be of no avail in a case like this, when the possession which the defendant has got is by virtue of an order of the Court and under which he is not entitled to retain possession after the Rs. 37 which he deposited had admittedly been paid off. This being my view of the case, I declare that the plaintiff is entitled to the possession of a moiety of the *kha* lands. As regards mesne profits this is a matter which will have to be enquired into afresh in the Court below, and I, therefore, allow this appeal with costs, leaving it to

(1) 23 C. 670 (P. C.); 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445.
(2) 11 B. 573; 6 Ind. Dec. (N. S.) 377.
(3) 26 B. 445; 4 Bom. L. R. 102.
(4) 11 C. 1; 4 Sar. P. C. J. 558; Rafique & Jackson's P. C. No. 82; 5 Ind Dec. (N. S.) 757.
(5) 9 M. I. A. 539 at p. 610; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.
(6) 7 Ind. Cas. 648; 32 A. 415; 14 C. W. N. 985; (1910) M. W. N. 311; 8 M. L. T. 193; 12 C. L. J. 226; 12 Bom L. R. 656; 13 O. C. 332; 20 M. L. J. 900; 37 I. A. 161 (P. C.).
(7) 27 M. 498.
(8) 38 Ind. Cas. 797; 2 P. L. J. 61; 3 P L. W. 258.
(9) 39 Ind. Cas. 458; 2 P. L. J. 280; 1 P. L. W. 827; (1917) Pat. 164.

the lower Appellate Court to find out the amount of mesne profits.

Appeal allowed.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 273 OF 1917.
June 24, 1919.
Present:—Mr. Justice Maung Kin.
U PYINNYA THIHA—APPELLANT
versus
PO THIN AND ANOTHER—RESPONDENTS.

Buddhist Ecclesiastical Law—Ayanzoungs, *who are* —Ayanzoung, *right of, to sue to recover property of* kyaung.

"Ayanzoungs" are persons who are in charge of a Kyaung and its precincts, and are entitled to sue to recover possession of land alleged to form part of a Kyaung. [p. 939, cols. 1 & 2.]

Mr. *Ba Thein*, for the Appellant.

Mr. *J. A. Maung Gyi*, for the Respondents.

JUDGMENT.—(*November* 20, 1918).—The plaintiffs claim to be the "Ayanzoungs" of Hnet Kyaung built on a piece of land which they allege was granted to U Da Cho for the purpose of building a Kyaung thereon. "Ayanzoungs" are persons who are in charge of a Kyaung and its precincts. The Hnet Kyaung is about eight years old, and was built soon after the grant. The plaintiffs were appointed "Ayanzoungs" by the last presiding Pongyi of the Kyaung who went away. The defendant-appellant is the presiding Pongyi of the adjoining monastery known as Mingala Kyaung. The plaintiffs are followers of a sect of Pongyis known as *Dwaya gaing* or *Sulagandhi gaing*. The defendant-appellant is of the sect known as *Kangaing* or *Mahagandhi gaing*.

The plaintiffs as the Ayanzoungs of the Hnet Kyaung sue for possession of a piece of land which they say forms part of their Kyaung land. The defendant denies that it forms part of the plaintiffs' Kyaung land, and alleges that he has been in possession of the land in dispute for upwards of twenty years and has thus acquired the status of a landholder, and claims on that basis the right to the land adversely to the plaintiffs. He also denies the right of the plaintiffs as Ayanzoungs to bring the suit.

It is not denied that the defendant's Kyaung is about twenty years old, or that the plaintiffs' Kyaung is eight years old. It is common ground that the plaintiffs' Kyaung is a Sanghika Kyaung.

The lower Appellate Court has held that the plaintiffs have a right of suit as "Ayanzoungs." This finding is amply supported by the texts cited by the Judge from the *Vinaya*, and from Volume II, page 75 of a book of authority known as *Vinaya Thamuha Vinicoya*. The former text is as follows:—"*Bikkhu va bikkuni va upasako va upasikappa va rakkhapetuni vattati.*" "It is proper for a monk to hand over the *sanghika* property either to another monk, or to a nun, or a layman, or laywoman for the purpose of looking after it." The other text is:—"*Oetipassaya sanghasse ta santakena cetiya santakani raka petuni vattati.*" "It is proper for a layman to take over and look after the property belonging to pagodas or to monks."

I would, therefore, hold that the plaintiffs as "Ayanzoungs" are entitled to sue.

Both the lower Courts held that the land in dispute falls within the grant land, and if the encroachment was after the grant the defendant will have no right to keep it as against the plaintiffs. His Counsel, however, urges that the defendant being a Pongyi could occupy any portion of the Hnet Kyaung and its lands, inasmuch as the whole is *sanghika* property, and there is no Pongyi presiding over it. It is an interesting question for decision whether a Pongyi can occupy a *sanghika* Kyaung or its lands without the permission of the "Ayanzoungs", but it is not necessary to decide the point in this case. It is clear *Vinaya* Law, and no authority need be cited for it that a Pongyi is not entitled to treat *sanghika* property as his own, *i. e.*, as *poggalika* property. That being the case, defendant's Counsel's contetion falls to the ground. However, one of the defences to the suit has not been enquired into by either of the lower Courts. The defendant alleges that he has been in possession of the land in question for

upwards of twenty years and has acquired the status of a landholder, and that, therefore, the Government had no right to include it in the grant to U Da Cho. If at the time of the grant the defendant was in possession of the land in dispute, and had been so continuously for more than twelve years, then he would have acquired the status of a landholder, and the Government would not have the right to grant it to U Da Cho, and neither U Da Cho nor his transferees would have any title to it.

I would remand the case to the Township Court for trial of the following issues:—

(1) How long had the defendant been in possession of the law in dispute when the suit was instituted?

(2) How long had the defendant been in possession of the land in dispute when the grant of Hnet Kyaung land was made to U Da Cho?

(3) When was Hnet Kyaung and the grant land dedicated in the *sanghika* form?

The findings will be returned as soon as possible.

FINAL JUDGMENT.—The evidence and findings on the issues sent down for trial have been received.

The evidence tendered on behalf of the defendant is to the effect that the stone wall was built twenty-one or twenty-two years ago. Taking this to be absolutely true, it would appear that the wall had been in existence eighteen or nineteen years when the suit was filed in December 1915. The Dwaya Kyaung built after the grant to U Da Cho was eight years old. That being so, the defendant has not proved possession for twelve years when the Government made the grant. And he has not been in possession adversely to the Dwaya Kyaung for twelve years since the grant.

The appeal is dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1571 OF 1916.

July 24, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice Dundas.

THAKUR DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GOWARDHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Accounts, suit for—Books in possession of plaintiff—Failure to produce books, effect of—Presumption—Evidence, secondary, admissibility of.

In a suit for accounts every presumption should be made against a party who withholds the accounts. [p. 941, col. 1.]

A plaintiff who has the accounts with him cannot ask a Court to take accounts whilst he withholds the evidence in his power. [p. 941, col. 2.]

Plaintiffs sued defendants for an account and for Rs. 3,200 alleged to be due to them out of the partnership funds. It was proved that the books of account were in the plaintiffs' possession:

Held, (1) that the loss of the books not having been proved, secondary evidence of the accounts was not admissible; [p 941, col. 1.]

(2) that the books of account being in the plaintiffs' possession, the defendants could not be called upon to give any account. [p. 941, col. 1.]

Upendra Kishori Rai Chaudhury v. *Ram Tara Debya Chaudhurani*, 4 Ind. Cas. 642; 13 C. W. N. 696, followed.

Second appeal from the decree of the District Judge, Karnal at Hissar, dated the 6th March 1916, affirming that of the Subordinate Judge, 1st Class, Rohtak, dated the 8th December 1914.

Lala *Moti Sagar*, R. S., Lalas *Rup Ram* and *Shamir Chand*, for the Appellants.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The plaintiffs Thakur Das and Dal Chand, together with Gulab Singh and Dalip Singh, deceased, the fathers of the defendants, were partners in an iron merchant shop at Cawnpore. Gulab Singh died in August 1909 and Dalip Singh died on the 15th November 1909. At that time it would appear that nearly Rs. 5,500 was deposited in the People's Bank and goods worth about Rs. 9,000 were forthcoming in the shop. The plaintiffs now sue the minor sons of the deceased partners, Gulab Singh and Dalip Singh, for an account and for Rs. 3,200 alleged to be the balance due to them of the principal sum of Rs. 4,600 invested by them in the partnership business. The defendants denied all knowledge of the account and asserted

that the plaintiffs themselves had managed the business after the death of Dalip Singh and Gulab Singh, that the plaintiffs were in possession of the accounts and had apparently misappropriated the proceeds of the business. The first Court came to the conclusion that the shares in the partnership were plaintiffs 1/3rd and defendants 2/3rds; that the partnership was dissolved on the 15th November 1909; that the business was carried on after that date by the plaintiffs themselves; that the plaintiffs, through their agents, Moti Ram and Nawal Kishore, kept the accounts, and that the accounts were in the plaintiffs' possession although they had refused to produce them. The Court held that the plaintiffs were not entitled to claim accounts from the defendants and had utterly failed to prove that the defendants received from the partnership business anything beyond the amount which they have themselves acknowledged.

The plaintiffs appealed to the lower Appellate Court, which concurred with the first Court in the findings of fact, especially in the finding that the plaintiffs had suppressed the accounts. An appeal has now been filed to this Court; and it has been urged that even if the account books are not forthcoming, secondary evidence could be produced and should have been admitted in the first Court. It has also been urged that the lower Appellate Court has come to no definite findings. There seem, however, to be three findings of fact against the appellants. First of all the books are proved to have been in the plaintiffs' possession up to 1911; and we cannot go behind this finding. The loss of the books has not been proved and secondary evidence of their contents is not admissible. Secondly, there is a definite finding that Moti Ram and Nawal Kishore were working for the plaintiffs as their agents, and thirdly, that the minors had nothing to do with the business after the death of Dalip Singh. As a matter of law it may be the case that the only penalty incurred by a partner who withholds the accounts is that every presumption is made against him; but there is an authority, *Upendra Kishori Rai Chaudhury* v. *Ram Tara Debya Chaudhurani* (1), that a plaintiff who has the account with him cannot ask a Court to take accounts whilst he withholds the evidence in his power. On the findings of fact that decision is directly in point. As a matter of fact the plaintiffs have no case from any point of view. It is admitted that they had their share of the cash. It has been found that the goods of the shop were in the possession of their agents. It has not been shown that the defendants have had more than their share, and no account books are in the possession of the defendants, nor is there any further account necessary.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 542; 13 C. W. N. 696.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 82 OF 1919.

February 6, 1920.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

JAHARMAL-DEBI DUTTA FIRM—PLAINTIFF—APPELLANT

versus

BIRINCHI BHUSAN NANDI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch II, para. 12—Arbitration—Dissolution of partnership—Arbitrator, power of, to award interest on sums due.

Where in a suit for dissolution of partnership and for accounts, the plaintiff claims interest which the defendant says he is not liable to pay and the matter in dispute is referred to arbitration, one of the points referred being whether the defendant is liable for any money and, if so, the amount due, it is not an error on the part of the arbitrator to include in his award the sum payable by the defendant as interest both on sums advanced to the firm, and on those advanced to the defendant for his personal use, and also for the period before and after the suit and up to the date of the award. [p. 944, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Pabna, dated the 10th of December 1918.

FACTS appear from the judgment.

Babu *Ram Chandra Majumdar* (with him Babu *Dinesh Chandra Roy*), for the Appel-

lant.—The plaintiff is the appellant. The appeal arises out of a suit for dissolution of partnership business and for accounts. The plaintiff's case is that he entered into an agreement of partnership business with the defendant, in which it was agreed that the plaintiff would advance money for the business and the defendant would supervise the contract works. The plaintiff not only advanced the money for the business of their partnership firm but also advanced money to the defendant for his own purpose. In the present suit plaintiff also prayed for the recovery of money advanced to the defendant on his personal account. After the filing of the written statement by the defendant the parties agreed to refer the matter to arbitration and five issues were framed for the decision of the arbitrator, one of which was "whether the defendant is liable to the plaintiff for any money and if so, what is its amount?" The arbitrator, after having examined all documents and other evidence produced before him, held that Rs. 5,000 and odd was due to plaintiff which the defendant was liable to pay. The defendant objected to the award on the ground of the arbitrator's dishonesty, and secondly, he contended that the award was wrong inasmuch as the arbitrator had allowed interest which was not within the scope of the reference to him. The arbitrator proceeded entirely on the accounts admitted by the parties.

My points are that the question of interest was included in the reference and even if the arbitrator exceeded the reference, the learned Subordinate Judge ought to have remitted the award to the arbitrator under Schedule II para. 14 of the Code of Civil Procedure, the award being in this matter inseparable from the other part of the award. The arbitrator in his award clearly stated that in working out the profits and losses of the firm he took into account the items as he found them in the account papers which were submitted to him. He did not award interest of his own discretion. The learned Subordinate Judge by his modification has practically made a new award and the difference is a good deal between the two awards. The arbitrator in his deposition says that all these items of interest were taken into account by him from the account books.

The question of interest is divisible into interest on the advances made and admittedly on the papers due and interest payable from the date of the institution of suit till realisation. The arbitrator merely dealt with the first part and did not at all go into the second part. The question that was referred to him was whether any amount was due from defendant. He only took the items to show what amount was due from defendant. He did not allow any interest. He did not, therefore, exceed his powers as given in the terms of reference.

My next point is that the question of interest being intermixed and inseparable, the learned Subordinate Judge ought to have remitted the award to the arbitrator under para. 14 of Schedule II of the Code of Civil Procedure.

Dr. *Dwarka Nath Mitter* (with him Babus *Girija Prasanna Sanyal* and *Satish Chandra Sinha*), for the Respondent.—There was no reference on the question of interest. Even in the contract between the parties there was mention only of the capital and nothing about interest in addition to the profits. The written statement was not filed. We asked for discovery and inspection before filing written statement under Order XI, rule 14 of the Civil Procedure Code. The arbitrator in his award says that there were no regular accounts. The books do show that interest was due, but the plaintiff cannot claim it inasmuch as there was no contract for it between the parties. Then as regards the second point urged by the appellant, I submit the claim of interest is a separable claim for which there ought to have been a specific prayer. The arbitrator could be examined as to the matter referred to him for arbitration. Refers to *Duke of Buccleuch* v. *Metropolitan Board of Works* (1). The question was nowhere raised in the plaint. Partners cannot claim, in a suit for partnership accounts, interest on the capital advanced. The matter does come under Schdule II, rule 12, Civil Procedure Code. The utmost the other side can ask for is to remit the matter to the arbitrator again. The matter of interest was never considered by the arbitrator and it can under rule 14, Schedule II of the Code of Civil Procedure, be remitted to him for consideration.

Babu *Ram Chandra Majumdar* replied in brief.

(1) (1871) 5 H. L. 418; 41 L. J. Ex. 137; 27 L. T. 1;

JUDGMENT.

TEUKON, J.—This appeal is directed against an order by which the Additional Subordinate Judge of Pabna, acting under the Second Schedule, rule 12, of the Code of Civil Procedure has modified an award made by an arbitrator.

The suit in which the award was made was one for dissolution of a partnership business and for accounts. It appears that the plaintiff's firm, who are primarily dealers in articles of various sorts, entered into an arrangement with the defendant for the purpose of carrying on building contracts. The firm was to supply the money and the defendant was to manage the business. The plaintiff's firm not only advanced the money for the business of their partnership contracts but also advanced money to the defendant for his own purposes. After the suit had proceeded for sometime the parties agreed to refer the matter in arbitration and five points were set out for the decision of the arbitrator selected. The 5th of those points is "whether the defendant is liable to the plaintiff for any money and if so, what is its amount?" Having examined the documents and taking the evidence produced before him, the arbitrator came to the conclusion that the sum of Rs. 5,105-12-12½ *gds.* was due from the defendant to the plaintiff's firm and made his award accordingly.

Against this award the defendant took a number of objections, alleging misconduct of various kinds against the arbitrator and also contending that in the sum awarded as due from the defendant to the plaintiff's firm the arbitrator had erroneously included a large sum as due by way of interest. All the allegations of misconduct were overruled by the Subordinate Judge and against his order, in so far as these charges were concerned, no appeal has been preferred by the defendant. The learned Subordinate Judge was, however, of opinion that in including in the sum awarded the sum shown in the books of the two firms as due by way of interest the arbitrator had fallen into error. On this account he has reduced the sum awarded by the arbitrator from Rs. 5,105 to Rs. 1,426 and odd. It is against this portion of his order that the plaintiff has appealed.

The Subordinate Judge's reasons for thinking that the arbitrator has erred in this matter of interest appear mainly to be that interest was not claimed in the plaint and that the arbitrator himself did not think it allowable to the plaintiff. Both those reasons appear to be erroneous. It is true that to the plaint the plaintiff did not append a detailed account showing how the sum claimed was arrived at, an account showing the principal and interest separately. But as a matter of fact in the plaint the sums he claimed are sums set out in the books upon which he based his claim, and those documents show that the total arrived at does include sums claimed by way of interest. That this was known to the defendant appears also from the 11th paragraph of his written statement, in which he says that "there was no agreement about paying interest for any money; the plaintiff cannot claim any interest; the debit entries appearing in the papers filed by the plaintiff of large sums of money as interest are wholly false and fraudulent." In his award the arbitrator has in reckoning the profits and losses of the partnership business included in his account, as he himself states, interests on the amount paid by the plaintiff firm to the contract firm as they are entered in the Bengali *Jumma Kharaches* and *Khatians* which have been proved to have been compiled by the parties concerned, that is to say, he reckoned the profits after allowing the interests claimed on advances made by the plaintiff's firm. Having done this he next took account of the money advanced by the plaintiff to the defendant himself for his own purposes, and here also, as is shown in the statement which he has marked III, he includes sums claimed by the plaintiff as interest on the sums advanced to the defendant personally. He further allows interest up to the date of suit and again interest from the time of the institution of the suit up to the date of his award. Though the defendant charged the arbitrator with serious misconduct, he yet examined him as his own witness and in the course of the examination elicited from the arbitrator that he had not himself calculated the amount due by way of interest, and he further elicited from him a statement to the effect that in the amount he awarded as due to the plaintiff's firm he had made the defendant liable for interest or had included interest, and at the same time he says, "I do not know whether or not the defendant

is liable for the same." But in another part of his deposition he further says, "I allowed interest as I find in the *Khatas*." It would rather seem that under examination the arbitrator had become confused and possibly had forgotten what he had really done when coming to his award. The award, however, is quite clear on this as on other points. The books of the plaintiff's firm and the books of the contract firm were both produced before him. He found that the books were true and genuine, and he further found that the Bengali *Jumma Kharach* books of the years 1322 and 1323 of the contract firm were compiled mainly from the defendant's note books, that the defendant was present when they were so compiled and that, moreover, they are in fact partly in his, the defendant's, writing. In these books he finds these sums entered as due on account of interest and he, therefore, allows them to the plaintiff. If then on the strength of the books which he finds to be true and compiled by the parties themselves, he thinks it right to include in his award certain sums by way of interest, we think that he has not committed any error which should necessitate modification of his award, and that his answers given in examination on this point should be disregarded. It being the case that the plaintiff did in fact claim interest in his plaint and it being also the fact that the defendant was aware of this and made non-liability to payment of interest part of his defence, we cannot but think that on the 5th issue which was framed for the arbitration of the arbitrator, namely, is the defendant liable to pay any money to the plaintiffs and if so, what is its amount, the arbitrator was well within the scope of the reference in allowing interest both on the sums advanced by the plaintiff to the contract firm, also on the sums advanced to the defendant for his own purposes and also further interest before and after suit up to the date of his award.

We, therefore, set aside the order of the Subordinate Judge and direct him to pronounce judgment in accordance with the award and make a decree thereon.

The plaintiff will have his costs both in the first Court and in this Court. We assess the hearing fee at three gold *mohurs*.

BEACHCROFT, J.—I agree.

Order set aside.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 721 OF 1916.

June 21, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Dundas.

Musammat ASO AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat HARNAMI AND ANOTHER—PLAINTIFFS AND *Musammat* RAMI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132—Mortgage—Charge, nature of—Suit to recover mortgage money wrongfully received by defendant—Limitation.

Plaintiffs, two out of the three daughters of one *G.*, who died 11 years before suit, sued for possession of 2/3rds of certain immoveable property and mortgage money realised by the defendants after *G.'s* death:

Held, (1) that the money realised by the defendants represented the security which the plaintiffs had under the mortgage and did not cease to represent that security by reason of the defendants having wrongfully received payment thereof from the mortgagors; [p. 945, col. 2.]

(2) that the suit was governed by Article 132 of Schedule I to the Limitation Act and was within time. [p. 945, col. 1.]

Second appeal from the decree of the District Judge, Amritsar, dated the 18th December 1915, reversing that of the Senior Subordinate Judge, Amritsar, dated the 19th June 1915.

Mr. *L. C. Mehra* for Mr. *Roshan Lal*, for the Appellants.

Dr. *Nand Lal*, for the Plaintiffs-Respondents.

JUDGMENT.—In the suit out of which the present second appeal arises the plaintiffs, two out of the three daughters of Ganga Ram, who died 11 years before suit, sued for possession of 2/3rds of certain immoveable property and mortgage money realised by the defendants after Ganga Ram's death. The lower Appellate Court, reversing the decree of the first Court, has granted the plaintiffs the decree sought and the defendants have filed a second appeal in this Court. The parties are Kumhars, and it is found that they are governed by Hindu Law and not by custom. No certificate has been obtained and this decision cannot, therefore, be challenged in second appeal. It has also been found as a fact by the lower Appellate Court that Ganga Ram was separate from the rest of the descendants of Gulaba (see the pedigree table at page 7 of the paper book) and was not a member of a

joint Hindu family. Oral evidence was produced by the defendants, and this was relied upon by the first Court which held that the defendants were joint with him. The lower Appellate Court, however, was of opinion that the documentary evidence showed that Ganga Ram was mortgagee of certain lands of which Sandhi and Nathu, his nephews, were the tenants, paying him cash rent and that this conclusively proved that he was not a member of a joint Hindu family. It is argued on behalf of the appellants that the lower Appellate Court has not considered the oral evidence; but the Court has referred to that evidence and we do not see any reason to suppose that it did not pay due attention thereto.

The main point which has been argued before us is whether the plaintiffs' claim to 2/3rds of the mortgage money realised by the defendants is barred by time or not. The lower Appellate Court holds that the claim is governed by Article 132 of the Limitation Act and that as the suit was brought within 12 years after the death of Ganga Ram, it was within time. Counsel for the appellants, however, argues that Article 62 of the Schedule applies, the suit being, according to him, one for money received by the defendants for the plaintiffs' use. The point does not seem to have been specifically taken in the trial Court and, therefore, it was not ascertained, though it could easily have been done, at what date the mortgage money was paid. We do not, however, find it necessary to remand the case for decision on this point, because we are clear that the suit is governed by Article 132 of the Schedule. The Article in question relates to suits to enforce payment of money charged on immoveable property, and the limitation is 12 years from the date when the money sued for becomes due. In *Sham Lal* v. *Johri Mal* (1) it was held that a person who takes a mortgage of immoveable property in the name of another, loses his lien on the security if a *bona fide* transferee acquires it for value from the *benamidar* but has a remedy against the latter for the money wrongfully received and retained by him and it being charged on immoveable property, the limitation for such a claim is that which is provided by Article 132 of the Second Schedule to the Limitation Act. The *ratio decidendi* in this and similar cases was that the lien which existed on the property as a charge was transferred under section 37 of the Transfer of Property Act to the purchase money and that there was nothing in the Limitation Act which would shorten the time within which the plaintiff could sue to recover the money, the suit being a suit not on the personal covenant but one to recover the money as charged on the mortgaged property. The same principle was followed in *Berhamdeo Pershod* v. *Tara Chand* (2) and *Barhamdeo Prasad* v. *Tara Chand* (3). Following the principle enunciated in the last named ruling, we hold that the money realised by the defendants represents the security which the respondents had under the mortgage and did not cease to represent that security by the fact of the appellants having wrongfully received payment thereof from the mortgagors.

We, therefore, hold that the present suit is within time and dismiss the appeal with costs.

Appeal dismissed.

(1) 1 Ind. Cas. 732; 37 P. R. 1909; 50 P. W. R. 1909; 38 P. L. R. 1909.

(2) 33 C. 92; 9 C. W. N. 989.

(3) 21 Ind Cas 961; 41 C. 654 at p. 655; 15 M. L. T. 62; (1919) M. W. N. 38; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R. 89; 26 M. L. J 243; 41 I. A. 45 (P. C.).

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 152 OF 1918.

July 23, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

S. V. S. T. CHETTY—PLAINTIFF—APPELLANT

versus

PO MYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59 - Attesting witness—Writer of document signing as scribe, whether attesting witness.

The writer of a document who signs it as scribe is not an attesting witness within the meaning of section 59 of the Transfer of Property Act. He can only be an attesting witness if he subscribes the document as a witness. [p. 946, col. 1.]

TAJAMMAL HUSSAIN v. ALI BAHADUR KHAN.

Mr. *Cowasji*, for the Appellants.

Messrs. *Maung Lat* and *Nariman*, for the Respondents.

JUDGMENT.—The only question in this appeal is whether the mortgage document, Exhibit A, has been duly attested by two witnesses as required by section 59 of the Transfer of Property Act. There is one attesting witness, a Chetty, and for the plaintiff-appellant it is urged that the writer of the document, Maung Ba O, who signed the document as scribe is the second attesting witness. Maung Ba O himself marked at the foot of the document with the Burmese word "*athi*" the place for the signature of the attesting witnesses, and it was in this place that the Chetty witness attested the document, and underneath the Chetty's Tamil signature Ba O transliterated the name into Burmese. Ba O himself signed in a different place describing himself as scribe. In his evidence he states that he was not asked to be an attesting witness, and he simply signed his name as writer, and did not sign as attesting witness.

Their Lordships of the Privy Counsel in *Shamu Satter* v. *Abdul Kadir Rowthan* (1), in considering the requirements of section 59 of the Transfer of Property Act as regards attestation, held that the words of the section "could only mean that the witnesses were to attest the fact of execution." Their Lordships in the course of their judgment examined a long series of English authorities as to the meaning to be assigned to the words "attestation" and "attest," and they pointed out that the Lord Chancellor in *Burdett* v. *Spilsbury* (2), summed up the conclusion in these words:—"The party who sees the Will executed is in fact a witness to it; if he subscribes as witness, he is then attesting witness." Their Lordships evidently accepted this conclusion, and we must, therefore, apply it in the present case.

It is clear that although Ba O was in fact a witness to the mortgage document, he did not subscribe as a witness, and he is, therefore, not an attesting witness within the meaning of section 59.

(1) 16 Ind. Cas. 250; 35 M. 607; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 39 I. A. 218 (P. C.).

(2) (1843) 10 Cl. & F. 340; 8 E. R. 772; 59 R. R. 105.

The appeal is, therefore, dismissed with costs—a separate Advocate's fee being allowed for defendants one and two and for defendants three, four and five.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 163 OF 1919.

April 27, 1920.

Present:—Justice Sir George Knox, Kt.

TAJAMMAL HUSSAIN AND ANOTHER
—DEFENDANTS—PETITIONERS
versus
ALI BAHADUR KHAN—PLAINTIFF
—OPPOSITE PARTY.

Agra Tenancy Act (II of 1901), s. 79—Suit to recover possession of holding—Jurisdiction of Civil and Revenue Courts—Revision—High Court, interference by.

Where a person seeks to recover possession of his holding the suit should be brought under section 79 of the Agra Tenancy Act and over such a suit the Revenue Court alone has jurisdiction [p. 946, col. 2.]

The High Court has jurisdiction to interfere in revision where a Civil Court has wrongly entertained a suit cognizable by a Revenue Court. [p. 947, col. 1.]

Civil revision against the order of the District Judge, Cawnpore, dated the 18th July 1919.

Mr. *Mukhtar Ahmad*, for the Petitioners.

Dr. *J. N. Misra*, for the Opposite Party.

JUDGMENT.—This is one of those numerous cases in which Civil Courts attempt to grasp jurisdiction. The plaint is ingeneously worded and the plaintiff has gone so far as to add an unnecessary person in the array of defendants, but the real remedy that the plaintiff seeks for is to recover possession of his holding. The suit should have been brought under section 79, and that being the case, no Court other than a Revenue Court is allowed to take cognizance of any dispute or matter in respect of which any suit might be brought or made. The words are very wide and in my opinion purposely made wide, in order to keep Civil Courts to their proper business and to keep them from meddling

with matters which are best understood and best decided by Revenue Courts.

The learned Advocate for the respondent attempted to make a strong case and to maintain that this was not a matter for revision. He called my attention to the following cases :—

Jwala Prasad v. *East Indian Railway Co.* (1) *Jhunku Lol* v. *Beshashar Das* (2) *Fazal Rab* v. *Mansur Ahmad* (3).

But on referring to these cases it will be found that not one of them is a revenue case or a case of which a Revenue Court should take cognizance. The revision is decreed and the order of the lower Court is set aside with costs.

Order set aside.

(1) 46 Ind. Cas. 99; 16 A. L. J. 535.
(2) 46 Ind. Cas. 71; 16 A. L. J. 495; 40 A. 612.
(3) 45 Ind. Cas. 772; 16 A. L. J. 433; 40 A. 425.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1155 OF 1919.

November 12, 1919.

Present:—Mr. Justice Bevan-Petman.

GURBACHAN SINGH—PLAINTIFF—APPELLANT

versus

RALLA RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Indian Soldiers (Litigation) Ordinance (II of 1915), ss. 2, 9—"Serving under war conditions," meaning of—Duty of Court in cases of doubt.

"Serving under war conditions" does not necessarily mean serving abroad.

When the Court is in doubt as to whether a party can be said to be serving under war conditions or not, it ought to refer the matter to the prescribed authority and act on the certificate given by such authority.

Second appeal from the decree of the Senior Subordinate Judge with appellate powers, Jullunder, dated the 21st March 1919, reversing that of the Munsif, 1st Class, Jullundur, dated the 24th January 1919, decreeing the claim.

Dr. *Nand Lal*, for the Appellant.

Mr. *Bhagat Ram*, for the Respondents.

ORDER.—The lower Appellate Court has come to no definite finding regarding the exact age of the plaintiff. For reasons stated that Court came to the conclusion that the entry in the birth register did not refer to the plaintiff and that the plaintiff was older than the person to whom the entry referred. Apparently the defendant had accepted the entry as relating to the plaintiff and relied on the fact that even according to that entry the plaintiff was time-barred. The plaintiff was claiming the benefit of Ordinance II of 1915 and the contest turned to a large extent on this point. It is true that on the record as it stands the plaintiff has failed to prove that he was "serving under war conditions," but the lower Appellate Court apparently did not study the Ordinance and has failed to catch its spirit, otherwise it would not have fallen into the error of thinking that "serving under war conditions" necessarily means serving abroad. The term is defined in the Ordinance. In my opinion the case was one in which the Court should have acted under section 9 of the Ordinance. If it is true that the plaintiff served in France, I think all possible indulgence ought to be extended to him. I, therefore, remand the case to the Court of the Munsif and direct him to refer, under section 9 of the Ordinance II of 1915, the points whether the plaintiff has been serving under war conditions and if so, from which date to which date, for decision by the prescribed authority. I also frame the following issue: "What was plaintiff's age on the date of the institution of the suit?" and direct the Munsif to try the said issue giving the parties full opportunity to produce further evidence. The return to this remand is to be made through the District Judge, who will express his opinion on the finding of the Munsif. Costs in this Court of the present hearing to be costs in the cause.

Case remanded.

S. B. DAS *v.* MUTHIA CHETTY.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 113 OF 1918.

May 8, 1919.

Present:—Mr. Justice Ormond and Mr. Justice Maung Kin.

S. B. DAS—DEFENDANT No. 2—APPELLANT

versus

C. T. A. R. A. MUTHIA CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60—Attachment of debt—Security deposit for carrying out contract, whether debt and liable to attachment.

An attaching creditor can attach a debt although the debt is not then payable, but it must be an existing debt. [p. 948, cols. 1 & 2.]

Money deposited as security for the due performance and completion of a contract, as well as monies deducted from sums already earned and retained till completion of the work, although liable to forfeiture, are debts due to the contractor until they became liable to be forfeited, and are attachable in execution of a decree against him. [p. 948, col. 2.]

Messrs. *Das* and *Dantra*, for the Appellant.

Mr. *Aiyar*, for the Respondent.

JUDGMENT.—The plaintiff Chetty sued his mortgagor Moodalayar on a mortgage, and he sued the present appellant as the 2nd defendant for a declaration that the attachment made by the appellant on the funds which were mortgaged to him was inoperative as regards the mortgage. Moodalayar carried out certain works as a contractor for the Public Works Department at Toungoo. He deposited Rs. 2,100 with the Public Works Department by way of security, and he was paid from time to time the value of the work done less ten per cent., which was retained till the work was completed. The 27th November 1916 was the date of the attachment. At that time the amount earned by Moodalayar which had not been paid him, but which was retained as being ten per cent. of the amount earned, was Rs. 6,831 and there was also Rs. 2,100 the security. The learned District Judge held that the mortgage which was subsequent in date, was subject to the attachment, but that the attachment was good only in respect of the amount that was then payable, *i. e.*, Rs. 1,500 which represented ninety per cent. of the amount earned by Moodalayar and not then paid. The 2nd defendant, the attaching creditor, appeals.

An attaching creditor can attach a debt although the debt is not then payable, but it must be an existing debt. The question in this appeal is, therefore, was the ten per cent. of the amount that had already been earned by the contractor, and retained by the Public Works Department until the completion of the work, and also the security deposited by the contractor, which was also not payable until the completion, existing debts due, but not then payable, to the contractor on the 27th November 1916? The District Judge thought that the contractor must be taken to have refused to carry on his work on the 27th November 1916, whereby he would have forfeited both the ten per cent. of the amount earned by him and retained by the Public Works Department as well as the amount of his security. The District Judge was not warranted in this assumption; as a matter of fact, the contractor did perform his contract and this ten per cent. and the amount of his security were payable to him in October 1917. The security, if it had been in Government paper and kept separate, would have remained the contractor's property until he had forfeited it; and if he paid cash and that cash was mixed with other funds, the Public Works Department would hold that amount in trust for the contractor until it became forfeited. Until forfeiture there would be a debt due by the Public Works Department to the contractor, although it was not payable until the completion of the work. Likewise, the ten per cent., even if it was liable to be forfeited, was money which the contractor had earned, and, therefore, it was a debt due to him until it became forfeited. In *Hutt* v. *Shaw* (1) it was held that a sum of money deposited by the judgment debtor with an outside broker as cover for several speculative transactions was not a debt owing by the broker to the judgment debtor until the transactions were closed. The Judges must, therefore, from the circumstances in that case have found that the £.50 given to the broker was given on account of those transactions and not by way of security. We think the attachment was good not only as regards the ninety per cent. of the amount already earned, and which the Public Works Department were

(1) (1886) 3 T. L. R. 354.

ready to pay on the 27th November 1916, but it was also good as to the ten per cent. which had been retained, and also as regards the security Rs. 2,100, although both these sums were not payable till the completion of the work. The decree, therefore, as regards the second defendant will be varied by making a declaration that the mortgage is subject to the attachment as to the Rs. 6,831 (the ten per cent. retained by the Public Works Department) and Rs. 2,1000 (the security) as well as the Rs. 1,500 which has been allowed by the District Judge. The appellant will have his costs in both Courts on the amount in respect of which he has been successful, *viz.*, in the District Court he should have costs on Rs. 10,431 and in this appeal on Rs. 8,931.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 945 OF 1918.

May 4, 1920.

Present :—Mr. Justice Das.

Raja KAMALESHWARI PROSAD SINGH—DEFENDANT—APPELLANT

versus

Lala JAGAR NATH SAHAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Co-sharers—Co-sharer, one of several, paying off rent decree—Contribution, suit for, maintainability of—Court, duty of, performance of—Presumption—Contract Act (IX of 1872), s. 69—Appropriation, doctrine of, applicability of, to contribution.

Where a co-sharer is not bound by law to pay a rent decree in favour of the superior landlord, he is not liable to contribution where the decree is paid off by the other co-sharer. [p. 949, col. 1.]

Where a statutory duty is imposed on a Court, it must be presumed that that duty has been performed. [p. 950, col. 1.]

No question of appropriation arises in a suit for contribution under section 69 of the Contract Act. [p. 950, col. 2.]

Appeal against the decision of the Subordinate Judge, Monghyr.

Mr. *N. C. Sinha*, for the Appellant.

Mr. *A. B. Mukerji* and *Rai Tribhuan Nath Sahai*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by the respondents for recovery of Rs. 539 from defendant No. 1. The lower Appellate Court has granted the plaintiffs a decree for the full amount claimed. The defendant No. 1 appeals.

The admitted facts are as follows :—The plaintiffs and the defendants are co-sharers of a certain Mokarrari interest under the Banaily Raj. The defendant No. 1 has five-annas interest in the Mokarrari in two different capacities. He is the mortgagee in possession in respect of 3-annas share in the Mokarrari and he is also the purchaser of 2-annas share, his purchase having been effected on the 8th September 1909. The Baraily Raj brought a suit for recovery of rent for the years 1315 to 1318. Defendant No. 1 was not a party to the suit, although his purchase of the 2 annas interest was previous to the date of the institution of the suit. The Raj got a decree against the defendants second and third parties for Rs. 1,278-4-9. Defendants Nos. 6 and 7 paid Rs. 211-0-0 towards the satisfaction of the decree. The balance, namely, Rs. 1,067-4-9, was paid by the plaintiffs on the following dates, *viz.*, Rs. 6-3-9 before the 7th April 1914, Rs. 200 on the 7th of April 1914 and Rs. 223-4-9 on the 18th of May 1914. The defendants, other than defendant No. 1, paid their proportionate share to the plaintiffs. The plaintiffs on the 5th of April 1917 instituted the present suit for recovery of Rs. 399-7-6, the proportion which ought to have been paid by defendant No. 1, and Rs. 139-8-6 as the interest on Rs. 399-7-6, in all Rs. 539.

The first point urged on behalf of the appellant is that so far as his purchased share is concerned, he was not bound by law to pay any portion of the rent decree obtained by the superior landlord and, therefore, the plaintiffs are not entitled to be re-imbursed by him. I think this contention is correct. It will be remembered that the defendants' purchase was prior to the institution of the suit by the superior landlord. In my view, the superior landlord was not entitled to sell the tenure in the possession of defendant No. 1 in a suit in which defendant No. 1 was not a party. It is clear under the law that the consent of the landlord was not necessary to the transfer of title to defendant No. 1. From the date of his purchase defendant No. 1 was the tenant of the superior landlord. The superior landlord could

only affect the tenure in the possession of defendant No. 1 in a properly constituted suit against defendant No. 1. Section 13 of the Bengal Tenancy Act is conclusive on this point.

But it was argued on behalf of the respondents that before this argument can be advanced it must be shown that the superior landlord had notice of the purchase made by defendant No. 1. In my view, we must assume that everything which the Court was bound to do in pursuance of a statutory duty was in fact done in this instance. Section 13 provides that the Court, before confirming the sale under Order XXI, rule 92 of the Code of Civil Procedure, shall require the purchaser to pay into Court the landlord's fee prescribed by section 12 of the Bengal Tenancy Act and such further fee for service of notice of the sale on the landlord as may be prescribed. The sale has in fact been confirmed and, therefore, I must assume that the fees required by the Court to be paid by the purchaser were in fact paid before the sale was confirmed. If these fees were in fact paid, then clearly it was the duty of the Court to send to the Collector the landlord's fee and a notice of the sale in the prescribed form and it was the duty of Collector to cause the fee to be transmitted to, and the notice to be served on, the landlord in the prescribed manner. These are statutory duties and I am bound to presume that these statutory duties were in fact performed.

If that be so, then clearly the landlord could not, by a decree obtained against the former tenant, affect the tenure in the hands of defendant No. 1. That tenure could only be affected by a decree for rent against the defendant No. 1 in a properly constituted suit against him. In my view, therefore, the defendant No. 1 was not bound by law to pay any portion of the rent decree obtained by the landlord in respect of the 2 annas share purchased by the defendant No. 1.

There still remains the question of the liability of defendant No. 1 in respect of five-annas share held by him as a mortgagee in possession. He was undoubtedly bound by law to pay his proportion of the decretal amount in respect of his 3-annas share. The plaintiffs, being interested in the payment of this money by defendant No. 1, have actually paid it and, if their suit is within time, they are entitled to be re-imbursed by the defendant. It is urged, however, by the appellant that the plaintiffs' suit in regard to whatever they paid before the 5th of April 1914 is barred by limitation. This contention must prevail. It appears that the plaintiffs paid Rs. 639 before the 5th of April 1914. The suit for contribution, therefore, with respect to this item should have been brought within three years from the date of payment. But it is contended on behalf of the respondens, a contention which has found favour with the lower Appellate Court, that the plaintiffs are entitled to take up the position that whatever they paid before the 7th of April 1914 must be deemed to have been paid on their own behalf and on behalf of the co-sharers other than the defendant No. 1. The argument is that the plaintiffs were entitled to recover from the defendant No. 1 Rs. 399. The plaintiffs have actually paid to the landlords, in satisfaction of his decree, more than Rs. 399 within three years of suit. Therefore they must be deemed to have paid the share of defendant No. 1 within three years of suit and accordingly their suit is within time. I do not agree with this contention at all. In my view, every rupee paid by the plaintiffs must be deemed to have been paid on behalf of all the co-sharers. No question of appropriation arises in a suit for contribution under section 69 of the Indian Contract Act. The plaintiffs' case is that they are interested in the payment of money which others were bound by law to pay. They have paid and are entitled to be re imbursed by the others. In my view, the plaintiffs must be deemed to have paid every portion of the money actually paid by them on behalf of all the co-sharers. In that view so far as Rs. 639 is concerned, they are not entitled to be re-imbursed by defendant No. 1 in respect of the 3 annas share held by him as a mortgagee. Plaintiffs are, however, entitled to be re-imbursed in regard to Rs. 428 4-9 paid by them within three years of suit. They are entitled to recover from defendant No. 1 the proportion which the defendant No. 1 ought to have paid to the plaintiffs in respect of his 3 annas share. Let the figure be worked

out in office and the decree of the lower Appellate Court be modified accordingly. The parties are entitled to their costs in proportion to their success.

Decree modified.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 36 OF 1919.

October 21, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr Justice Robinson.

M. A. M. MUTHIA CHETTY—PLAINTIFF—APPELLANT

versus

SEENA V. THEVAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art 142, applicability of—Possession and dispossession—Burden of proof.

In order to avail himself of the period of limitation prescribed by Article 142 of Schedule I to the Limitation Act, the plaintiff in a suit for possession of immoveable property must prove the dispossession which he alleges, and that he was in possession within twelve years of the suit. [p. 951, col. 2]

Mr *Dhar*, for the Appellant.

Mr. *Halkar*, for the Respondent.

JUDGMENT.—The plaintiff appellant, a Chetty money lender, brought this suit in 1916 to eject the defendants from a piece of paddy land measuring about eighteen acres. His case is that he bought the land in 1905, from one Sankaralingam, that he was in possession through his tenants from that time up to 1910, when the defendants ousted him by turning out his tenant. The defendants denied that the plaintiff was ever in possession either personally or by a tenant. They put plaintiff to proof of his alleged purchase in 1906. They admitted that the land formerly belonged to Sankalingam but said that about twenty years before the suit, *i. e*, about 1896 Sankalingam sold the land to them, and that on their giving him a promissory note for the purchase money he made over the land to them, and promised to execute a registered conveyance as soon as they should pay the amount due on the pro note.

The findings of fact are that the land in question was sold by Sankalingam in 1906 by a registered conveyance to the plaintiff but that the plaintiff never obtained possession. He alleged that he let the land for four years beginning in 1906 to a cultivator named Arsappa Thevan and in 1910 to a Burman Maung Kan Gyin, who was ousted by the defendants. But the evidence in support of these allegations was disbelieved and the Court found it established that the defendants had been in continuous possession for eighteen or twenty years. On the other hand the defendants did not succeed in satisfying Court that they were in possession as owners. The learned Divisional Judge was not satisfied as to the alleged sale by Sankalingam to the defendants about 1896, and he thought it possible that the defendants were in possession merely as tenants of Sankalingam and Sankalingam's predecessors-in-title. But on his finding that the plaintiff had failed to prove possession within twelve years of the suit the Divisional Judge, concurring with the District Court, dismissed the plaintiff-appellant's suit.

The suit is clearly governed by Article 142 of the Limitation Act and it is a well established rule of law that in suits under this Article the onus of proof lies on the plaintiff. He has to prove the dispossession which he alleges and that he was in possession within twelve years of the suit. Here the plaintiff has failed to prove that he or tenants of his were in possession at any time, and the allegation as to dispossession consequently falls to the ground. As the plaintiff failed to prove possession within twelve years of the suit which was essential to the maintenance of the suit, it was unnecessary to go into the question of the defendant's title at all.

It is urged in second appeal that the plaintiff having acquired Sankalingam's title by purchase in 1906, *i. e.* within twelve years of the suit, it should be held that the plaintiff obtained possession in 1906 through the defendants themselves, as the defendants must be regarded as Sankalingam's tenants. But the plaintiff has not shown that the defendants were Sankalingam's tenants or licensees in 1906. The learned

KASTURI v. LOTE MAJOR.

Divisional Judge observes that this is "quite possible," but there is no proof of it. The plea is substantially an attempt to shift the burden of proof to the defendants, and we are in effect asked to hold that the plaintiff's suit must prevail because the defendants have not proved adverse possession for twelve years. The defendants deny that they were Sankalingam's tenants in 1906; their case is that they became full owners by purchase from Sankalingam some ten years earlier. They got no conveyance because they did not pay the purchase money in cash; but the Transfer of Property Act, section 54, was not in force in rural areas in 1906, and oral transfers with delivery of possession then in vogue were valid. If the suit were a suit governed by Article 144 of the Limitation Act, the plaintiff on proving his title could put the defendants to proof of their allegations of adverse possession. But the Article 144 cannot be applied in this case. It is a residuary Article which has to be applied only to suits for possession of immoveable property not otherwise expressly provided for, and the present suit is expressly provided for in Article 142 under which no question of adverse possession arises.

The suit was rightly dismissed, and we dismiss this appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 300 OF 1919.

April 24, 1920.

Present:—Mr. Macnair, A. J. C.

Musammat KASTURI—DEFENDANT—APPELLANT

versus

LOTE MAJOR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Inheritance—Illegitimate daughter, right of, to inherit her mother's property—Hindu female entitled to maintenance—Possession—Mutation—No indication that possession is in lieu of maintenance—Adverse possession—Daughter, right of, to inherit.

According to Hindu Law an illegitimate daughter, even among twice born classes, inherits the property of her mother in preference to trespassers. [p. 953, col. 1; p 954, col. 1.]

Where a share in the property of a Hindu was held by his mistress, and mutation was effected in her favour some 40 years ago, and although she was entitled to maintenance, there was nothing to show that her possession was in lieu of maintenance, it was held that she had acquired title by adverse possession and that upon her death her share devolved on her daughter [p. 954, col. 2.]

Appeal against the decree of the Additional District Judge, Jubbulpore, in Civil Appeal No. 1 of 1919, decided on the 31st March 1919.

Mr. *V. V. Chitale*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—One Shankar had three sons, Kandhai, Sheobux and Birbal. The case of the plaintiffs as set out in the plaint and pleadings is as follows: The five anna 4 pie *patti* to which this suit relates was the joint property of the three brothers. Kandhai died about 45 years ago. After the death of Kandhai mutation was ultimated effected in the name of his widow *Musammat* Gomti with respect to a three anna 6 pie *patti*. After this *Musammat* Gomti was the mistress of Birbal. The defendant Kasturi is the illegitimate daughter of Gomti by Birbal. She has got a three annas 6 pie *patti* entered in her name in the revenue records and is claiming profits with regard to that *patti*.

The plaintiffs sue for a declaration that the defendant has no right to any share in the 5 annas 4 pie *patti*. The learned Munsif held that even if Gomti was in possession of the *patti* (apparently the three annas 6 pie *patti*), she was in possession as widow of Kardhai and her heirs would be her natural (*sic*) daughters, and not the defendant.

I cannot follow the remainder of the learned Munsif's judgment. The plaintiffs were granted a declaration. The defendant appealed.

The learned Additional District Judge held that the possession of Gomti, who was living with Birbal as his wife or mistress, could only be said to be adverse to plaintiffs after the death of Birbal twelve years ago He also held that the defendant who had received no share in the profits since the death of Gomti eight or nine years ago, could not be said to be in pos-

session. He held that *Musammat* Gomti had not acquired a title by adverse possession: the defendant, an illegitimate daughter of *Musammat* Gomti, had no title to succeed to the property of *Musammat* Gomti's former husband Kandhai. The appeal was dismissed.

The main argument urged before me in second appeal is that *Musammat* Gomti had acquired a title by adverse possession. This title descended to her illegitimate daughter. The learned Counsel for the respondents contended that an illegitimate daughter could not inherit the property of her mother if she was not a Sudra.

The question is not free from difficulty but the balance of authority is strongly in favour of the view that an illegitimate daughter, even among the twice born classes, inherits the property of her mother.

The authors of several commentaries on Hindu Law expres a clear opinion on the point. In Ghose's Principles of Hindu Law, Volume I, 3rd Edition, Vribat-Parasara, Chapter V, is cited at page 69:

"The son, begotten by one of equal caste (the illegitimate son), is the offerer of *pindas* of his mother, and is (in every respect) a son to her; but he is nothing to the begetter, as he is born of lust."

On page 369 it is stated:

"The decisions against the rights of the children of unchaste females are not based on any rule of the Smritis".

Again on page 763.

"According to Hindu Law, an illegitimate child is not the child of the father, but only of the mother, and can thus have no relations or rights of inheritance except to the mother's property"; and

on page 767:

"I have shown at page 369 that the illegitimate sons offer *pindas* to their mother and are thus related according to law to her and to one another and have thus also rights of inheritance to the estate of the mother and also of one another. There are no doubt several dscisions denying such relationship and right. But the texts cited in this book were not before the Judges, and it also must be said that there is very great force in the observations of the Oudh Court, in the case mentioned above, that such rights should be allowed on grounds of natural justice".

Trevelyan in his work on Hindu Law, 2nd Edition at page 462 states:

"Illegitimacy is not a bar to the succession of children to their mother's property, but in a competition between legitimate and illegitimate children the rights of the former prevail.

This has no application to the illegitimate child of a married woman."

In Gour's Hindu Code published in 1919 it is stated in paragraph 2180 that illegitimate daughters are entitled to inherit to their mothers. Dr. Gour is speaking of illegitimate daughters whether of a twice born or of a Sudra.

In Mayne's Hindu Law, 8th Edition, section 552, the passage occurs:

"Still less is there any absence of heritable blood as between bastards and their mother".

With the doubtful exception of the sentence cited from Mayne, it is clear that all the passages cited refer to the twice born classes as well as to Sudras. Trevelyan excludes adulterous issue, but this is immaterial for the decision of the present appeal. The case law on the subject is more obscure. It is complicated by distinctions between Sudras and twice born classes, by reliance on custom in the case of certain classes, and by the distinction drawn between adulterous and non-adulterous issue. In *Myna Boyee* v. *Ootaram* (1) the plaintiff was the daughter of a wife living in adultery. Their Lordships stated at page 423:—

"If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, whether married or unmarried, inherit her property, this custom is not in proof."

It is clear, however, that their Lordships laid stress on the fact that the plaintiff was adulterous issue. In *Arunagiri Mudali* v. *Ranganayaki Ammal*(2) the plaintiff's illegitimate daughters sued to recover possession of a house to which they claimed to be entitled in succession to their mother. Although the question whether the daughters had any right of inheritance was not discussed, the daughters obtained a decree.

(1) 8 M. I. A. 400; 2 W. R. P. C. 4; 2 M. H. C. R. 196 1 Suth. P. C. J. 452; 1 Sar. P. C. J. 797; 19 E. R. 582.
(2) 21 M. 40; 7 Ind. Dec. (N. S.) 384.

MAUNG SEIN v. U PO KO.

The respondents rely strongly on *Meenakshi* v. *Muniandi Panikkan* (3). In that case the competition was between the illegitimate son of a Sudra woman and her illegitimate daughter born in prostitution. The learned Judges who decided this case do not dissent from previous rulings to the effect that illegitimate daughters succeed in the absence of legitimate heirs. Oldfield, J., states that the reference in a former case to the rights of illegitimate children is not inconsistent with their postponement to all legitimate heirs and later on speaks of the expressly limited recognition of the rights of illegitimate children in Hindu Law. Seshagiri Ayyar, J., endeavours to reconcile the statement that illegitimate sons are entitled to succeed to their mother.

In *Tripura Charan Banerjee* v. *Hari Mati Dasi* (4) it is stated at page 500*:—

"Under these circumstances, I am of opinion that the rule as to separation by degradation is as I have suggested above, and that such separation does not operate to sever a prostitute from her sons or her chaste daughters born after her degradation, so as to disable them from inheriting from her."

The Judge then considers that the illegitimate sons or daughters of a prostitute have a right of inheritance. The decision of this case rests on this consideration. In *Jagannath Raghunath* v. *Narayan Lal* (5) it was held that the *stridhan* of a female devolves upon her husband on her death in preference to the son born of her by adulterous intercourse.

There is then very considerable authority for the proposition that an illegitimate child, whether of a Sudra or of a twice born, inherits the property of the mother if there are no preferential heirs and if the child is not born of adulterous intercourse. I find no authority to the contrary. I agree with Rao Bahadur, J C. Ghose that common humanity and natural justice appear to require that an innocent child should have some right of inheritance from the erring mother.

(3) 25 Ind Cas. 957; 38 M. 1144; 1 L. W. 704; (1914, M. W. N. 672; 16 M. L. T. 270; 27 M. L. J. 353.

(4) 9 Ind. Cas. 657; 38 C. 493; 15 C. W. N. 807.

(5) 7 Ind. Cas. 459; 34 B. 553; 12 Bom. L. R. 545.

*Page of 38 C.—*Ed.*

In the present case, then, the defendant succeeded to the rights of her mother in preference to trespassers.

The plaintiffs' case is that Gomti was the widow of a member of a joint family. She had then no right to succeed on the death of her husband: but the plaintiffs admit that mutation was effected in the name of *Musammat* Gomti some forty years ago. The learned Counsel for the respondents was at first prepared to admit that *Musammat* Gomti's possession was adverse. He subsequently urged that this possession was in lieu of maintenance. Mutation in favour of Gomti is evidence of her possession and possession is *prima facie* adverse. *Musammat* Gomti was entitled to maintenance, but there is nothing to indicate that her possession of the share in question was in lieu of maintenance. I hold then that *Musammat* Gomti acquired title by adverse possession.

On her death her share devolved upon her illegitimate daughter, the defendant. It is admitted that the defendant got the share entered in her name and claimed profits. It is unnecessary to consider the pleadings of the defendant. The plaintiffs' suit must fail if *Musammat* Gomti obtained rights by adverse possession and these rights descended to her daughter. The appeal, therefore, succeeds. The suit is dismissed. The plaintiffs must bear costs in all Courts.

Appeal accepted.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 143 OF 1918.

June 23, 1919.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

MAUNG SEIN—APPELLANT

versus

U PO KO—RESPONDENT.

Buddhist Law, Burmese Adoption—Giving and taking, evidence of—Presumption—Proof necessary.

Under Burmese Buddhist Law it is not essential in adoption cases that direct evidence should be given of the actual giving and taking in adoption. No documentary evidence is necessary and no particular ceremony or formality is required. Where it is clearly proved that the child was brought up

with a view to inherit, the actual giving and taking may be presumed; but where the giving and taking is not actually proved, it is incumbent on the adopted child to prove his case by clear and unambiguous evidence as to the publicity and notoriety of his status as *kittima* child. [p. 955, col. 2.]

Mr. *May Oung*, for the Appellant.

Mr. *Hay*, for the Respondents.

JUDGMENT.—The plaintiff Ma I sued for a declaration that she was the Kittima adopted daughter of the defendant-respondent Maung Po Ko, and of his wife Ma Thet deceased, and she claimed a quarter share of the joint property as being the Aurasa daughter, her adoptive mother Ma Thet having died. The defendant Maung Po Ko denied the adoption, but he said that the plaintiff had been brought up by his wife's father and mother. The Judge on the Original Side held that the plaintiff had proved the adoption but not a Kittima adoption with a view to inherit, and the suit was, therefore, dismissed.

The plaintiff Ma I died after filing the suit and the claim was prosecuted by her husband Maung Sein and her minor daughter as legal representations of Ma I.

Po Ko and Ma Thet had no natural issue, but they admittedly adopted as their son one Po Win who was the grand-nephew of Ma Thet's mother Ma Mo, and Po Win is a witness for defendant Maung Po Ko in this case. He is younger than the plaintiff Ma I and his adoption by Maung Po Ko and Ma Thet was subsequent by several years to the time of Ma I's arrival in the family. The plaintiff's evidence shows that she was brought up from the age of four or five up to the time of her marriage in the house of Po Kyaw Saw and Ma Mo, the parents of Ma Thet, and that during the greater part of this time Po Ko and Ma Thet also lived in the same house. At the time of Ma I's arrival in the house Po Kyaw Saw was a man of some wealth and substance while Po Ko was a young man, and had no substantial means of his own. Ma I was about forty-four years old at the time of the suit (in 1918) and she was about thirty when she married Maung Sein. The plaintiff's witnesses are unable to give any particulars as to the actual giving and taking in adoption. But the defendant Po Ko states that Ma I as an orphan child was brought to Kanaungto by a man named Kyin Bo who said he had no means of bringing up the child, and asked Ma Mo and Kyaw Saw to look after her out of compassion. Po Kyaw Saw is said to have died about twenty-four or twenty five years ago, and Ma Mo about eight or nine years ago. The evidence of the plaintiff's witnesses leaves it in some doubt whether she was brought up by Po Ko and his wife or by Kyaw Saw and Ma Mo. It may well be that she was taken in by the old couple originally and that after their death Ma Thet looked after her. After her marriage with Maung Sein the plaintiff left Kanaungto for five years or more. When they came back to Kanaungto, Maung Sein says that they put up for a few months with Po Ko and Ma Thet, and then built themselves an abode in a different part of the village and lived there. Subsequently they built a house in a corner of Po Ko's compound. Maung Sein says he bought this land for Rs. 40 from Po Ko; but Po Ko says that he did not sell the land to Maung Sein but only sold him the materials of an old house on behalf of Po Win.

It is not essential in adoption-cases that direct evidence should be given of the actual giving and taking in adoption. No documentary evidence is necessary and no particular ceremony or formality is requried. Where it is clearly proved that the child was brought up with a view to inherit, the actual giving and taking may be presumed; but where, as in this case, the giving and taking is not actually proved, it is incumbent on the plaintiff to prove her case by clear and unambiguous evidence as to the publicity and notoriety of her status as Kittima child.

The plaintiff produces witnesses from among the neighbours in Kanaungto, whose evidence shows that she was brought up in this house up to the time of her marriage and that she was kindly treated by Po Ko and Ma Thet as well as by Ma Thet's parents. It appears from the statements of these witnesses that Ma I was treated as a natural child of the family (*i.e.*, the combined family of Kyaw Saw and Ma Mo, and Po Ko and Ma Thet) would be treated, and that no distinction was made between her and the admittedly adopted child Maung Po Win. But although some of these witnesses are closely connected with Po Ko's family, none of them is able to give any information as to how Ma I entered the family.

This point is left in utter obscurity by the plaintiff's witnesses and the only account we have is that given by the defendant Po Ko. It is clear that Po Ko never publicly declared that he had adopted Ma I, although there are several witnesses who say that Ma Thet deceased did say on various occasions that Ma I was her daughter. The plaintiff produced as her first witness the Pleader Maung Po Ya from Twante, who is a friend of the family of long standing. When Maung Sein sent Po Ko a notice of his present claim, Po Ko went to Maung Po Ya and consulted him as a friend. The gist of his evidence is that Po Ko never admitted that Ma I was his adopted daughter, but on the other hand he never denied it. He asked Po Ya to try and effect an amicable settlement of the claim with Maung Sein. Maung Po Ya did his best to bring about a settlement, but the attempt failed because the parties could not agree as to the terms. We cannot attach great weight to the fact that defendant was willing to come to an arrangement with Maung Sein. It may well be that he was willing to yield to some extent to Maung Sein's demands because Ma I had for so many years lived with him, and had been brought up in his house. He may also have thought, though he had never acknowledged her as a Kittima daughter, she had some claim upon him owing to the fact that she had been brought up in his house. Besides he would naturally be anxious to avoid going to Court.

Perhaps the strongest piece of evidence in the plaintiff's favour is that of the promissory note form which was drawn up by the defendant during his mother in-law's lifetime. In this form the names of the lenders are given as Po Ko, Ma Thet, son Po Win, and daughter Ma I, and it is argued with some appearance of probability that Po Ko would not have caused promissory note forms to be drawn up in this way if he had not adopted Ma I as his Kittima daughter. It is said that these forms were never actually used for the purpose of loans, because Ma Mo objected to her name being omitted from them, but the fact remains and it is a strong point in the plaintiff's favour that the forms were actually drawn up in this way with her name inserted as joint lender. The explanation given by Maung Po Ko that he inserted Ma I's name so that she might collect the money during his absence, does not appear to account for it.

There is another similar piece of evidence, that of the invitation cards which were issued with Maung Po Ko's cognizance or approval after Ma Thet's death. In these cards the persons issuing the invitation are mentioned, namely, U Po Ko, his son-in-law Maung Sein, Ma I (Maung Sein's wife), his son Maung Po Win, and his wife Ma Hlaing. But the inclusion of Ma I's name in the funeral card can hardly be relied upon as proof that she was adopted as a Kittima daughter. Her name may well have been inserted because she had been so long a member of the household of the deceased Ma Thet and had been treated by Ma Thet as a daughter.

The entry of Ma I's name in the promissory note is no doubt a circumstance of great weight, but it has to be weighed against several important facts which appear to be inconsistent with the plaintiff's claim. Some of these facts have already been mentioned. We notice also the absence of evidence that on the occasion of her marriage with Maung Sein any valuable presents were given to her by Po Ko and Ma Thet, or that any feast was given by them on that occasion. We are impressed by the extraordinary circumstance that after she and her husband had returned to Kanaungto and were invited by Po Ko to go and solace him in his loneliness he required them to pay Rs. 40 for the materials, of the dwelling that they were to occupy in his compound. The learned Judge on the Original Side has rightly attached great importance to this incident, as being wholly inconsistent with the view that Po Ko had adopted Ma I with a view to inherit.

The conclusion at which we arrive is that the evidence produced by the plaintiff falls short of proving that she was adopted by Po Ko and his wife Ma Thet with a view to inherit and we dismiss the appeal with costs.

Appeal dismissed.

JAINAB BIBI v. HYDERALLY SAHEB.

MADRAS HIGH COURT.
FULL BENCH.
CIVIL APPEAL No. 3 OF 1919.
March 25, 1920.
Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Krishnan.

JAINAB BIBI SAHEBA—DEFENDANT No. 1—APPELLANT

versus

HYDERALLY SAHEB AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 TO 4—RESPONDENTS.

Evidence Act (I of 1872), ss. 33, 165—Evidence taken in judicial proceeding, admissibility of, in subsequent proceeding between same parties, by consent of parties.

Evidence given by a witness in a judicial proceeding is admissible in a later proceeding between the same parties where they agree upon that course, irrespective of the conditions prescribed by section 33 of the Evidence Act. [p. 959, col. 1; p. 960, col. 1.]

Ponnuswami Pillai v. *Singaram Pillai*, 46 Ind. Cas. 849; 41 M. 731; 34 M. L. J. 526; (1918) M. W. N. 768, overruled.

Prakasarayanim Garu v. *Venkata Rao*, 21 Ind. Cas. 319; 38 M. 160; 25 M. L. J. 360; (1913) M. W. N. 800; *Krishna Reddi* v. *Sundara Reddi*, 26 Ind. Cas. 384; (1914) M. W. N. 931 and *Ramaya* v. *Devappa Ganpaya*, 30 B. 109; 7 Bom. L. R. 642, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Original Suit No. 85 of 1916.

The appeal coming on for hearing on the 30th October 1919, upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the suit and upon hearing the arguments of Mr. *K. Srinivasa Aiyangar* and Mr. *T. Ramachandra Rao*, for the Appellant, and of Mr. *P. Narayanamoorti*, for the 1st Respondents and Mr. *K. Ramamurti*, for the 2nd Respondent, and the other respondents not appearing in person or by Pleader, the Court (Oldfield and Krishnan, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The greater part of the evidence in this case was taken in a previous judicial proceeding to which the same persons were parties and in which the same main issues were raised. That evidence was admitted by the lower Court by consent. The first point taken here is that it was inadmissible. Authority on the question is conflicting in *Ponnusami Pillai* v. *Singaram Pillai* (1), *Prakasarayanim Garu* v. *Venkata Rao* (2) and *Krishna Reddi* v. *Sundara Reddi* (3). We, therefore, refer to a Full Bench the question whether such evidence is admissible.

This appeal came on for hearing on the 5th March 1920 in pursuance of the Order of Reference to the Full Bench.

Messrs. *K. Srinivasa Aiyangar* and *T. Ramachandra Rao*, for the Appellant.—The lower Court erred in admitting the evidence of witnesses recorded in previous proceedings. The consent of parties cannot cure a statutory defect. The provisions of section 33 of the Evidence Act are stringent. The section enumerates the conditions under which alone the evidence is admissible. The parties cannot render legal that which is declared illegal by Statute. See *Ponnusami Pillai* v. *Singaram Pillai* (1). The proviso to section 165 of the Evidence Act makes the position clear. Whatever questions may be put by a Court, its judgment must be based on relevant facts.

Mr. *P. Narayanamurti* and Mr. *K. Ramamurti*, for Respondents Nos. 1 & 2—Consent of parties cures all defects. Section 33 of the Evidence Act must be read independently of the consent of parties. The question relates only to the method of proof. Evidence may be taken orally and even affidavit evidence is sometimes accepted. Where parties are agreed that evidence recorded in a prior proceeding may be used as evidence in a case, there can be no justification in ignoring their joint request and insisting on statutory formalities. Much of the Court's time will be saved by adopting this procedure. The proviso to section 165 has no bearing on this question. It does not state what facts should be considered to be duly proved. The English practice is the same. See *Prakasarayanim Garu* v. *Venkata Rao* (2), *Krishna Reddi* v. *Sundara Reddi* (3) and *Ramaya* v. *Devappa Ganpaya* (4). *Ponnuswami*

(1) 46 Ind. Cas. 849; 41 M. 731; 34 M. L. J. 526; (1918) M. W. N. 768.
(2) 21 Ind. Cas. 319; 38 M. 160; 25 M. L. J. 360; (1913) M. W. N. 800.
(3) 26 Ind. Cas. 384; (1914) M. W. N. 931.
(4) 30 B. 109; 7 Bom. L. R. 642.

Pillai v. *Singaram Pillai* (1) has been wrongly decided. There are recognised exceptions to *viva voce* examinations and the rule in question is one of such exceptions. There is nothing to preclude a party from waiving the benefit of the provisions of section 33 of the Evidence Act.

OPINION.

WALLIS, C. J.—The decision in *Ponnusami Pillai* v. *Singaram Pillai* (1), that the consent of the parties to a suit cannot make admissible the evidence given in a previous judicial proceeding between the same parties where some of the issues were the same, was based mainly on the provisions of sections 165 and 33 of the Indian Evidence Act. Section 165, which enables the presiding Judge to ask any question "about any fact relevant or irrelevant", contains a proviso "that the judgment must be based on facts declared by this Act to be relevant and duly proved." The effect of this section merely is that, while the presiding Judge in the course of the trial may ask questions about irrelevant facts, including under the scheme of the Act statements made to the witness by other parties or hearsay, he must base his judgment upon facts which are relevant to the issues and are duly proved. It does not throw any light on the question, what facts should be considered to be duly proved. Section 33, which occurs under the heading "statements by persons who cannot be called as witnesses," provides that "evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states" in the circumstances set out in the rest of the section. As pointed out in Amir Ali and Woodroffe's Commentries, the word "relevant", as used in the Act, is equivalent to "having probative force" and the effect of the section is to make the evidence admissible in the circumstance specified independently of the consent of the parties. Though differently worded, this section has really much the same effect as Order XXXVII, rule 3, of the Rules of the Supreme Court, which enables the Court to order evidence taken in another case to be read. This is in accordance with the old Chancery practice, which is stated as follows in Daniel's Chancery Practice, Chapter XII, section 2 (1), page 515: "Evidence taken in another Court may be read in a cause on production of a copy of the pleadings if the two suits are between the same parties or their privies, and the issue is the same; and such depositions are admissible in evidence in the former cause," citing *Williams* v. *Williams* (5). Such orders are only made in cases similar to those specified in section 33, but if the Court could make such depositions admissible even without the consent of parties, the case for admitting them by consent is even stronger. Rules 1 and 18 of Order XXXVII, which require the examination of the witnesses to be *viva voce* in open Court, except in cases where proof is to be made by affidavit or evidence taken on commission to be admitted, and provide that these two modes of proof shall not be adopted except in the cases specified, both contain a saving clause enabling it to be done in any case by the consent of parties.

This is a recognition of the principle that such matters may properly be regulated by the consent of the parties. The admission by consent of evidence taken in other cases raising the same issues is of daily occurrence in England and must now be taken to be the settled practice, which is the law of the Court. If there is not much direct authority on the point, that would appear to be because it had never been seriously questioned. In *Conradi* v. *Conradi* (6) a divorce suit in which a new trial had been ordered, the question arose whether according to the practice of that Court the Judge's notes of the deposition of a witness at the earlier trial who had since died could be read at the second trial except by consent. Lord Penzance, who had been a Common Law Judge, observed that he had known of its having been made a condition of granting a new trial that the Judge's notes of the previous trial should be admitted. No such order could have been made except on the footing that the consent of the parties could render the evidence admissible.

There is, in my opinion, no sufficient reason for holding that a different rule is applicable in India where the practice in

(5) (1894) 12 W. R. 663; 10 L. T. (N. S.) 286; 10 Jur (N. S.) 608; 3 N. R. 701.

(6) (1868) 1 P. & D. 514; 37 L. J. Mat. 55; 18 L. T. 659; 16 W. R. 1023.

cases such as the present is scarcely less well established than in England, and is of such obvious convenience that very strong grounds should be shown for holding it inadmissible. The Indian Evidence Act, it is true, contains no express recognition of the practice, but neither, so far as I can see, is any such express recognition to be found in Taylor on Evidence. The Indian Statute and the English treatise both confine themselves to stating the well-established rules of evidence, and do not deal with the question how far the strict requirements of the established rules may be departed from by consent in cases such as this. Far from the practice being opposed to public policy, evidence not taken before the Judge actually deciding the case has been made admissible in India by Statute, as pointed out by Sundara Ayyar, J., in *Prakasarayanim Garu* v. *Venkata Rao* (2), in cases where a suit is transferred from one Court to another and where there is a change of Judge in the trying Court owing to death, transfer or other cause. In these circumstances the practice seems to be in accordance with the principle embodied in the maxim *Unusquisque potest renuntiare juri pro se introducto*, seeing that it is not only not opposed to public policy but entirely in accordance with it. The trend of the Indian decisions which are referred to by Sundara Aiyar J., is also in its favour, and the judgment of Sir Lawrence Jenkins, C. J., in *Ramaya* v. *Devappa Ganpaya* (4) is to the same effect. *Ponnusami Pillai* v. *Singaram Pillai* (1) must be overruled and the question answered in the affirmative.

COUTTS TROTTER, J.—It is clear that in this country neither an omission by the Advocate to object to the giving of irrelevant and inadmissible evidence nor the failure of the tribunal to exclude it of its own motion will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. A wholly different question arises, where the objection is not as to the nature and quality of the evidence in itself but merely as to the mode of proof put forward. I agree that consent can cure what would otherwise be a defective method of putting forward evidence in its substance and context relevant and germane to the issues; and that to hold otherwise would not only be contrary to the established practice both in England and in this country but would prohibit litigants from adopting a method leading to the saving of time and expense and in itself neither inconvenient nor unjust. I am of opinion that *Prakasarayanim Garu* v. *Venkata Rao* (2) was rightly decided and that *Ponnusami Pillai* v. *Singaram Pillai* (1) is contrary both to principle and practice.

KRISHNAN, J.—This reference raises the question of the correctness of the ruling in *Ponnusaumy Pillai* v. *Singaram Pillai* (1). The learned Judges who decided that case held, on a construction of sections 33 and 165 of the Indian Evidence Act, that in spite of the consent of parties the evidence given by a witness in a former proceeding was not admissible in a later proceeding between the same parties unless the "conditions prescribed by section 33 of the Indian Evidence Act were found by the trial Judge to exist." In arriving at this conclusion they expressly declined to follow an earlier ruling of this Court in *Prakasarayanim Garu* v. *Venkata Rao* (2). With all respect to the learned Judges it seems to me that their view cannot be supported.

As pointed out in *Krishna Reddi* v. *Sundara Reddi* (3) the question involved here is one of mode of proof of relevant facts rather than one of the relevancy of the facts themselves. The former depositions were sought to be admitted as proof of facts relevant to the present case spoken to by the witnesses then. The primary rule to prove relevant facts by the evidence of witnesses is to call them before the trial Judge and examine them *viva voce* in the manner stated in Chapter X of the Evidence Act. But that rule has several recognised exceptions, such as the examination of witnesses on commission, or the use of affidavits as evidence, the use of evidence taken by one Judge by another as in cases where a suit is transferred from one Court to another or when there is a change of Judge in the trying Court. One of such exceptions recognised by law is the method of filing the record of evidence of a witness taken in a former judicial proceeding. This is allowed by section 33 of the Evidence Act subject, no doubt, to certain restrictions

and conditions. These limitations seem from their nature to be intended to protect the opposing party from being prejudiced by such admission, as it may interfere with his right of cross-examination and of testing the credibility of the witness. I quite agree that if such evidence is to be admitted against the opposition of a party, the Judge should be satisfied that the conditions and restrictions imposed by section 33 are fully complied with; but I can see no difficulty in holding that a party may waive the benefit of those provisions which are intended for his benefit, at any rate in a civil suit where no question of public policy is involved, whatever the position may be in a criminal trial. A civil suit is a proceeding *inter partes* and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be; and when the trial Judge has admitted and acted upon such evidence, it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal.

This view is in accordance with the rulings of our Court in *Angammal* v. *Aslami Sahib* (7) and *Krishna Reddi* v. *Sundara Reddi* (3), and it has also the high authority of Sir Lawrence Jenkins in its favour in *Ramaya* v. *Devappa Ganpaya* (4). That learned Judge says: "parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way, and it is common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used."

It is also in accordance with the established practice both here and England, and we should not lightly depart from such practice as it tends to the saving of time and expense. Again, where such evidence has been admitted and acted upon by the trying Judge without objection, it is clear from *Lakshman Govind* v. *Amrit Gopal* (2) and the authorities cited in it that the Appellate Court should not allow any objection to be taken to the procedure.

The learned Judges in the 41 Madras case consider that what they call "the stringent provisions" of section 165 of the Evidence Act, that is, the first proviso in it, prevent the views above stated from being taken. I agree with the learned Chief Justice that that section has really no bearing on the question before us.

The section is enacted to enable the presiding Judge to ask any question he pleases, whether relevant or irrelevant, and to order the production of any document or thing which he wishes to have. The provision relied on in *Ponnusami Pillai* v. *Singaram Pillai* (1) is the proviso to that section; and as such it has no general application but merely prohibits the Judge from basing his judgment on the facts so obtained by him unless they are relevant and duly proved. It comes into operation only when the Judge has acted under the section.

I, therefore, agree that our answer to the reference must be in the affirmative and that the case in *Ponnusami Pillai* v. *Singaram Pillai* (1) must be overruled.

M. C. P.

Answered in the affirmative.

(8, 24 B. 591; 12 Ind. Dec. (N. S) 924.

(7) 21 Ind. Cas. 883; 38 M. 710 at p. 731; 14 M. L. 418, (1913) M. W. N. 974; 25 M. L. J. 625.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 226 OF 1917.

November 21, 1981.

Present:—Mr. Justice Maung Kin.

M. M. P. L. K. CHETTY—APPELLANT

versus

SUPAYA MAISTRY—RESPONDENT.

Maliciously procuring order of Court—Damages, suit for—Malice, absence of, effect of.

In the absence of proof of malice or its equivalent, a suit for damages for having wrongfully procured an order of Court appointing a Receiver will not lie. [p. 962, col. 1.]

M. M. P. L. K. CHETTY v. SUPAYA MAISTRY.

Mr. *Doctor*, for the Appellant.

Mr. *Chari*, for the Respondent.

JUDGMENT.—In Suit No. 10 of 1914 of the Sub Divisional Court of Kyaiklat the defendant appellant sued Adhira for rent making the plaintiff-respondent the second defendant on the ground that he had stood surety for the payment of the rent by the first defendant. The defendant-appellant successfully applied for the appointment of a Receiver of the paddy constituting the rent on the ground that the defendants were removing it. The Receiver seized two thousand three hundred baskets of paddy which was on plaintiff respondent's thrashing floor and sold it. The sale-proceeds were paid to the defendant appellant.

Some considerable time afterwards the defendant appellant's suit was dismissed against the plaintiff-respondent, the Court holding that the paddy seized by the Receiver was the plaintiff-respondent's paddy and not the first defendant's. The result was that the Receiver was discharged. The sale-proceeds which were paid out to the defendant-appellant were ordered to be returned and paid to the plaintiff respondent. Subsequently plaintiff-respondent filed the present suit for damages after giving credit for what he had received and obtained a decree for Rs. 2,646, which amount was reduced to Rs. 1,002 by the Divisional Court.

The defendant-appellant has now appealed to this Court and the grounds he has urged are that the suit was time barred, and that the plaintiff cannot succeed without proof of malice.

The Sub-Divisional Court held that the defendant obtained the appointment of a Receiver wrongfully. The Divisional Court held that the order for the appointment of a Receiver was obtained on insufficient grounds. Neither of the lower Courts found that in applying for the appointment of a Receiver, the defendant was actuated by malice. On reference to the plaint it is found that the suit was not based on malice.

The utmost that can be said against the defendant is that he obtained an erroneous order from the Court. The case he attempted to make out was insufficient, and the Court gave an erroneous decision. There is nothing to show that the affidavits which the defendant filed in support of his application for the appointment of a Receiver were false to his knowledge.

In the *Mina Kumari Bibi* v. *Surendra Narain Chakravaty* (1) it was laid down that "It is well settled that no action will lie against any person for procuring an erroneous decision of a Court of Justice. This is so, even though the Court has no jurisdiction in the matter, and although its...order is for that or any other reason invalid. A Court of Justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the Court commits. Every party is entitled to rely absolutely on the presumption that the Court will observe the limits of its own jurisdiction and decide correctly on the facts and law." Later in the judgment it is stated that in *Joykalee Dasee* v. *Chandmalla* (2) Sir Barnes Peacock, C. J., pointed out that if a person makes an application maliciously or without probable and reasonable cause to a Court of competent jurisdiction to seize the property of another person as the property of his judgment debtor, he may be liable to damages for any injury which may be occasioned by reason of the order of the Court, and upon the same principle a person may be liable to damages for applying for an injunction upon a ground which he knows to be insufficient. The learned Judges (Mookerji and Vincent, JJ.) proceed to say:—"But this doctrine has no application where a person is not acting maliciously or without probable cause." The same view has been taken by the Madras and Allahabad High Courts in *Boja Reddi* v. *Perumal Reddi* (3) and *Dudhnath Pandu* v. *Mathura Prasad* (4).

In *Madras Steam Navigation Company* v. *Shalimar Works Limited* (5) the defendant Company sued the plaintiff for an amount alleged to be due to them for maritime necessaries and obtained a warrant of arrest of the Company's ship. The ship remained under arrest for a considerable time. The suit of the defendant Company was dismissed eventually on the ground of want of jurisdiction. The plaintiff Company then filed a

(1) 3 Ind. Cas. 12; 14 C. W. N. 96; 10 C. L. J. 226.
(2) 9 W. R. 133.
(3) 26 M. 506.
(4) 24 A. 317; A. W. N. (1902) 75.
(5) 28 Ind. Cas. 463; 42 C. 85.

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suit for the wrongful arrest of the ship. The suit framed was based on malice or its equivalent, but at the hearing the suit was proceeded with on the footing of its being one for mere trespass. It was held by Jenkins, C. J., and Stephen, J., that in the absence of proof of malice or its equivalent, a suit for simple trespass will not lie for the arrest of a ship.

The position in the case before me is similar to that in the case cited above. By appointing a Receiver the Court gave the Receiver power to seize the paddy and he did seize it. On the authority of the rulings quoted above I am bound to hold that the suit of the plaintiff-respondent did not lie. In this view it is unnecessary to consider the question of limitation. The appeal is allowed with costs.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 6 OF 1919.

May 14, 1920.

Present:—Mr. Justice Coutts and Mr. Justice Adami.

BALKRISHNA SAHAI AND ANOTHER —APPELLANTS

versus

Babu SHAM SUNDAR SAHAY AND OTHERS —DECREE-HOLDERS, SHEOKARAN DAS— JUDGMENT DEBTOR—RESPONDENTS.

Hindu Law—Debt incurred by father on suretyship—Son, liability of.

A Hindu son or grandson governed by the Mitakshara Law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money and which comes within the meaning of *vyavarika*, which has been translated as lawful, useful or customary, unless the transaction is either illegal or immoral.

Appeal from an order of the Munsif, Mozuffarpore.

Messrs. *Kulwant Sahay* and *Rai Tribhuan Nath Sahay*, for the Appellant.

Messrs. *Parmeshwar Dayal* and *Jadubans Sahay*, for the Respondents.

JUDGMENT.

COUTTS, J.—The decree-holder obtained a decree against three persons] on the basis

SHEOLAL v. CHINDHU.

of two Hundis. The Hundis were drawn by the defendants Nos. 2 and 3 and were accepted by the defendant No. 1. Execution was taken out against the defendant No. 1 and his property was attached. He died but no steps were taken for substitution and the execution case was dismissed. On the 6th of July 1917 the decree-holder filed another application for execution, which is the one with which we are now concerned. In that application he sought to substitute the minor son of the defendant No. 1. The minor objected that his father was only a surety and that execution could not proceed against him.

In the Court of first instance the objection was allowed but on appeal the order, allowing the objection, was set aside and the minor defendant has now appealed to this Court.

The case is completely concluded by the decision of this Court in *Mahabir Prasad Sri Narayan* (1), in which it was held that a Hindu son or grandson governed by the Mitakshara Law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money and which comes within the meaning of *vyavarika*, which has been translated as lawful, useful or customary, unless the transaction is either illegal or immoral. I agree with the view taken in this decision, which is also in accordance with the law as laid down by the Calcutta High Court. I would accordingly dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

(1) 46 Ind. Cas. 27; 3 P. L. J. 396; (1918) Pat. 328; 4 P. L. W. 437.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 266 OF 1919.

March 11, 1920.

Present:—Mr. Macnair, A. J. C.

Seth SHEOLAL—PLAINTIFF—APPELLANT

versus

CHINDHU AND OTHERS—DEFENDANTS— RESPONDENTS.

Suit against legal representative of deceased debtor—Assets, extent of, proof of, whether necessary.

NAGAPPA CHETTY *v.* AH FOKE.

In a suit against the legal representative of a debtor, the plaintiff is entitled to a decree if he proves that any assets belonging to the deceased debtor exist. He is not bound to prove the extent of such assets.

Appeal against the decree of the District Judge, Chhindwara, in Civil Appeal No. 137 of 1918, decided on the 31st January 1919.

Mr. *M. B. Kinkhede*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondents.

JUDGMENT.—The learned District Judge has held that the respondents in this Court are bound to pay the decretal amount to the extent of the value of any ancestral family property and any separate property inherited by them from him which is in their hands for which they have not already duly accounted, provided that such property can be proceeded against in execution. He has held that it is for the plaintiff to prove that there is any such property and he has passed a decree defining the property which is liable.

It is settled law that the plaintiff is entitled to a decree if he proves that any assets exist. The plaintiff was not bound to prove the extent of this property. There was no issue on the point. I consider that the learned District Judge was wrong in finding that certain property was exempt from attachment, when the plaintiff was not bound to allege and prove the contrary and has not had a reasonable opportunity of adducing evidence on this point. The appellant's Counsel before me states he will be satisfied if the decree of the lower Appellate Court be modified by the addition of the words "used for agricultural purposes" after the words "house, land or cattle." I, therefore, order that these words be inserted.

The respondents must bear the costs of this appeal. Pleader's fee Rs. 15.

Decree modified.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 87 OF 1918.

April 11, 1919.

Present.—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

P. M. A. NAGAPPA CHETTY—DEFENDANT—APPELLANT

versus

AH FOKE—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 23—Auction sale—Agreement not to bid against each other, whether unlawful—Bidding curtailed—Fraud on vendor.

It is not unlawful for two or more persons to agree not to bid against each other at an auction sale. The fact that owing to such an agreement the bidding is curtailed is not a fraud upon the vendor. [p. 965, col. 2; p. 966, col. 1.]

Mr. *Giles*, for the Appellant.

Mr. *Das*, for the Respondent.

JUDGMENT.—The plaintiff Ah Foke sued the defendant Chetty firm for the recovery of two sums of Rs. 5,000 and Rs. 4,000 deposited with the defendant P. M. A. Nagappa Chetty on the 2nd April 1917. One Li Kut Chaung was joined as second defendant. The plaintiff alleged that he deposited the money with the Chetty in order that it might be paid out to the second defendant, if he abstained from bidding at the auction of certain Government licenses for the sale of country liquor, namely, Hlawza licenses Nos. 2 and 3. According to the plaintiff, a further condition was made that the license No. 2 should be knocked down to him for not more than Rs. 72,000 and No. 3 for not more than Rs. 70,000. The auction took place on the 2nd April. No. 2 license was knocked down for Rs. 1,05,000 and No. 3 for Rs. 75,100. No. 2 license was bought in the name of Li Kan Shoo who was a partner of Ah Foke, and Ah Foke and Li Kan Shoo were partners with one Wong King in the purchase of No. 3 license. The second defendant, Li Kut Chaung, did not bid for No. 2 license, but after that license was knocked down to Li Kan Shoo, he took part in the bidding for No. 3 license.

The plaintiff states that as the prices were higher than those agreed upon he went to the Chetty, the first defendant, on the same evening and demanded re-payment of the amount deposited. The Chetty told him that he would re-pay the money after consulting the second defendant Li Kut

Chaung. The plaintiff made further demands, and as the money was not re-paid by the Chetty he brought this suit, joining Li Kut Chaung as second defendant, because the first defendant stated that he had paid the money to Li Kut Chaung.

The Chetty denied that the money had been deposited by the plaintiff, and maintained that it had been deposited by the second defendant, Li Kut Chaung. Li Kut Chaung also denied the plaintiff's case, and said that he had deposited the money with the Chetty. It is common ground, however, between the plaintiff and the second defendant that the deposit was made with a view to prevent Li Kut Chaung from bidding at the auction. But according to Li Kut Chaung the inducement offered to him by the plaintiff was not a payment of Rs. 9,000 in the event of the license being knocked down at the prices arranged between them but a promise to admit Li Kut Chaung to a quarter share in a partnership in the two licenses, if the licenses were knocked down to the plaintiff at not more than one lakh and Rs. 85,000 respectively. According to Li Kut Chaung's version, it was arranged that he should deposit with the Chetty an instalment towards his quarter share in the proposed partnership and the sum of Rs. 9,000 which he deposited, with the Chetty was apporximately one-fourth of the estimated amount of the one-fifth instalments to be paid in respect of the two licenses on the fall of the hammer. Li Kut Chaung states that as license No. 2 was knocked down for more than a lakh, he considered that the bargain had fallen through, and went to the Chetty to withdraw the money which he had deposited.

On the evening of the day of the auction, the Chetty gave the second defendant, Li Kut Chaung, a promissory note for the amount deposited, Rs. 9,000, and it is the case of both the defendants that the money was not actually paid to Li Kut Chaung till the 7th June and that, in the meantime, it was left in deposit with the Chetty without interest, as Li Kut Chaung had no immediate use for it.

The Chetty states that Ah Foke and Li Kut Chaung both came at the time of the original deposit, and the second defendant handed over the money, saying: "Keep this Rs. 9,000 with you. I am going to an auction. I shall be coming back in the evening. On my return I shall tell you what to do with the money." The Chetty states that he was told nothing at the time as to the arrangement between the plaintiff and the second defendant. Li Kut Chaung says that when depositing the money with the Chetty he told him that it was to be used for buying a license at the auction, and that the license was to be bought by him and Ah Foke jointly. The plaintiff Ah Foke, on the other hand, states that the arrangement between him and Li Kut Chaung was explained to the Chetty at the time of the deposit, and that a piece of paper written in Chinese and signed by himself, Li Kut Chaung and Wong King, who was also present, was made over to the Chetty. Wong King, who was a partner of Ah Foke in the Hlawza business, corroborates him fully on this point. Wong King also states that out of the Rs. 4,000 which was deposited in respect of No. 3 license he contributed Rs. 2,000. He produces an account book which is called "Cash book of the various liquor shops for 1917," and this book appears to be written in the ordinary course of business. It contains an entry of 2nd April 1917 in respect of No. 3 Hlawza shop, "Paid for Baksheesh for insuring peace in the license—Rs. 2,000." According to the plaintiff the balance, Rs. 7,000, of the Rs. 9,000 deposited with the Chetty was furnished by his partner Li Kan Shoo, and Li Kan Shoo in his evidence corroborates him on this point. Li Kan Shoo, however, produced no accounts. The plaintiff tendered certain accounts, and they were rejected because in a previous affidavit of documents the plaintiff had stated that he had no accounts relating to the matter of the suit.

On a consideration of the facts and probabilities of the case, the learned Judge on the Original Side found that the deposit of Rs. 9,000 was made by the plaintiff, and not by the second defendant, but the learned Judge held further that the object of the agreement between the plaintiff and the second defendant was fraudulent, and the agreement was, therefore, unlawful and void under section 23 of the Contract Act. He, therefore, decided that the plaintiff could not recover from the second de-

fendant, Li Kut Chaung. As regards the first defendant Nagappa Chetty, however, the Judge held that he was liable to repay the money to the depositor, Ah Foke, on the ground that Ah Foke had sent him a lawyer's letter demanding the refund of the money before it had been paid over to the second defendant, and when only a promissory note had been given for the amount to the second defendant, and the Judge cited an authority under section 23 of the Contract Act, showing that authority to pay money in respect of an unlawful transaction may be revoked at any time before the money has been actually paid. A decree was, therefore, granted against the first defendant as prayed.

We think the learned Judge has taken the right view of the facts. Ah Foke's partner Li Kan Shoo was at daggers drawn with Li Kut Chaung, and it seems very unlikely, as the learned Judge points out, that in these circumstances Li Kut Chaung would be willing to join in a partnership with Ah Foke and Li Kan Shoo. Ah Foke and Li Kut Chaung were mutually distrustful. The plaintiff was very apprehensive that Li Kut Chaung would bid up the licenses to an exorbitant figure to spite him and Li Kan Shoo. It was, therefore, Li Kut Chaung who had to be bought off, and there is nothing improbable in the plaintiff's story that he and his partners between them decided to buy off Li Kut Chaung's opposition at the auction, and that the money should be deposited in the meantime with the Chetty who was trusted by both sides. On the other hand, Li Kut Chaung's story that he was promised a quarter share in the licenses, and that he deposited the Rs. 9,000 as an instalment toward the purchase price, seems very improbable in the circumstances. The very fact that Li Kut Chaung had deposited Rs. 9,000 of his own money with the Chetty would not bind the plaintiff in any way and would still leave the plaintiff a free hand to carry out or not his promise of a quarter share in the licenses.

But we feel bound to hold that the learned Judge has taken an erroneous view of the law in deciding that the agreement between Ah Foke, the plaintiff, and Li Kut Chaung, the second defendant, was fraudulent. It is well established according to English law that an agreement between two or more persons not to bid against each other at an auction is not an unlawful agreement. *Vide Galton* v. *Emuss* (1), *Carew's Estate In re* (2), *Heffer* v. *Martyn* (3). See also Snell's Principles of Equity, page 455 (17th Edition), Smith's Manual of Equity, 15th Edition, page 75, and Story's Equity Jurisprudence, 2nd Edition, page 187. The view taken by the learned Judge is based on certain remarks of Mookerji, J., in *Ambika Prasad Singh* v. *Whitwell* (4). It is there said that the test in each case is, what was the object of the agreement among the bidders. If the object be to obtain the property at a sacrifice by artifice, the combination is fraudulent; if the object be to make a fair bargain, or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent. But these remarks are based upon certain American cases cited in Mr. Justice Mookerji's judgment, and they seem to be at variance with the rule laid down by Lord Romilly in *Heffer* v. *Martyn* (3) that "intending buyers may arrange between themselves which lots they will bid for and which not, and agree not to compete with each other, and if they may do so...they may take money for abstaining to compete, as well as arrange to take one lot against another." We concur in the following remarks of the learned Judge on the Original Side in this case. They are in consonance with Lord Romilly's remarks in *Heffer* v. *Martyn* (3): "The question whether the vendor, who has ample power to ascertain the value of his property, and who can by putting a reserve price upon it, avoid having to part with it at less than his own price, is entitled to rescind his contract, merely because he has not chosen to put a reserve price, or has put too low a price, is quite a different one. If he is willing to sell at a certain price and gets that price, has he any right to complain because if he had put a higher price, he would have obtained it?" It appears to follow that the vendor

(1) (1844) 13 L. J. Ch. 389; 8 Jur. 507; 1 Coll. 243; 63 E. R. 402.

(2) (1858) 28 L. J. Ch. 248; 26 Beav. 187; 4 Jur. (N. S.) 1290; 7 W. R. 81; 53 E. R. 869; 122 R. R. 76.

(3) (1867) 36 L. J. Ch. 372 at p. 373; 15 W. R. 390.

(4) 6 C. L. J. 111.

has no reason to complain if the bidders by combination amongst themselves curtail the bidding. And if there is no fraud upon the vendor, it is hard to see how there can be any fraud at all.

We decide that the agreement between the plaintiff and the second defendant was not unlawful and that the plaintiff is entitled to recover the amount of his deposit from the Chetty. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION No. 88 OF 1919-20.

May 6, 1920.

Present:—Mr. Hopkins, S. M., and Mr. Porter, J. M.

SANT PATHAK AND OTHERS—APPLICANTS

versus

Raja PARTAB BAHADUR—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 37, Exp. I—Trespasser, land held by, nature of.

Land held by a trespasser is not a "holding" or parcel of land held by a tenant and forming the subject of a separate engagement within the meaning of Explanation I to section 37 of the Oudh Rent Act.

Application for review of the order of the Board of Revenue, United Provinces, dated the 13th of December 1919, in the case of ejectment.

JUDGMENT.

PORTER, J. M.—[*May* 5, 1920.]—This is an application for review of an order of this Court, dated 11th December 1919. By that order the first issue in the suit contesting ejectment in the Court of the Assistant Collector, in which applicant was plaintiff, was finally decided against him. He was held to be a trespasser, liable to ejectment by an unstamped notice.

He applied for review on the grounds that issues Nos. (2) and (3) as framed in the first Court were never decided. The application was admitted for hearing by my predecessor. As issue No. (1) had been decided in his favour in the first Court, it is true that no decision was given, or was necessary there on a part of issue No. (2) and on issue No. (3).

Issue No. (2) was:—"Has the service of the notice been proper? Is the notice in order? Is a Court-fee stamp due?".

The last portion has been decided. The first portion relates to Mahabir, plaintiff No. 2 in the suit, who is said to have been absent in Bombay. The notice was affixed to his house. Mahabir personally contested the notice, which sufficiently disposes of the objection now raised.

Issue No. (3) was:—"Does the notice relate to a part of the holding?" The Patwari was not examined. The applicant, however, has been held to be a trespasser. The land in suit was, therefore, no holding, or parcel of land held by a tenant and forming the subject of a separate engagement (section 37, Explanation. 1).

I would dismiss the application with costs.

HOPKINS, J. M.—I agree.

Application dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 970 OF 1916.

June 1, 1920.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie-Jones.

HARNAM SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BHOLA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, scope of—Mortgage—Suit for possession of mortgaged land—Subsequent suit for return of mortgage money, whether barred.

Order II, rule 2, of the Civil Procedure Code is directed against two evils, the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it: if he omits one of his remedies, he cannot afterwards pursue it. [p. 967, col. 2.]

HARNAM SINGH v. BHOLA SINGH.

Govind v. *Parashram*, 25 B. 161; 2 Bom. L. R. 864, followed.

Plaintiffs sued defendants for recovery of mortgage money with interest, alleging that the land of *B.*, defendant No. 1, was originally mortgaged with possession to *C.*, defendant No. 2, by three deeds, but that these mortgages were transferred to their father *I.* by *C.* They also alleged that *B.* orally mortgaged this land to *I.* for Rs. 1,000 and that mutation of this mortgage was effected but was set aside on appeal. It appeared that *I.* had sued *B.* for possession of the land alleged to have been orally mortgaged to him, but his suit was dismissed on the ground that the mortgage was not proved:

Held, (1) that the plaintiffs ought to have sued for both the remedies—the possession of the land or the return of the mortgage money—in the alternative in one suit. [p. 967, col. 1.]

(2) that having omitted to sue for the mortgage money in the first suit, they were precluded from suing for it now by Order II, rule 2, Civil Procedure Code. [p. 967, col. 2.]

Second appeal from the decree of the District Judge, Ferozepore, dated the 3rd January 1916, affirming that of the Subordinate Judge, 2nd Class, Ferozepore, dated the 16th August 1915.

Dr. *Nand Lal*, for the Appellants.

Mr. *Devi Dial*, for Chogat Singh, Respondent.

JUDGMENT.—The land of Bhola Singh, defendant No. 1, was mortgaged with possession to Chogat Singh, defendant No. 2, by three deeds for Rs. 550, Rs. 50 and Rs. 200 respectively. The plaintiffs allege that these mortgages were transferred to their father Ishar Singh by Chogat Singh and that each deed bears an endorsement on it referring to the assignment. It is also alleged that Bhola Singh orally mortgaged this land to Ishar Singh for Rs. 1,000 and that mutation of this mortgage was effected but set aside on appeal. Ishar Singh then sued Bhola Singh for possession of the land alleged to have been orally mortgaged to him, but his suit was dismissed on the ground that he was unable to prove the mortgage. He then brought this suit for Rs. 1,000 mortgage money plus Rs. 600 interest and made Chogat Singh, Mala Singh and Bishen Singh defendants as well as Bhola Singh. The Courts below have dismissed the suit, holding that as regards Bhola Singh it is barred by Order II, rule 2, Civil Procedure Code, and the plaintiffs have no cause of action against the other defendants.

Mr. Nand Lal has argued the case on behalf of the appellants, sons of Ishar Singh, and has contended that the present suit against Bhola Singh is not barred by Order II, rule 2, Civil Procedure Code, but he cites no authority in support of his argument. As pointed out in *Govind* v. *Parashram* (1), "Section 43 (corresponding to Order II, rule 2 of the present Code) is directed against two evils—the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it: if he omits one of his remedies, he cannot afterwards pursue it." Now in the present case the plaintiffs' cause of action was the alleged oral mortgage to Ishar Singh by Bhola Singh and the latter's refusal to acknowledge it. Another part of the cause of action was the assignment of Chogat Singh's mortgage rights which he had under three separate deeds of mortgage. The cause of action in both suits is, in our opinion, exactly the same. The plaintiffs had two remedies, one possession of the land; the other return of the money paid by their father. They ought to have sued for these remedies in the alternative in one suit. Having omitted to sue for the mortgage money in the first suit they are, in our opinion, clearly precluded from now suing for it. We, therefore, agree with the lower Courts that the suit as against Bhola Singh is barred by Order II, rule 2, Civil Procedure Code. We also agree with the learned District Judge's reasons for holding that the plaintiffs cannot succeed as against Chogat Singh. Their father Ishar Singh paid Chogat Singh Rs. 800 for the mortgages which he held against Bhola Singh, and Chogat Singh was not to blame for the fact that his assignee failed in his suit for possession of the land against the mortgagor. Plaintiffs' father's failure was really due to the fact that he did not get a properly registered deed of mortgage from Bhola Singh. The plaintiffs do not allege that their father was defrauded in any way by Chogat Singh and, therefore, they are not entitled to any relief on the ground of fraud. Chogat Singh is in no way to blame for the failure of the previous suit and we agree with the learned District Judge that he is not

(1) 25 B. 161; 2 Bom. L. R. 864.

liable for re-payment of the money which Jshar Singh paid to him.

We accordingly dismiss the appeal with costs against Chogat Singh, who alone is represented before us.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 167 OF 1917.
September 4, 1918.
Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.
KO PU AND ANOTHER—DEFENDANTS—APPELLANTS
versus
MA THEIN YIN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 68, applicability of—Probate and Administration Act (V of 1881), s. 78—Administration security bond, suit on—Limitation applicable.

An administration security bond is not a bond subject to a condition as contemplated in Article 68 of Schedule I to the Limitation Act, consequently the period of limitation prescribed by that article does not apply to a suit brought upon a breach of the terms of the bond. Article 68 applies to a bond which is to become enforceable only when a specified condition is broken. The obligation to sue under an administration surety bond is liable to be enforced at once, and can only be avoided by the sureties showing that the conditions laid down in the bond have been fully carried out, or carried out as far as possible up to the time of the suit. The right to sue on such a bond accrues on failure of the administrator to comply with any of the conditions, or on the administrator putting it out of his power to comply with them. [p. 969, col. 1.]

Mr. *Ohari*, for the Appellants.

Messrs. *Giles* and *Doctor*, for the Respondent.

JUDGMENT.—This is a suit for the administration of the estate of two deceased persons Ko Kala and Ma Nge, who died intestate in 1903. The plantiff Ma Thein Yin claims as the sole heiress and the first defendant Ma Nyein Hla is the administratrix of the estate. Ma Nyein Hla obtained Letters of Administration in May 1903. The security bond for Rs. 10,000 under section 78 of the Probate and Administratio Act was executed by the second and third defendants, who are the present appellants, on the 16th April 1904. At that time the plaintiff was a minor and she states in her plaint in the present case that she attained her majority on the 6th March 1914 (when she attained the age of eighteen years). She brought this suit in April 1915 as an adult and no question was raised at that time that she was still a minor.

The surety bond is in the usual form. It provides that the sureties are bound in the sum of Rs. 10,0.0 to be paid to the Judge of the District Court, Hanthawaddy, for the time being and goes on to prescribe certain conditions which are to be fulfilled by the administratrix. She has to make and exhibit an inventory of the estate by a certain date, and by another prescribed date she has to furnish an account of her administration. As to the residue of the estate she has to pay such persons as shall be lawfully entitled to it, and finally she has to deliver the Letters of Administration to the Court. It is provided that on her fulfilling these conditions the sureties' obligation is to be void and of no effect, but it is otherwise to remain in full force. This surety bond was assigned to the plaintiff on the 12th March 1915 under section 79 of the Probate and Administration Act, and she filed her administration suit on the 30th April 1915.

The particular breach of the bond alleged in the plaint is that the administratrix failed to hand over the residue of the estate to the person entitled thereto, namely, the plaintiff.

The appellants pleaded that the suit was barred by limitation. This plea has been disallowed by the District Court, and the sole question in this appeal is whether it has been rightly disallowed. The District Court held that as the plaintiff was a minor up to 1914, there was no one to whom the administratrix could make over the residue of the estate, there being no one from whom she could receive a valid discharge. The Judge considered, therefore, that the breach of the bond did not occur, and in virtue of section 6 of the Limitation Act the plaintiff's cause of action did not arise, till the plaintiff attained her majority in March 1914, and that the period of three years' limitation prescribed under Article

68 of the Limitation Act did not begin to run till then.

In appeal it is contended on behalf of the sureties that a breach of the surety bond occurred when the administratrix failed to file an inventory within six months from the date of the bond and that limitation began to run from then. Assuming that Article 68 applies to the case, no authority has been shown for holding that limitation runs from the date when the inventory should have been filed. The ruling of this Court in *Ahmed Moola Dawood* v. *Fatima Bee Bee* (1) does not support this view, and the rulings of the Madras and Allahabad High Courts in *Ramanatham Chetty* v. *Ragammal* (2) and *Kantee Chandra Mukerji* v. *Al i-Nabi* (3) are also against it. It seems by no means clear, however, that Article 68 applies at all to a bond of this nature. The Allahabad High Court in the case cited did not mention what article they considered to be applicable, but as the learned Judges held the period of limitation to be six years, it would appear that they were not applying Article 68, but probably considered that Article 120 should be applied. Article 68 provides for the case of a bond subject to a condition and the period of limitation under that Article is three years from the time when the condition was broken. But a bond under section 78 of the Probate and Administration Act does not appear to fall within the description of a bond subject to a condition as contemplated in Article 68. That article appears to apply to a bond which is to become enforceable only when a specified condition is broken. The obligation to pay under an administration surety bond is liable to be enforced at once, and can only be avoided by the sureties showing that the conditions laid down in the bond have been fully carried out, or carried out as far as possible up to the time of the suit. The right to sue on such a bond would accrue on failure of the administrator to comply with any of the conditions or on the administrator putting it out of his power to comply with them. The fact that no action is taken on the breach of any one or more of the various successive conditions contained in such a bond would not bar a suit on a breach of a subsequent condition. This view is in accordance with that expressed in the Madras case cited above.

In the present case as the District Court has held that as there was no person who could give a valid discharge for the residue of the estate until the plaintiff had attained her majority (less than three years before the suit), the plaintiff's cause of action on the breach of the condition as to payment of the residue would not arise till then.

It has been argued for the appellants that the administratrix Ma Nyein Hla was also the guardian of the minor plaintiff under the Guardians and Wards Act and that when the administratrix had realised the estate, she held the property as guardian on behalf of the minor and in effect handed over the share of the minor to the person properly entitled to receive it and, therefore, that the sureties are not liable for any maladministration of the estate by the administratrix. There would no doubt be much force in this plea if the administratrix Ma Nyein Hla were in fact the duly appointed guardian of the minor. The Madras case already cited is an authority for the proposition that, when the administration has been completed, if the administrator can continue to hold the property in some capacity other than that of administrator, then the presumption is that he is holding the property in that other capacity. It is clear, however, that the plea must fail on the ground that the administratrix Ma Nyein Hla was not in fact appointed to be the guardian of Ma Thein Yin. It is true that the Letters of Administration issued to her in 1903 were granted on her application that she should be appointed as guardian of the minor. In passing orders in that case (Civil Miscellaneous Case No. 34 of 1903 in the District Court of Hanthawaddy) the District Judge observed "the minor, a little girl, has been, and is still living with petitioner who seems to me a suitable person in every way to be guardian of her person and property, and Letters of Administration may issue to Nyein Hla as prayed." It appears, therefore, that Ma Nyein Hla, having first applied to be the guardian of the minor, afterwards found it more convenient to be appointed as administra-

(1) 26 Ind. Cas. 505; 8 Bur. L. T. 59; 8 L. B. R. 99.
(2) 27 Ind. Cas. 849; 17 M. L. T. 61.
(3) 9 Ind. Cas. 935; 33 A. 414; 8 A L. J. 199.

trix of the estate and abandoned her application to be appointed guardian. The Privy Council case of *Mungniram Marwari* v. *Gursahai Nand* (4) has been cited to show that when a Court to which an application has been made for a certificate of guardianship has adjudged the applicant entitled to have one, he then substantially obtains it, although the actual certificate may not be drawn up or issued at the time. In that case the Judge passed a definite order on the application for a certificate: "application allowed." Their Lordships say: "When the Court makes that enquiry and comes to a decision that the application should be allowed, that is doing all that is substantially necessary in the matter; and when the order is made that the applicant shall have his certificate, the applicant really then obtains his certificate." But the present case must be distinguished from the above inasmuch as the District Court passed no order on the application for a certificate, but clearly with the assent or at the instance of the applicant granted her Letters of Administration instead. It must be held, therefore, that Ma Nyein Hla was not appointed guardian of the plaintiff.

On these grounds we hold that the suit against the sureties was not barred by limitation, and we dismiss this appeal with costs.

Appeal dismissed.

(4) 17 C. 347; 16 I. A. 195; 13 Ind. Jur. 449; 5 Sar. P. C. J. 463; 8 Ind Dec. (N. S) 770

PATNA HIGH COURT.

SECOND CIVIL APPEALS Nos. 1295 and 1296 OF 1918.

May 10, 1920.

Present:—Mr. Justice Sultan Ahmed.

RADHE MANDER AND OTHERS—DEFENDANTS—APPELLANTS

versus

FAKIR MANDER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Easement, suit based upon—Easement not established—Natural right, decree, whether can be based on—Natural right not specifically pleaded—Appellate Court whether can make new case not set out in plaint.

Where a plaintiff claims a right based upon easement and fails to establish the exercise of the right for the statutory period, he cannot succeed upon his natural right, and it is not open to the Court to make out a case not set up in the plaint and grant relief. [p. 971, col. 1.]

Plaintiff sued for a declaration of right by easement to two *mochas* for draining off rain water from his lands, but he failed to establish the exercise of the right for the statutory period. The Appellate Court, however, gave him a decree, holding that he was entitled to the natural flow of the water through the *mochas*. In second appeal:

Held, that the decree could not be maintained; that the plaintiff having failed to establish the easement asserted by him, it was not open to the Appellate Court to change the claim into one for the flow of natural water; that the plaintiff could not succeed upon his natural right to drain off water from higher to lower lands in the absence of evidence that the water flowed in the usual course of nature and in undefined channels, and that to succeed upon his natural right, the plaintiff must have specifically pleaded such right. [p. 971, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Bhagulpore.

Mr. *Siva Narayan Bose*, for the Appellants.

Mr. *Baikuntha Nath Mitter*, for the Respondents.

JUDGMENT.—These two appeals arise out of one suit instituted by the plaintiffs for a declaration of right of easement in two narrow strips called Moohas, and for removal of an obstruction placed by the defendants in them and for injunction and damages. The plaintiffs' case is that these Moohas were needed for draining off rain water and the natural slope was from north to south and west to east, that these Moohas had been in existence for 24 or 25 years and during all these years the rain water had been flowing through the said Moohas. The defendants' case was that the suit was not maintainable, that the landlord was a necessary party, that the Moohas were not passages for water but were *parti* lands used as foot-paths only, that the plaintiffs had not acquired prescriptive right to the passage of water through the two Moohas and that the story of the obstruction was false and that the plaintiffs had incurred no loss and as such the suit was liable to be dismissed. The trial Court held that the plaintiffs had established their right to the Moohas in the southern block and that the defendants had restrained the flow by obstructing the passage of the water and so gave a

special decree to the plaintiffs. In appeal the learned Judge held, and in my opinion very rightly, that the claim based upon easement completely failed, inasmuch as apart from the fact that they had not established their exercise of the right for the statutory period, they had not made the landlord a party and, therefore, he held that the plaintiffs could not get a declaration of the right based on easement. But by a curious process of reasoning and misconception of law he has made out a new case for the plaintiffs and given a decree to them. He has held that the plaintiffs are entitled to the natural flow of water through the Mochas and that the defendants have got no right to put any obstruction in them. A reference to parapragh 4 of the plaint will show that the plaintiffs' case was that they dug out earth and constructed these Mochas for the outlet of rain water from the Barethas, and this they did over 24 or 25 years ago. His whole case was based upon the right to take water through these two artificial Mochas and he based his claim entirely on the exercise of this right for a period of 24 or 25 years. How on this case in the plaint the learned Judge could change it into a claim for the flow of natural water it is impossible for me to understand. There is no doubt that not only has every landowner a natural right to collect and retain within the limits of his own land surface water not flowing in a definite channel but he has also the right to drain it off on his neighbour's lower land or put it to whatever use he pleases, but as was held in *Arkwright* v. *Gell* (1) and *Young & Co*, v. *Bankier Distillery Co.* (2) "though there is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels, there is no obligation upon an adjoining landowner to submit to an artificial discharge from his neighbour's lands unless he is bound by an easement to do so." The case of easement asserted by the plaintiff has failed, so the plaintiff cannot succeed upon his natural right to drain off water from higher lands to lower lands unless it is established that the water flows in the usual course of nature and in undefined channels. On the case set up in the plaint itself it is perfectly clear that this claim, though raised for the plaintiffs by the learned Subordinate Judge in appeal, cannot be raised by the plaintiffs themselves. It is an elementary principle that if the plaintiff bases his claim upon the natural right, he must specifically plead it. This, however, as I have shown, far from having been specifically pleaded, was not pleaded at all. It has, however, been suggested by the learned Subordinate Judge that as the plaintiffs asserted that the defendants had committed a nuisance, the plainiffs were entitled to the abatement of that nuisance. This can only be possible if the plaintiffs can succeed in showing that they were entitled to dig earth from the Mochas which they have done. This on the findings of the Subordinate Judge the plaintiffs have failed to prove. In my opinion it is impossible to uphold the decree of the lower Appellate Court on the ground on which it is based. The result is that this appeal is decreed and the appellants are entitled to costs in this Court as well as in the Courts below.

Appeal decreed.

(1) (1839) 5 M. & W. 203; 2 H. & H. 17; 8 L. J. Ex. 201; 151 E. R. 87; 52 R. R. 671.

(2) (1893) A. C. 691; 69 L. T. 838; 58 J. P. 100.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 382 OF 1920.

May 21, 1920.

Present:—Mr. Shadi Lal, Chief Justice.

GOBIND SAHAI—DEFENDANT—APPELLANT

versus

RAM CHAND—PLAINTIFF AND LADHA MAL—DEFENDANT—RESPONDENTS.

Costs—Discretion of Court, how to be exercised—Appeal, when competent.

Courts have full discretion in the matter of award of costs, but that discretion is not an arbitrary one and must be exercised in accordance with general principles [p. 972, col. 1.]

In a pre-emption case the plaintiff's right of pre-emption was admitted, the only point in controversy being the price payable. The District Judge, dissenting from the Court of first instance, held that the whole of the price was paid before the Sub-Registrar and that there was no proof of the return of any part of the price. He accordingly accepted the vendee's appeal as to the price, but did not set

MA DWE v. TA TIN LUN.

aside the first Court's decree awarding costs against him. The vendee filed a second appeal in the High Court:

Held (1) that in the circumstances of the case the Court of Second Appeal was entitled to entertain an appeal on the question of costs;

(2) that the vendee, having defeated his adversary on the only point in controversy between them, was entitled to recover his costs.

Second appeal from the decree of the District Judge, Gujranwala, dated the 10th November 1919, modifying that of the Junior Subordinate Judge, Gujranwala, dated the 8th May 1919.

Mr. *D. C. Ralli* for Mr. *Kanwar Narain*, for the Appellants.

Mr. *Gobind Ram*, for the Respondent.

JUDGMENT.—This appeal which is from an appellate decree relates to costs only. It is contended by the learned Counsel for the respondent that no appeal lies. I am unable to accede to this contention. It is true that Courts have full discretion in the matter of awarding costs, but that discretion is not an arbitrary one and must be exercised in accordance with general principles. This rule has been enunciated in several judgments; Vide, *inter alia*, *Daulat Ram* v. *Durga Prasad* (1).

Now what are the relevant facts of this case? The plaintiff's right of pre-emption was admitted by the vendee, and the only point in controversy between them was whether the pre emptor should pre-empt the property on payment of Rs. 1,500 for which the sale had been effected. Now the District Judge, dissenting from the Court of first instance, holds that the whole of the price was paid before the Sub-Registrar and that there is no proof of the return of any part of the price. The learned Judge further finds that the market value of the property is not less than Rs. 1,500. He has accordingly accepted the appeal of the vendee as to the price, but has not set aside the decree of the first Court awarding costs against the vendee. Indeed the matter has been entirely overlooked by him, nor has he given any reason whatsoever why the vendee, when he defeated his adversary on the only point which was in issue before the Appellate Court, should not have recovered his costs in that Court.

In these circumstances I am of opinion that the Court of second appeal is entitled to entertain an appeal on the question of costs. I, therefore, allow the appeal, and direct the plaintiff to pay the costs of the vendee in all the Courts.

As regards cross-objections preferred by the plaintiff, it is sufficient to say that they challenge the finding of the District Judge on the question of price which finding, being one of fact, cannot be assailed. The cross-objections are, therefore, dismissed with costs.

Appeal allowed.

(1) 15 A. 333; A. W. N. (1893) 110.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 43 OF 1918.

November 25, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond

MA DWE—DEFENDANT—APPELLANT

versus

MA TIN LUN—RESPONDENT PLAINTIFF

Buddhist Law, Burmese—Joint and separate property—Obligation incurred during marriage but discharged after death of husband, whether can be debited to joint account—Gift of separate property by one party during marriage—Property inherited during marriage—Profits, division of, rule of—Nissayo *and* nissito, *rule of, applicability of—Civil Procedure Code (Act V of 1908), O. XXVI, r. 14 (2)—Commissioner, report of—Objection not taken before trial Court, whether can be taken in appeal.*

In deciding what is joint property under Burmese Buddhist Law, all payments of money the obligation for which was undertaken during coverture must be debited to the joint account, even though the actual payment was made by the survivor after the death of the other party to the marriage. [p. 973, col. 2.]

A gift of the separate property of one of the parties to a marriage, even though the name of the other party is joined as donor, must be held to be made out of the separate property of the party to whom the property belongs. [p. 974, col. 1.]

Profits of property inherited by either of the parties to a marriage during coverture are to be divided equally between the parties, and the same rule applies to the profits of the separate property brought by either party to the marriage. [p. 975, col 2.]

The rule of *nissayo* and *nissito* does not apply to the profits during coverture of the separate property of either of the parties. [p. 976, col. 1.]

The proper time for an aggrieved party to object to the findings of a Commissioner is when the parties are called upon to state their objections for the

consideration of the trial Court, and if either party fails without sufficient cause to state his objections, he cannot be heard on those points in the Appellate Court. [p. 795, col. 1.]

Mr. *Ginwala*, for the Appellant.

Messrs. *Giles* and *Ormiston*, for the Respondent.

JUDGMENT.

TWOMEY, C. J.—The plaintiff respondent Ma Tin Lun jointly with her brother Maung Ba Hla obtained a decree in First Civil Appeal No. 122 of 1911 of this Court against the defendant-appellant Ma Dwe, their step mother, for an eighth share in the joint property or *lettetpwa* of the marriage of Ma Dwe and Po Aung, who was father of the plaintiffs. Subsequently the second plaintiff Maung Ba Hla died, and the surviving plaintiff Ma Tin Lun is admittedly entitled to the whole of the one-eighth share decreed in favour of herself and her brother. The case was remanded to the District Court which was directed to decide the remaining issues *viz.*—to ascertain the *lettetpwa* properties of the marriage, and to decide the amount to which the plaintiffs were entitled under the decree. The District Court thereupon referred the case to a Commissioner to take accounts, and after considering the Commissioner's report awarded Ma Tin Lun a decree for Rs. 39,592-13 *minus* plaintiff's one-eighth share of the aggregate costs of the suit. The defendant Ma Dwe appeals against this decree on various grounds of fact and of law.

In calculating the amount of the *lettetpwa* the Court deducted in Ma Dwe's favour all the sums which were held to have been expended by her and her husband Po Aung jointly during the period of coverture on charities and works of merit, and three of Ma Dwe's objections to the District Court's decree relate to large items of expenditure of this class. These three items are: (1) a sum of Rs. 10,000 spent on gilding a Zaungdan or portico at the northern entrance to the Shwe Dagon Pagoda, (2) a sum of Rs. 3,000 spent on building a Zayat at the Konan Kyaung in Pazundaung, and (3) alleged gifts of 400 acres of land valued at Rs. 40,000 for religious purposes.

It was held by the Commissioner who took accounts that the expenditure on gilding the Zaungdan was incurred in Maung Po Aung's lifetime, and, therefore, this sum of Rs. 10,000 should be deducted from the total amount of the *lettetpwa*. The District Court, however, held that the expenditure of this sum took place after Po Aung had died and that, therefore, it should not debited to *lettetpwa*, being a work of merit undertaken by Ma Dwe on her own account. The contract for building the Zaungdan was given in October 1904 and according to Saya Hnya, the builder, the work took more than one year and seven months to build. So that it could not have been finished before the end of May 1906. U Po Aung died in June 1905. The gilding was not done by Saya Hnya, but by another contractor U Kaung. U Kaung says that Po Aung was alive when the work was finished. Ma Dwe herself states that Po Aung was alive when the gilding was done, but she admits that gilding is not done during the rains, and, therefore, even assuming that the actual building was completed as early as June 1906, it seems unlikely that the gilding which took from four to six months was completed before Po Aung's death on the first of November; but in order to charge this expenditure to the *lettetpwa* account it is not necessary that the actual gilding should be completed during coverture. It would be sufficient if the obligation was entered into by the husband and wife jointly. Before the Commissioner it was apparently contended on behalf of the plaintiff that the contract was not made until the middle of 1263, *i. e.*, about October 1901. Mr. Ormiston urged that the contract must have been made when Po Aung was "dead or just about to die." But even if the contract for the work had been entered into before he died, that would be a sufficient reason for charging the whole expenditure of the gilding to the *lettetpwa* account. As regards this item of Rs. 10,000, therefore, I would dissent from the finding of the District Judge, and restore that of the Commissioner debiting this amount to the *lettetpwa*.

The Zayat at the Konan Kyaung was admittedly begun after the gilding of the Shwe Dagon Zaungdan had been completed. I think, therefore, that there can be no

doubt that the District Court was right in deciding that the expenditure of Rs. 3,000 on the Zayat was incurred after Po Aung's death, and could not properly be charged against the *lettetpwa* account.

Next as to the alleged gifts of land for religious merit the Commissioner found that an area of 100 acres was given by Ma Dwe for the upkeep of a Zaungdan at Pegu and that this gift was made in the lifetime of her husband U Po Aung. The Commissioner considered that the position was the same as if the *payin* land had been purchased from Ma Dwe by the joint estate for the purpose of a joint gift. As to the remaining 300 acres the Commissioner found that the gift was made after Po Aung's death and that the value of these 300 acres should, therefore, not be charged against the *lettetpwa*. The District Court confirmed the finding of the Commissioner in disallowing the 300 acres gift, but it disallowed also the alleged gift of 100 acres on the ground that the land still remained Ma Dwe's *payin* property at the time of the gift, and, therefore, the value of it could not be debited to the *lettetpwa* account. The whole of the 400 acres alleged to have been a gift for religious purposes was Ma Dwe's *atet* or *payin* property, and even if she had during the period of coverture with Po Aung disposed of these lands by a valid gift, the value of the land could not be debited to the *lettetpwa* account. The mere fact that Po Aung's name was joined with that of his wife Ma Dwe in the invitation Exhibit 4 relating to the 100 acres gave Maung Po Aung no interest in the lands. It merely indicated that Ma Dwe wished her husband to share in the merit which she hoped to acquire as the reward of her piety. But so far as the evidence shows, there was no outright gift either of the 100 acres or the 300 acres. Exhibit 4 is a rhymed invitation to a dedication ceremony of certain religious buildings erected by Ma Dwe and her husband Po Aung in 1263 B. E. The ceremony was to be held on the 12th waxing Nadaw 1263 (22nd December 1901) at the Shwemawdaw Pagoda, Pegu, and it mentions *inter alia* a perpetual gift of 100 acres of paddy land for the upkeep of the Pagoda. Speaking of this ceremony Ma Dwe herself states in her evidence:—"I made gifts to the people in general. The 100 acres of paddy land for the upkeep of the Zaungdan at the Shwemawdaw Pagoda were not given to any one; but I kept them in my possession, and the rents of these 100 acres I have set aside for repairs to the Zaungdan." It appears that an address was read out at the ceremony and in that address some mention was made of the gift of land for the upkeep of the Zaungdan. Ma Dwe never parted with possession of these lands; she has been collecting the rents ever since, though she states that after deducting taxes she made over the balance of income from the lands to certain Pongyis, etc. Seeing that no donee was indicated, that no specific lands were mentioned, that Ma Dwe retained the title deeds in her possession, and has continued to deal with the lands in every respect as if they belonged to her, it cannot be held that there was an outright gift of the 100 acres in 1263. Ma Dwe's action at the dedication ceremony at most amounted to an undertaking (given not to any one in particular, but to the public generally) that she would devote the produce of 100 acres of her lands to the upkeep of the Zaungdan at the Shwemawdaw Pagoda. Exhibit 8 is an invitation to a similar ceremony in Hnaung Tagu 1269 (April 1908) *i. e.*, eighteen months after Po Aung's death. It was at this ceremony that the gift of 300 acres (of unspecified land) to Pongyis is alleged to have been made. There are clearly no grounds for charging the value of this land against the *lettetpwa* account. I think, therefore, we must agree with the District Judge in refusing to make any deduction from the *lettetpwa* account in respect of lands alleged to have been given for religious purposes.

The parties arrived at an agreement as to the total amount of the rents received from Ma Dwe's *payin* property during the coverture and as to the amount of revenue paid to Government on this property (statement No. 4). They also agreed as to the amount of rents received from immoveable properties purchased during coverture and as to the revenue paid to Government on these properties (statement No. 6). But in both cases Ma Dwe claimed

before the Commissioner that certain other expenses of collection should be deducted in her favour. In the case of statement No. 4 she claimed that these expenses amounted to Rs, 28,419 12-0 and in the case of statement No. 6 to Rs. 16,941. The Commissioner in both cases refused to allow these alleged extra expenses to be deducted. He held that Ma Dwe had failed to prove that any special expenses of collection were incurred over and above the wages (which the Commissioner allowed) of the men actually engaged in collecting the rents. We are asked to take these claims of Rs. 28,419-12-0 and Rs. 16,941 into consideration and to allow them. But when the Commissioner's report was before the District Court, the defendant Ma Dwe raised no objection whatever to the Commissioner's adverse findings with respect to these claims, although the fullest opportunity was given to both parties to file objections to the Commissioner's findings. it was certainaly Ma Dwe's duty if she persisted in her claims as to extra expenses of collection, to object specifically in the District Court to the Commissioner's adverse finding with respect to these claims. Mr. Ginvala argues that although he made no objection in the District Court, he is at liberty to re open the matter before us in appeal. This is tantamount to saying that a party is entitled to ignore altogather the proceedings in the District Court, if the result is unfavourable to him, and to challenge any of the Commissioner's findings for the first time in appeal from the District Court's decree. This can hardly be the intention of the provisions of the Civil Procedure Code relating to commissions to examine accounts. It is true that the rules in Order XXVI do not require the parties to file objections before a fixed date, and it has been held by the Calcutta High Court in *R. M. S. Chetty* v. *Mahomed Essa Saheb* (1) that the Appellate Court's duty is commensurate with that of the trial Court; and if it is dissatisfied with the proceedings in whole or in part it is incumbent on it to do what the lower Court ought to have done, namely, set them aside either wholly or partially, and send the matter back for such further enquiry as may be necessary. But as explained by Hill, J., in that case, the duty cast upon the trial Court (*viz.* to satisfy itself that the Commissioner's proceedings are fair and in accordance with law) is in practice modified to this extent, that it is usual to confine the examination to those parts of the Commissioner's report to which exception has been taken by the parties. This is an obvious and well-recognized limitation and it applies not only to the examination of the proceedings by the trial Court, but also to the subsequent examination, if any, by the Appellate Court. The proper time for an aggrieved party to object to the findings of the Commissioner is clearly when the parties are called upon to state their objections for the consideration of the trial Court, and if either party fails without sufficient cause to state his objections, then he cannot be heard on those points in the Appellate Court.

The only other question raised at the hearing of the appeal was whether the whole of the profits of Ma Dwe's *payin* property could be treated as *lettetpwa* or whether only a part of these profits should be treated as *lettetpwa*, the remainder being Ma Dwe's *payin*. Mr. Ginwala bases his argument on the assumption that if Ma Dwe and Po Aung had effected a divorce by mutual consent, the profits of Ma Dwe's *payin* property received during coverture would have been divided between them in the proportion of one-third and two-thirds, one third going to Po Aung as the defendant (*nissito*), and two-thirds to Ma Dwe as the party "by dependence on whom" the property was obtained (*nissayo*). But this assumption is incorrect The subject of the division of profits on divorce was fully examined in the case of *Mi Myin* v. *Nga Twe* (2). It is there pointed out that in the case of property inherited by one spouse during coverture, the partition of the profits made during coverture should be equal, and the same rule applies to the profits of lands brought by either spouse to the marriage, *i.e.*, *atet* or *payin* property. The husband and wife live together and presumably manage their concerns together, and even where the profits arise from the separate property of the one, the other would either be in charge of the property, or would be manag-

(1) 5 C. W. N. 692.

(2) U. B. R. (1904—1906), Buddhist Law, Divorce p. 19.

ing the domestic affairs of the family, or in the case of the wife, would be ministering to the other's domestic comfort, and would give him leisure to attend to his outdoor business. See *Maung Shue Ngon* v. *Mi Min Dwe* (3). Though property may have come from either the side of the husband or the wife, they would be dealing with it together, or their joint labours would be such as to justify the profits being regarded as acquired equally by both. It is clear from these considerations that the relation of *nissayo* and *nissito* does not exist with respect to the profits during coverture of the *payin* property of either spouse. Ma Dwe in her evidence states that Po Aung took no part in the collection of the rents, and that she managed everything concerning her property. But this statement is plainly incredible. There is no reason to suppose that Po Aung was an exceptional husband in this respect, and that he did not take a share in the management of his wife's property just as any other Burmese husband would. But even if the rule as to *nissayo* and *nissito* did apply to the profits of the *payin* property, and the division in case of divorce should therefore be unequal, it does not follow that the step child Ma Tin Lun in this case should get less than one-eighth of the whole profits. She is entitled to one-eighth of the whole profits because they are wholly *lettetpwa*.

The only change, therefore, which I would make in the account drawn up by the District Court is to add to the expenditure side the sum of Rs. 10,000 spent on gilding the Zaungdan at the Shwae Davon Pagoda. The effect of this alteration is to reduce the net value of the *lettetpwa* property from Rs. 3,16,742 9 0 to Rs. 3,06,742 9 0 and the plaintiff's one eighth share will be reduced proportionately. The appellant is entitled to her costs on the amount by which she succeeded in this Court, namely one-eighth of Rs. 10,000 and will recover costs in the proportion of Rs. 1,250 to the total value of the appeal.

ORMOND, J.—I concur.

Appeal allowed in part.

(3) S. J. 110.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 31 OF 1918

AND

CIVIL REVISION PETITION No. 629 OF 1918.

March 16, 1920.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

ARUMUGAM PILLAY—PETITIONER—APPELLANT

versus

KRISHNASAWAMI NAIDU AND OTHERS—RESPONDENTS NOS. 1 AND 5 AND LEGAL REPRESENTATIVES OF RESPONDENT NO. 2 RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Arrangement between parties before decree to treat decree as in part inexecutable, enforceability of.

An arrangement between the parties to a suit made before decree to treat the decree as in part inexecutable cannot be given effect to by Courts.

Chidambaram Chettiar v. *Krishna Vathiyar*, 37 Ind. Cas. 836: 40 M. 233: 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13, explained.

Rama Ayyan v. *Sreenivasa Pattar*, 19 M. 230; 5 M. L. J. 218; 6 Ind. Dec. (N. S.) 865, not approved.

Appeal against the decree of the District Court, Madura, in Appeal Suit No. 106 of 1917, preferred against the order, dated the 13th February 1917, of the Court of the District Munsif, Dindigul, in Execution Appeal No. 801 of 1916, in Execution Petition No. 860 of 1915, in Original Suit No. 255 of 1912.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the District Court, Madura, in Appeal Suit No. 106 of 1917, preferred against the order of the Court of the District Munsif, Dindigul, in E. A. No. 801 of 1916, in E. P. No. 260 of 1915, in Original Suit No. 255 of 1912.

Mr. *K. S. Jayarama Aiyar*, for the Appellant.

Mr. *K. S. Ganapathy Aiyar*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—On the question whether effect has been wrongly refused to the arrangement made before decree, I observe that *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) dealt with an arrangement to postpone execution, not with one, such as is pleaded

(1) 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13.

here, for the decree being treated as in part inexecutable. An arrangement of the latter description has received effect in this Court, as far as appears from authorised reports, only in one case, *Rama Ayyan* v. *Sreenivasa Pattar* (2), the decision of a single Judge; and I do not think that the decision in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) obliges us to extend the principle to the extent required by appellant's contention.

The other objection to the sale is that it was obtained and carried through by a person having no authority from the decree-holder in the matter. The objection is pressed here in the shape of a contention that the whole proceedings from and including the final decree were taken without notice going to appellant or the judgment-debtor and that they, therefore, were vitiated by fraud and cannot be sustained. But on the assumption, which at present rests on mere assertion, that the purchaser was a party to that fraud, there is still the fact that the absence of notice to appellant or the debtor was never distinctly alleged or, so far as appears, relied on in the lower Courts or in the grounds of appeal here. In fact, so far as we are able to test this case, by reference to the final decree, we observe that the mention in it of the judgment-debtor as absent is ground for a presumption that he had had notice and disregarded it, and then his remedy was by proceedings to have that decree set aside. This objection also to the lower Appellate Court's decision is, therefore, untenable.

The appeal against appellate order is dismissed with costs. The civil revision petition is dismissed; no order as to costs.

SESHAGIRI AIYAR, J.—I agree in the main with the observations of my learned brother in the judgment just now delivered. In *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) I rested my conclusion on the theory of *stare decisis*. It is argued before us by Mr. Jayarama Aiyar that it follows from my judgment in that case that all the cases referred to therein as supporting the theory of *stare decisis* must be taken to have been accepted by me as correct. I do not think this suggestion is well founded. The course of decisions was referred to for the general proposition that procedure arrangements are within the language of section 47. I did not intend to accept as correct every one of the decisions I quoted for that purpose. On the other hand I want to make it clear that the decision in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) should not, in my opinion, be applied to what are termed cognate cases. Further I am clear that an attack against the decree as having been obtained by fraud by one of the parties thereto is not within the principle of *Chidambaram Chettiar* v. *Krishna Vathiyar* (1).

I agree, therefore, with my learned brother that this appeal should be dismissed with costs.

Appeal dismissed;
Revision petition dismissed.

(2) 19 M. 230; 5 M. L. J. 218; 6 Ind. Dec. (N. s) 865.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND CIVIL APPEAL No. 22 OF 1919-20.

April 30, 1920.

Present:—Mr. Hopkins, S. M., and Mr. Porter, J. M.

Chaudhri GAURI SHANKAR—APPELLANT

versus

MEWA AND OTHERS—RESPONDENTS.

Ejectment, suit for—Lease, expiry of—Plaintiff not relying on lease—Cause of action, change of.

A suit for ejectment was contested on the ground that the defendant had acquired occupancy rights. To rebut this the plaintiff produced a lease to cover a period of 8 years. Defendant objected in appeal that the lease should have been made the basis of the suit and that the suit ought to have been under section 58 of the Agra Tenancy Act. The objection was allowed and the suit dismissed on the ground that plaintiff ought not to have been allowed to change his cause of action. In second appeal:

Held, that the plaintiff had not changed his cause of action and that he was not bound to base his claim on the lease. [p 978, col. 1.]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 8th of September 1919, in the case of ejectment.

JUDGMENT.

HOPKINS, S. M.—(*April* 21, 1920.)—The appellant sued to eject the respondents as non-occupancy tenants. They resisted the

suit on the ground that they had acquired occupancy rights. The appellant then filed a registered lease covering the eight years 1316—1323 F. in order to rebut the claim of occupancy rights. The respondents objected that this lease, if it was relied upon, ought to have been made the basis of the suit and that the suit ought to have been laid under section 58 (*b*) of the Tenancy Act. The Commissioner has accepted this objection and has dismissed the appellants' suit on the ground that they ought not to have been allowed to change their cause of action.

I cannot see that the appellant has changed his cause of action at all. The land was held by the respondents both before and after the period of the 8 years' lease. The tenancy was not initiated by that lease, so that after its termination it cannot be said that the respondents must necessarily be holding over. The appellant did not produce the lease as his cause of action but as showing that the period covered by it could not be included in the calculation of the period for the acquisition of occupancy rights under section 11 (*a*) of the Tenancy Act. When the period of the lease came to an end, the tenancy reverted to the conditions obtaining before the lease was granted, that is, it became a tenancy from year to year. In the present case the lease expired at the end of 1323 F. and the suit was not brought until the beginning of 1326 F. I cannot see that the appellant was in any way bound to base his cause of action on a lease which had expired more than two years previously, and no authority is cited in the support of this contention.

As regards the allegation of surprise the lease was filed on the date on which issues were fixed on 28th November 1918. The respondents objected on 10th January 1919. A fresh issue was struck on 14th February 1919. Evidence was taken on 4th March 1919 and the case was decided on 5th April 1919. It is clear that the respondents had very ample time within which to raise any defence they wished.

It is, however, contended that they have been deprived of the privilege given by section 67 of the Tenancy Act. They did not claim this in that Court. I cannot see that the claim was barred because the suit was one under section 58 (*a*) : section 58 (*b*) is not specified in section 67. It is, however, just possible that they have been misled on this point and I would give them an opportunity of substantiating the plea.

I would remand the suit to the Court of the Assistant Collector for a trial of the issue: "Are the defendants entitled to the benefit of section 67 of the Tenancy Act ?" The Commissioner should return the finding with his own opinion within two months. Ten days allowed for objections. A fresh date will not necessarily be fixed.

PORTER, J. M.—I agree to the order proposed.

Suit remanded.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 44 OF 1919.

May 10, 1920.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Robinson.

AH CHOY—PLAINTIFF—APPELLANT

versus

TRADING COMPANY—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), *ss.* 79, 83, 86, 118—*C. I. F. contract—Sale of goods—Property in goods, when passes—Buyer, right of, to reject goods—Remedy in case of shortage or deterioration.*

Under a *C. I. F.* contract property in the goods sold passes at the time of shipment, but such passing is subject to the buyer's right to reject the goods if after inspection they are found to be not goods in accordance with the contract; this, however, refers to the goods at the time of shipment and not to any shortage or deterioration caused on the voyage for which the buyer's remedy lies in the policy of insurance. [p. 980, col. 1.]

Section 86 of the Contract Act does not preclude a buyer from agreeing to take the risk of loss or damage before the property in the goods passes to him. On tender of the effective shipping documents the property in the goods passes to the buyer, but even if this were not so, a contract, the terms of which imply that the goods are at the buyer's risk from the time of the shipment, is not invalid. [p. 980, col. 2.]

Appeal against the decree of the District Court, Amherst, in Civil Suit No. 100 of 1915.

AH CHOY v. TRADING COMPANY.

Mr. *Giles*, for the Appellant.

Mr. *Lentaigne*, (*Sr.*) for the Respondent.

JUDGMENT.

TWOMEY, C. J.—The defendant-respondent Company contracted to supply the plaintiff Ah Choy with 750 tons Java hard molasses to be shipped *C. I. F.* from Java to Moulmein. It is alleged that the goods on arrival at Moulmein were found to be short in weight and in a liquified and otherwise damaged condition and that the plaintiff thereby suffered loss which he estimates at Rs. 14,708 7 0. It appears that the loss and the deterioration occurred when the molasses were lying on the wharf at Rangoon awaiting transhipment to Moulmein. The plaintiff took over the goods but brought this suit against defendant Company for damages.

The defendants pleaded that the goods as shipped at Java were of contract quality and weight and that according to the terms of the contract they are not responsible for loss or deterioration after shipment. The suit was dismissed by the District Court of Amherst, the learned Judge holding that according to the usual terms of a *C. I. F.* contract the risk is with the buyer from the time of shipment. The plaintiff-appellant admits that he is unable to prove that the goods as shipped at Java were not of contract quality and amount.

The only ground argued before us in the plaintiff's appeal is that under a *C. I. F.* contract the property in the goods does not pass to the buyer until he has had an opportunity of examining the goods on arrival. The right of the buyer to examine the goods on arrival and reject them if not in conformity with the contract is well settled law, *vide Biddell Brothers* v. *E Clemens Horst Co.* (1). And it is argued that the property in the goods cannot yet have passed to him, for how could he exercise a right of rejection with respect to his own goods? The judgments of the trial Court (Hamilton, J.), the Court of Appeal and the House of Lords in the case above cited show that this argument cannot prevail. Hamilton, J., pointed out that the terms of a *C. I. F.* contract constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery at the port of shipment and the delivery is completed by the tender of the documents, *i e*, bill of lading, invoice and insurance policy, to the buyer. In the Court of Appeal, Farwell, L. J., said that the delivery commences on shipment and the property passes subject to certain qualifications when the goods are shipped. Kennedy, L. J., explained that by the shipment the goods are appropriated by the vendor to the fulfilment of the contract and the delivery of the goods to the carrier for transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the purchaser under section 32, Sale of Goods Act (*cf.* section 91, Indian Contract Act). The goods are at the risk of the buyer and the property in the goods has passed to him either conditionally or unconditionally. In the case of goods afloat the bill of lading in law and fact represents the goods and possession of the bill of lading places the goods at the disposal of the purchaser. He cited L. J. Bowen's statement of the law in another case that the bill of lading is the symbol of physical delivery and the property in the goods passes by endorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property should pass by the actual delivery of the goods. The bill of lading carries full ownership of the goods. According to Kennedy, L. J., a purchaser could not be heard to say: "I will not pay because I cannot have delivery of and an examination of the goods." The House of Lords, approving of the exposition of the law by Hamilton, J., said:—"Delivery of the bill of lading when the goods are at sea can be treated as delivery of the goods themselves," this law being so old that they considered it quite unnecessary to refer to an authority for it. In *Arnhold Karberg & Co.* v. *Blythe Green Jourdain & Co.* (2) it was laid down by the Court of Appeal that in *C. I. F.* contracts the documents tendered by the sellers must be valid and

(1) (1911) 1 K. B. 214; 16 Com. Cas. 12, 13 on appeal (1911) 1 K. B. 934; 16 Com. Cas. 197, reversed in (1912) A. C. 18; 81 L. J. K. B. 42; 105 L. T. 563; 17 Com. Cas. 55; 12 Asp. M. C. 80; 56 S. J. 50; 28 T. L. R. 42.

(2) (1916) 21 Com. Cas. 174; 1 K. B. 495; 114 L. T. 152; 13 Asp. M. C. 235; 60 S. J. 156; 32 T. L. R. 186.

effective documents at the date of tender, for instance a bill of lading is no longer an effective document if the contract of affreightment contained in it has been dissolved by the outbreak of war. But no such question arises in the present case in which the buyer actually took physical delivery of the goods on their arrival at Moulmein.

According to the English authorities it seems clear that under a *C. I. F.* contract the property in the goods passes at the time of shipment, the passing of the property being, however, subject to the buyer's right to reject the goods after inspection if they are found to be not goods in accordance with the contract. In the words of Kennedy, L. J., "no one suggests that the buyers, if they pay against documents, become thereby precluded from rejecting the goods if, on examination after their arrival, they are found to be not goods in accordance with the contract, or from recovering damages for breach of contract if they prefer that course." But this plainly refers to the condition of the goods at the time of shipment and not to any shortage or deterioration caused on the voyage, for which the buyer's remedy lies in his policy of insurance.

Mr. Giles contends that whatever the English Law may be, we are bound by the express terms of the Indian Contract Act, and he relies on section 79 under which transfer of ownership of unascertained goods cannot take place till the goods sold are ascertained, section 83 by which the appropriation of goods for the purpose of the agreement requires the assent of the buyer, section 86 under which the buyer has to bear the loss when the goods become his property and section 118 which provides the buyer's remedy on breach of warranty in respect of goods which were not ascertained at the time of the contract. As regards section 79 it is clear that the goods are ascertained by being appropriated to the buyer at the time of shipment, delivery to the shipping company being delivery to the buyer under section 91. With respect to section 86 it appears that by the ordinary terms of the *C. I. F.* contract property in the goods passes to the buyer by tender of the shipping documents, but it passes subject to the condition that the buyer has the right of examination and rejection on actual arrival of the goods if they are not in accordance with the contract. There was admittedly no breach of this condition in the present case.

I would hold, therefore, that on tender of effective shipping documents the property in the goods passes to the buyer under *C. I. F.* contracts. If we assume that the property in the goods did not pass till then, the terms of the contract imply that the goods are at the buyer's risk from the time of shipment and it does no appear to me such a contract is invalid. Section 85 of the Contract Act would not preclude a buyer from agreeing to take the risk of loss or damage before the property in the goods passes to him. It is plain that all risk is taken by the buyer in *C. I. F.* contracts from the time of shipment, the buyer relying for protection on the insurance policy.

ROBINSON, J.—I concur.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 26 OF 1919-20.

May 2, 1920.

Present :—Mr. Hopkins, S. M., and Mr. Porter, J. M.

Lala KISHORI SARAN—APPELLANT

versus

RAMESHWAR—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 34—Grove brought under cultivation—Grove-holder, status of—Landlord, right of, to eject.

When grove land is brought under cultivation, the holder thereof loses his rights and is liable to be treated by the land-holder as a tenant under section 34, Agra Tenancy Act, and to be ejected. [p. 981, col. 1]

Second appeal from the order of the Commissioner, Allahabad Division, dated the 19th of September 1919, in the case of ejectment.

JUDGMENT.

HOPKINS, S. M.—(*April* 21, 1920)—The

appellant brought this suit to eject the respondent as a tenant from year to year without payment of rent. The respondent contested the suit on the ground that the land was grove, and this was the sole issue raised in the two lower Courts. The Commissioner has dismissed the suit on the ground that the plaint as it stands does not disclose any cause of action, that the appellant did not describe the respondent as holding without his permission and that a person holding land without payment of rent with the consent of the land-holder is a rent-free holding and can only be sued under Chapter X of the Tenancy Act.

The Commissioner is, in my opinion, wrong in setting up for the respondent a plea which he did not raise himself. He did not claim to be a rent free holder. When, as in this case, a grove-holder loses his right by the grove being brought under cultivation, the land holder is entitled to treat him as a tenant under section 34 and eject him by suit: *Babu Raman Das* v. *Purshottam Singh* (1). The plaint as worded is sufficient to cover a suit of this nature, and no objection has been raised to it on the ground which the Commissioner takes.

I would accept the appeal with costs and restore the order of the Assistant Collector. This order is passed *ex parte*, the respondent not having appeared.

PORTER, J. M.—I agree with the proposed order.

Appeal accepted.

(1) S. D. No. 14 of 1912.

CALCUTTA HIGH COURT.
CIVIL RULE No. 44 OF 1920.
March 1, 1920.
Present:—Mr. Justice Newbould.
AMBICA CHARN KHASKEL—AUCTION-PURCHASER—PETITIONER
versus
ESMAIL AND OTHERS—OPPOSITE PARTIES.

Execution of decree—Sale—Application to set aside sale, dismissal of—Application to set aside dismissal—Appeal, whether lies.

An order rejecting an application to set aside an order dismissing for default an application to set aside an auction sale, is not appealable.

Charu Chandra Ghosh v. *Chandi Charan Roy Chowdhury*, 27 Ind. Cas. 492; 19 C. W. N. 25, followed.

Rule against the order of the Sub Judge, 2nd Court, Backarganj, in Miscellaneous Appeal No. 127 of 1919.

Babu *Suresh Chandra Talukdar*, for the Petitioner.

JUDGMENT.—The opposite party applied to set aside an auction sale. That application was dismissed in default. He then applied to set aside the order of dismissal. The latter application was also rejected. He then appealed to the Subordinate Judge, Second Court, Bakergunge. He decreed the appeal and ordered a re-hearing of the case arising out of the application to set aside the auction sale. It is clear that the decisions of this Court support the contention of the petitioner that no appeal lay. The case of *Charu Chandra Ghosh* v. *Chandi Charan Roy Chowdhury* (1), clearly supports this proposition. The learned Subordinate Judge relies on the case of *Bhuban Behari Nag Mazumdar* v. *Dhirendra Nath Banerjee* (2). But in that case to which I was party, although we expressed some doubt as to the correctness of the previous decisions, we held that the view that no appeal lay in such a case had been taken in a series of cases ending with the case which I have just cited. Sitting alone I am bound to follow the previous decisions of the Divisional Benches and could not, even if I would, make a reference to the Full Bench on this point.

I accordingly make this Rule absolute and set aside the order of the Subordinate Judge allowing the application of the opposite party and directing a re hearing of the case.

Rule made absolute.

(1) 27 Ind. Cas. 492; 19 C. W. N. 25.
(2) 33 Ind. Cas. 581; 20 C. W. N. 1203.

JANARDAN MISSIR *v.* BRIJNANDAN SINGH.

PATNA HIGH COURT.

CIVIL REVISION No. 82 OF 1920.

May 6, 1920.

Present:—Mr. Justice Das.

JANARDAN MISSIR—PETITIONER

versus

BRIJNANDAN SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Finding not based on evidence—Material irregularity.

It is the duty of a Court to found its decision upon a consideration of the evidence adduced before it, and where it omits to do so but founds its decision on a consideration that has no basis, it acts in the exercise of its jurisdiction with material irregularity, and its decision is liable to be set aside under section 115 of the Civil Procedure Code. [p. 983, col. 1.]

Appeal from a decision of the 2nd Munsif, Darbhanga.

Messrs. *P. C. Manuk, S. C. Mitter* and *J. N. Moitra*, for the Petitioner.

Mr. *B. N. Mitter*, for the Opposite Party.

JUDGMENT.—This application is directed against an order passed by the learned Munsif, 2nd Court, of Darbhanga, under Order XXI, rule 98, of the Code of Civil Procedure, on the 16th of March 1920. It appears that the opposite party instituted a suit and recovered a decree against two persons of the names of Jieneh and Alik Missers in respect of Survey Khesra Plot No. 490. The petitioner, who claims to have an interest in Survey Plot No 496, was not made a party to the litigation. In that suit the defendants in the written statement specifically raised the point that the suit was bad for non-joinder of parties. On the pleadings of the parties the Court framed an issue as to whether the suit was bad for non-joinder of parties. The first witness examined on behalf of the defendants was Jiwachh Jha, who stated that the petitioner had an interest in the land that was in dispute in that litigation. That evidence was objected to by the plaintiff in that suit, with the result that the Court held that evidence as to the title of the petitioner was irrelevant and he ruled out all evidence relating to the interest possessed by the petitioner in the land in dispute.

As I have stated, the opposite party recovered a decree against the defendants in the action and thereupon they took out execution as against the defendants in the action, and in the execution case the Amin went to the locality to give delivery of possession to the decree-holder, when he was resisted by the petitioner. This took place on the 24th September 1919. It appears that another attempt was made by the decree-holder sometime in December to get actual delivery of possession of the properties. He was again resisted by the petitioner. Thereupon on the 8th December 1919 the opposite party presented their application under Order XXI, rule 97, before the learned Munsif.

Before the learned Munsif the parties went into evidence on the question of possession. The petitioner adduced evidence to show that he claimed in good faith to be in possession of the property on his own account. Undoubtedly that was a matter which the learned Munsif was bound to inquire into. In his order, however, the learned Munsif does not discuss the evidence that was adduced at all. He decides in favour of the opposite party on one consideration and on one consideration alone. The grounds for his decision may be stated in his own words. They are as follows:—"When they", namely, the plaintiffs in the title suit, the opposite party in the matter before me, "brought the title suit for recovery of possession of the disputed land, the judgment-debtors did not raise that point that the applicant was also interested in it. The case was fought out tooth and nail with the care and attention engendered by bitterness of spirit between the parties. It is said that the omission of the judgment-debtors is not binding upon the opposite party. Certainly not. But it is a circumstance which induces the Court to accept the applicants' contention that the opposite party had never had any concern with the land and that he has been set up by the judgment debtors to prop a failing cause. I accordingly allow the application with costs." I have no doubt at all in my mind that he based his decision on one fact alone and that is that the judgment-debtors did not raise the point that the applicant was also interested in the property. Now, if there was any foundation for this contention in fact, then I would have no power to interfere with the order under section 115. But as I have stated already, the judgment-debtors did specifically raise the point in the written statement

that the suit was bad for non-joinder of parties. The first witness called by them did say that the petitioner was interested in the property as a co-parcener or as a co-owner with them, and they were prepared to adduce further evidence on the point if only they were permitted to do so. If that be so, can it be said that the Court has acted with jurisdiction in deciding this case in favour of the opposite party on a ground that is wholly unsustainable? In my opinion in exercising his jurisdiction, he acted with material irregularity. He ought to have founded his decision on the evidence that was adduced before him and not on a consideration that had no basis at all. I accordingly allow this application and set aside the order passed by the learned Munsif on the 16th March 1920. The petitioner is entitled to his costs, which I assess at two gold *mohurs*. The Munsif will now dispose of the application on the materials before him.

Application accepted;
Case remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL No. 95 OF 1918-19.
April 17, 1920.

Present:—Mr. Hopkins, S. M., and
Mr. Porter, J. M.

Musammat ULFAT—APPELLANT
versus
Musammat BARKAT-UN-NISA—
—RESPONDENT.

Res judicata—*Law, wrong application of, whether arrests rule of* res judicata.

The fact that in a previous suit the law was wrongly applied to a particular state of facts, does not prevent the operation of the rule of *res judicata* in a subsequent suit where these facts come into issue therein.

Second appeal from the order of the Commissioner, Agra Division, dated the 2nd of June 1919, in the case of ejectment.

JUDGMENT.

PORTER, J. M.—(*April* 2, 1920.)—I would accept without hesitation the finding now

recorded that Najib Khan, whose occupancy holding this was, died before 1st January 1902, while Act XII of 1881 was in force. This being so, his holding devolved at the time of his death on his son, who died about 1903 at the age of nine, and on his wife and daughter, the defendant-appellants.

A suit was brought to eject them in 1909, and was dismissed on the ground that the wife was an occupancy tenant, although the daughter, her co-tenant, was a non-occupancy tenant.

The Commissioner refused to accept this decision as *res judicata* on the ground that it was bad in law. He apparently overlooked the fact that the tenancy devolved under Act XII.

Moreover, if the law has been applied to a particular state of facts, and these facts come to issue in another suit, the judgment on these facts, whether it rightly or wrongly applied the law, is *res judicata* [Woodroffe and Amir Ali's Civil Procedure Code]. I would hold for the purpose of the present appeal that it is *res judicata*, that the wife is an occupancy tenant, and the suit to eject her and her daughter as non-occupancy tenants must, therefore, fail. I would decree the appeal with costs, restoring the order of the Assistant Collector dismissing the suit.

HOPKINS, S. M.—I agree.

Appeal decreed.

PATNA HIGH COURT.

CIVIL REVISION No. 257 OF 1919.
March 12, 1920.

Present:—Justice Sir B. K. Mullick, KT., and
Mr. Justice Sultan Ahmed.

GAYA SINGH AND OTHERS—PETITIONERS
versus
NAME SINGH AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), *s.* 115, *O. XLI, r.* 27—*Appellate Court, order by, directing evidence to be produced before it—Revision, whether competent.*

If an Appellate Court makes a mistake in law in

directing evidence to be tendered before it which it is not competent to receive in accordance with the provisions of the Civil Procedure Code, it commits an error of law, but that will not give the party aggrieved by the order the right to invoke the interference of the High Court under section 115 of the Code of Civil Procedure.

Appeal from a decision of the District Judge of Monghyr, dated 1st August 1919.

Mr. *R. L. Dutt*, for the Petitioners.

Mr. *Ganesh Dutt Singh*, for the Opposite Parties.

JUDGMENT.

MULLICK, J.—The plaintiffs sued the defendants for a money decree on the allegation that although the defendants had executed an usufructuary mortgage in respect of some property, the plaintiffs had been dispossessed from that property by the act of the defendants.

The first Court gave a decree against the defendants.

On appeal to the District Judge by the defendants the learned District Judge was of opinion that the mortgage bond should be proved by an attesting witness and though the plaintiffs had by inadvertence not called an attesting witness, he decided under Order XLI, rule 27, Civil Procedure Code, to take the evidence of such a witness himself.

The defendants thereupon came to this Court and obtained a Rule for the interference of the Court under section 115, Civil Procedure Code.

It is quite clear that there is no question of jurisdiction involved. Jurisdiction must be distinguished from power, and in this case the learned District Judge had full jurisdiction to hear the appeal. If he has made a mistake in law in directing evidence to be tendered before him which he was not competent to receive in accordance with the provisions of the Civil Procedure Code, he has committed an error of law, but that will not give the defendants the right to invoke the interference of this Court under section 115, Civil Procedure Code. The order is one which, in my opinion, cannot be revised under that section.

Whether the order itself is right or wrong, is a different matter. It does seem that *prima facie* the District Judge is not competent to call for evidence under Order XLI, rule 27, which the party, if he had been diligent, might have produced in the lower Court ; but we cannot express any opinion upon this point and the admissibility of the evidence, if and when taken, will have to be judged at the hearing of the appeal before the learned District Judge.

The defendants will be entitled to submit that the evidence, not being admissible under the provisions of the Code, should be expunged from the record in the hearing of the appeal.

The application is dismissed with costs. Hearing fee one gold *mohur*.

SULTAN AHMED, J.—I agree.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 30 OF 1919.

January 5, 1920.

Present:—Mr. Justice Teunon and Mr. Justice Beachcroft.

SADAK ALI—DEFENDANT—APPELLANT

versus

SAFAR ALI SUFANI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25, 27, 29—Case not decided on preliminary point—Remand, order of—Procedure.

Where a trial Court has decided a case not upon a preliminary point, but after taking all the evidence and trying all the issues, it is improper for an Appellate Court to remand the case for trial afresh under Order XLI, rule 23 of the Code of Civil Procedure. In making an order under the rule, however, the Court cannot direct the omission of one of the essential issues in the case. If the Court is of opinion that a fresh local investigation should be made or that fresh evidence is necessary on any point, its order should be one under rules 25, 27 and 29, and not under rule 23, of Order XLI. [p. 985, col. 2; p 986, col. 1.]

Appeal against the order of the Subordinate Judge, 2nd Court, Chittagong, dated the 2nd of October 1918, reversing that of the Munsif, 1st Court, at Chittagong, dated the 25th of June 1917, and remanding the case to the first Court.

FACTS appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Paresh Chandra Sen*), for the Appellant.—The defendant is the appellant. The appeal arises out of a suit for recovery of possession on establishment of plaintiff's title thereto.

The first Court directed a local investigation and on the Commissioner's report dismissed the suit. On appeal the lower Appellate Court held that the report of the Commissiner being unsatisfactory, the case should be remanded and the whole case re-tried. Against that order of remand the present appeal is directed. The landlord settled with different tenants the same plot of land. In order to determine the identity of the plots claimed by the parties the first Court directed a local investigation. The learned Munsif duly considered the report of the Commissioner and dismissed the suit on the ground that the lands claimed by the plaintiff did not really belong to him at all. My submission is that the order of remand is wrong and not permissible in law. Refers to *Bejoy Krishna Mukerjee* v. *Jibon Krishna Garguly* (1). That case is exactly like the present one.

Babu *Charu Chandra Sen* (with him Babus *Dhirendra Nath Bagchi* and *Monmohan Banerjee*), for the Respondents.—My preliminary objection to the hearing of this appeal is that the case was not remanded under Order XLI, rule 23, Civil Procedure Code. The Appellate Court below did not set aside the finding of the first Court on the question of title. The first Court did not decide on a preliminary point. Hence no appeal lies to this Court. The Appellate Court has power to remand the case according to law. The lower Appellate Court sent back the case to have the lands located. It did not enter into the questions of limitation and estoppel. Under these circumstances I would ask your Lordships to dismiss the appeal for the ends of justice and uphold the order of remand.

Babu *Jogesh Chandra Roy* briefly replied.

JUDGMENT.

TEUNON, J.—This is an appeal against an order of remand made by the first Appellate Court. The suit out of which the appeal arises is one for recovery of possession on establishment of the plaintiff's title. The plaintiff's case was that of the lands in suit he had obtained a lease from the superior landlord in the year 1250 Maghi, the superior landlord being one Abdul Ali Malum. The case for the defence was, first, that the lands in dispute were not covered by the lease obtained by the plaintiff in 1250, and secondly that even if so included, that they have been previously leased out by the landlord to one Noor Ali and that, therefore, at the date of the plaintiff's lease the landlord had no right to lease out the lands in question. The first Court directed a local investigation, and after considering the report of the Commissioner thus appointed and the oral evidence adduced by the parties, came to the conclusion that the lands in suit were not included in the plaintiff's lease and further that they were included in the prior lease granted to Noor Ali. On these findings the first Court dismissed the plaintiff's suit.

On appeal the learned Subordinate Judge apparently came to the conclusion that the local investigation made by the Commissioner and the report of the Commissioner were unsatisfactory. The main reason he gives for this conclusion appears to be that according to the report of the Commissioner the lands in dispute between the parties are to be located "in the middle of the sea." On his finding as to the nature of the Commissioner's investigation and report he set aside the decree made by the first Court and directed that a fresh local investigation should be held at the cost of the defendant-respondent. He further directed that the whole case should be re-tried. His order is thus one which purports to be made under Order XLI, rule 23, Civil Procedure Code. As such it is obviously an improper order for the first Court did not decide the case on any preliminary point, but having taken the whole of the evidence decided the case after trying all the issues. While directing a re-trial the learned Subordinate Judge further directed that the first portion of Issue No. 5, namely, whether the disputed lands were included in the plaintiff's lease, should be struck out. Having directed a *de novo* trial he was not competent at the same time to direct that one of the essential issues in the case should be omitted. If his order had been one under Order XLI, rule 25 or rules 27 and 28, it is true that when directing the trial of certain issues and the taking of additional evidence on certain points, he might himself come to the conclusion that the first part of Issue No. 5 was one to be decided in the plaintiff's favour. But any such finding we have been unable to trace in his judgment, which we regret to say we must characterise as

(1) 46 Ind. Cas. 333; 27 C. L. J. 556.

extremely confused and indeed almost unintelligible.

On the whole we think the proper course to take in this matter is to set aside the decree of the learned Subordinate Judge and remand the appeal to be tried afresh by that learned Subordinate Judge's successor-in-office. If, when he hears the appeal, he comes to the conclusion that the local investigation made by the Commissioner and the Commissioner's report are unsatisfactory, it will be open to him in his discretion to direct a fresh local investigation, and if he thinks that further evidence on any point is necessary, it will be open to him also to direct the taking of such additional evidence. But if he finds any such order necessary, his order must be one drawn up in accordance with the provisions of Order XLI, rules 27, 28 and 29 and not in accordance with the provisions of Order XLI, rule 23.

Costs of this hearing will be costs in the case. The hearing fee is assessed at two gold *mohurs*.

BEACHCROFT, J.—I agree.

Case remanded.

ALLAHABAD HIGH COURT.

FULL BENCH.

FIRST APPEAL FROM ORDER No. 82 OF 1919.

May 14, 1920.

Present:—Justice Sir P. C. Banerji, KT., Mr. Justice Piggott and Mr. Justice Walsh.

ANUP SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

FATEH CHAND AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Mortgage—Redemption—Acknowledgment by mortgagee—Limitation—Burden of proof.

Where in a suit for the redemption of a mortgage the plaintiff relies upon an acknowledgment by the mortgagee to establish the subsistence of the mortgage, it is for him to prove that the acknowledgment was made before the expiry of the period of limitation and that he had a subsisting title at the date of the suit. [p. 987, col. 2; p. 992, col. 1; p. 990, col. 2.]

First appeal against the order of the Second Additional Subordinate Judge, Meerut, dated the 24th of April 1919.

Dr. *Kailas Nath Katju*, for the Appellant.

Mr. *Peary Lal Banerji*, for the Respondents.

JUDGMENT.

BANERJI, J.—This appeal arises out of a suit for redemption of a mortgage alleged to have been made some time between 1833 and 1839 by Albela and Lachhman in favour of Ganga Ram and Ram Dayal. It is stated that the property which is the subject matter of the suit was the subject of a mortgage, that the amount of the mortgage was Rs. 561-4 and that the mortgage was redeemable upon payment of the mortgage money in the month of Jeth of any year. The plaintiff is the purchaser of the equity of redemption from the successors-in-title of the original alleged mortgagors. The principal defendants, who are the representatives of the mortgagees, deny the fact of the mortgage and deny that the claim is within limitation. Undoubtedly it is for the plaintiff who comes into Court for possession of property by redemption of mortgage to prove two things, first, that a mortgage answering substantially to the description of the mortgage alleged in the plaint was created, and, secondly, that the mortgage was a subsisting mortgage when the suit was brought, *i, e.*, that the plaintiff's claim was not time barred. The fact of the mortgage as alleged by the plaintiff has been found by the Court below, and there is ample evidence on the record to show that a mortgage of the property now in suit was made by the two alleged mortgagors in favour of Ganga Ram and Ram Dayal for a sum of Rs. 564 4 0. In the Khatauni which is to be found in the settlement record of 1833 and which is referred to by the Court below as the Khatauni of 1839, there is a specification of this particular mortgage. It is stated to be a mortgage made by Albela and Lachhman in favour of Ganga Ram and Ram Dayal. The property is mentioned, the amount of the mortgage is mentioned, and it is further mentioned that the mortgage is redeemable upon payment of the mortgage money in the month of Jeth of any year. A Settlement took place in 1863, and in that Settlement a *wajib ul arz* was prepared in which all mortgages in the village were specified. At the heading of the list of these mortgages it is stated in the *wajib ul arz* that these mortgages could be redeemed upon

payment of the principal amount in the month of Jeth of any year. Among these mortgages is the mortgage now in question. The property mortgaged is specified. The names of the mortgagors and the mortgagees are also mentioned and the amount of the mortgage is mentioned also. This *wajib-ul-arz* was signed by Ganga Ram and by the successors-in-title of Ram Dayal, so that the entries in the Khatauni to be found in the Settlement Record of 1833 and in the *wajib-ul-arz* of 1863 clearly prove the existence of a mortgage of the disputed property with all the details alleged by the plaintiff in this case. The only thing that is wanting in both these documents is the initial date of the mortgage. In my opinion the fact of the plaintiff having been unable to prove the date of the mortgage is not sufficient to justify our holding that the mortgage has not been proved. The date of the mortgage was not material, except for the purpose of the question of limitation to which I shall have to refer later. In the Full Bench case of *Parmanand Misir* v. *Sahib Ali* (1) the learned Chief Justice at the conclusion of his judgment stated that what was necessary to be shown was "a definable or distinguishable mortgage." In the present case a definable or distinguishable mortgage has been fully proved and the mere inability of the plaintiff to prove the exact date of the mortgage is not a valid reason for holding that the fact of the mortgage sought to be redeemed has not been established. The learned Subordinate Judge has found that a mortgage of the property in dispute was made by the alleged mortgagors in favour of the alleged mortgagees for a sum of Rs. 561 4 0, and this finding, which is justified by the evidence to which I have referred, is binding on us in this appeal.

The next question is: "Has it been established that in 1863 when this mortgage was acknowledged by the mortgagees it was a subsisting mortgage?". It is true that in the acknowledgment itself there is no specific allegation that the mortgage was a subsisting mortgage, but it must also be remembered that in the *wajib ul arz* a specification was made of all the mortgages which existed in the village and which must be taken to have been deemed to be mortgages which were subsisting at the date of the preparation of the *wajib-ul-arz*. In that document, as I have already stated, a specification is given of a number of mortgages with the addition of a clause to the effect that the mortgages could be redeemed by payment of the amount of the mortgages in the month of Jeth of any year. Among these mortgages was the mortgage now in dispute, and this mortgage was acknowledged by the mortgagees to be a mortgage which was in existence. Of course it was for the plaintiff who came into Court to prove that that acknowledgment was one which had been made before the expiry of the period of limitation, otherwise the acknowledgment could not be availed of for the purpose of saving the operation of limitation. In my opinion the question is one of the amount of proof which has been given of the existence of a subsisting mortgage in 1863. I do not think that any hard and fast rule can be laid down as to what should be the quantity of evidence to be adduced in each case. But where in respect of a mortgage, the creation of which was established, the mortgagees acknowledged that the mortgage existed, that acknowledgment is, in my opinion, *prima facie*, evidence that it was a mortgage which subsisted at the time when the acknowledgment was made and was not a mortgage which had become extinct by lapse of time. As observed by Mr. Justice Pearson in his judgment in the Full Bench case of *Daiu Ohand* v. *Sarfraz* (2), "It is not reasonable to suppose that any one would allow himself to be described as the mortgagee of a property of which the mortgage had ceased to be redeemable at law and the names of the owners thereof had been lost to knowledge by lapse of time". In my opinion where a mortgagee has acknowledged a mortgage, that acknowledgment is *prima facis* evidence that there is a subsisting mortgage which he acknowledges. If the mortgage had become extinguished by reason of lapse of time, there was no occasion for him to acknowledge such a mortgage; the mortgage had to all intents and purposes, ceased to exist

(1) 11 A. 433; A. W. N. (1889) 155; 6 Ind. Dec. (N. S.) 708.

(2) 1 A. 117; 1 Ind. Dec. (N. S) 79.

and there is nothing which had to be acknowledged. This case is very similar to that of *Kamla Devi* v. *Gur Dayal* (3). Before the enactment of Act XIV of 1859 there was no period of limitation for a suit for redemption of a mortgage. By that enactment a limitation of 60 years was prescribed for a suit for redemption and a grace of two years was given to all mortgagors who wished to redeem their mortgages after the passing of the Act. This period of grace expired in 1862, so that if a suit had been brought to redeem a mortgage whether the mortgage had been made in 1833 or at a much earlier period, the suit would not have been time-barred. It was after the passing of the Act that the Settlement of 1863 took place and it was at this time that in the present case the mortgagees admitted the existence of the mortgage. When they made that acknowledgment, they must have deemed the mortgage to have been in existence as a subsisting mortgage which could be redeemed by the mortgagor. Of course this acknowledgment cannot be more than *prima facie* evidence of the existence of a subsisting mortgage and is not conclusive. It may be rebutted by proving that the mortgage was made at a date from which, if limitation were computed, 60 years had elapsed before the acknowledgment was made. There is no such evidence in the present case; on the contrary in every subsequent Settlement this property has been recorded as the property of the mortgagor and as being in the possession of the mortgagees as such. In the year 1321 Fasli a partition took place at the instance of Anup Singh, defendant, and a separate Mahal was formed. This land was not included in Anup Singh's Mahal and Anup Singh did not claim that it should be made a part of his Mahal. It was included in the Mahal of the non applicants for partition, among whom were the successors in-title of the original mortgagors. All these circumstances raise a very strong presumption in favour of the existence of a subsisting mortgage. Reference was made to the ruling of the Privy Council in *Fatimatulnissa Begum* v. *Sundar Das* (4). In that case the date of the mortgage was known. It was also known that the acknowledgment which had been made was an acknowledgment after the expiry of 60 years from the date of the mortgage, so that that acknowledgment could not be relied upon as saving the operation of limitation and was not in fact so relied upon before their Lordships. What was contended before their Lordships was that by reason of the mortgagees having granted a lease to the mortgagors and described themselves as mortgagees they were estopped from denying the existence of the mortgage as a subsisting mortgage. This contention was repelled by their Lordships, and they proceeded to hold that the mere fact of the mortgagees regarding themselves as mortgagees, although the period of limitation for redemption of the mortgage had expired, could not affect their rights which had matured into the rights of absolute owners. Such is not the case here. In this case it is true we have no evidence as to the exact date on which the mortgage was made. It is quite possible that, in 1863, 60 years had not expired from the date of the original mortgage, and it seems to me to be improbable that had the mortgage been made sometime prior to 1803 it would have been treated in 1863 as an existing mortgage. We have, however, no evidence on the point. In that year, as I have said above, the mortgagees acknowledged the existence of a mortgage, and, in my opinion, that acknowledgment is *prima facie* evidence of the existence of a subsisting mortgage. This is the view which the Court below took, and I think that Court was fully justified in holding that view. I would dismiss the appeal with costs.

PIGGOTT, J.—I have carefully considered the judgment which has just been delivered by Mr. Justice Banerji. I am in agreement with so much of it that it is only after considerable hesitation that I have arrived at the conclusion that I am bound to dissent from the order which he proposes to pass on this appeal. I may say at once that I agree with him that the plaintiff in this case had proved his mortgage sufficiently to satisfy all reasonable requirements on that point. There is, in any case, a finding of fact that the mortgage is proved

(3) 51 Ind. Cas. 283; 17 A. L. J. 330.
(4) 27 C. 1004; 27 I. A. 103; 4 C. W. N. 565; 7 Sar. P. C. J. 718; 14 Ind. Dec. (N. S.) 657.

and that finding undoubtedly rests upon the evidence. The entry made in what has sometimes been spoken of as the Settlement Record of 1833 and sometimes as the Settlement Record of 1839 (it must be remembered that in many of these old Settlement papers an entry to the effect that the paper in question appertains to "a settlement Record of 1833" means nothing more than that it was made in the course of a Settlement prepared under the Regulations of 1833) was made at a time when there was no period of limitation prescribed by law for the redemption of a mortgage. It is, therefore, evidence that certain specified land was held by certain named persons as the mortgagees of certain other named persons, and that the latter were entitled to reedeem the mortgage at any time on payment of a specified sum. Under these circumstances I do not think it was incumbent on the plaintiffs, except for purposes of limitation, to prove that this mortgage had been contracted in a particular year.

We now come to the crucial question of the acknowledgment, to be found in the Settlement Record of 1863. There was undoubtedly an acknowledgment sufficient in law to save limitation, provided it was made at a time when the liability acknowledged was still subsisting. The question is then whether it has or has not been proved that the mortgage in suit, whatever its precise date, was at any rate contracted within 60 years of this acknowledgment of the year 1863. Admittedly there is no direct evidence on the point. The question is one of inferring one fact as presumably true because of certain other established facts. If the lower Appellate Court had looked at the matter, plainly and unmistakably, from this point of view and had recorded a clear finding that from such and such established facts it drew the inference that the mortgage must have been contracted within 60 years of its acknowledgment in the Settlement Record of 1863, I should have felt more difficulty about the case than I actually do. A clear finding of fact by a Court of first appeal can only be interfered with in second appeal on the ground that it proceeds upon some erroneous view of law, or that it rests upon no legal evidence. I should have felt considerable difficulty about holding that a clear finding of fact, such as that above suggested, would in this case have rested upon no legal evidence; obviously, in face of the judgment which has just been delivered, it would have been exceedingly difficult to say this. However, I am satisfied that the learned Subordinate Judge in this case has not looked at the matter from this point of view. He has assumed that, for practical purposes, it was sufficient for the plaintiff to prove that there was in existence in the year 1839 a mortgage which was at that date redeemable, and that an acknowledgment of liability has been proved, which acknowledgment was made within 60 years of the year 1839. That this is not a correct statement of the law is obvious enough from the mere terms of the Indian Limitation Act, XIV of 1859. The Legislature in that year, for the first time, imposed a sixty years' period of limitation for redemption suits. I did not proceed on the assumption that those sixty years would begin to run with the passing of the Statute, as it would have done if it had considered it sufficient to note that every mortgage then in existence was redeemable on the date on which the Statute came into force. All it did was to allow mortgagors, whose right of redemption would otherwise have been abruptly cut off the moment the Statute came into force, a short period of grace within which to make the necessary arrangements and to bring a suit for redemption if they were able to do so. The mere fact, therefore, that there was a redeemable mortgage in the year 1839 does not suffice to make out the plaintiff's case unless the Court is prepared to infer that the said mortgage must have been contracted some time within 60 years of its acknowledgment in the Settlement Record of 1863. It is here that, in my opinion, a question of principle is involved and I have felt driven to dissent from the judgment which has just been delivered because of the importance I attach to this question of principle. The inference that the mortgage must have been contracted within 60 years of the preparation of the Settlement Record of 1863 is sought to be based mainly on the terms of the acknowledgment itself. Something has been said about the subsequent conduct of the mortgagees, and to

this I must refer briefly later on. In the main, however, the question is, and it has been very clearly stated by Mr. Justice Banerji in his judgment, whether or not the Settlement Record of the years 1863, read in connection with the fact that it was signed as a correct entry by the then mortgagees, justifies an inference that the mortgage was not at the date of that acknowledgment over 60 years old. We are really dealing with a question of circumstantial evidence inferring one fact from another, applying the principles laid down in section 114 of the Indian Evidence Act. My main reason for being unable to concur with the judgment delivered by the senior member of this Bench is that I dissent quite definitely from the dictum which he has quoted from the judgment of one of the members of the Full Bench which decided the case of *Daia Chand* v. *Sarfraz* (2) and am unable to accept as of general validity the proposition that it is not reasonable to suppose that a man would describe himself as mortgagee of a property under a mortgage which had ceased to be redeemable at law. I do not think that the proposition can be founded upon any wide experience of the ordinary principles of human nature and conduct as prevailing amongst the smaller landholders in this country. A glaring instance to the contrary is on record for all time in the Privy Council case to which reference has been made, that reported as *Fatimatulnissa Begum* v. *Sundar Das* (4). We there have a mortgagee continuing for years and years to describe himself as mortgagee of certain property, and even describing himself as such in a covenant of lease which he enters into with his mortgagor, many years after the right of redemption had become Statute-barred. In one sense it is possibly correct to say that a man does not ordinarily acknowledge a liability which he knows to have become Statute-barred; but the possibility of such an acknowledgment was clearly contemplated by the Legislature when drawing up the relevant clause of the Indian Limitation Act. It required to be laid down that in order to save limitation an acknowledgment must be made before the period of limitation in respect of the liability so acknowledged had expired; and in so doing the Legislature clearly contemplated the possibility of acknowledgments being made of Statute-barred debts. If the Courts are in a general way to act upon the sort of principle involved in the words which I have quoted from the judgment of Mr. Justice Pearson, the result will be that an acknowledgment made within 60 years of the limitation period prescribed for the institution of any suit will have to be treated as ordinarily sufficient to save limitation, unless and until the party bound by that acknowledgment is able to prove affirmatively that it was made beyond limitation. I do not think this is a sound principle, or was intended by the Legislature.

I now come to consider more definitely the particular acknowledgment in question in this case which is to be found in the Settlement Record. An entry in a Settlement Record is presumably in itself a correct statement of the facts therein recited. We have that in the present case, and we also have the acknowledgment of the correctness of the entry by the signatures of the then mortgagees. So far the case looks well for the plaintiff; but I do not think it is a strong case, when one comes to consider the terms of the entry in view of the circumstances under which it was made. In the year 1863 the Limitation Act of 1859 was a comparatively recent Statute. The special period of grace allowed thereby had only lately expired. The Settlement Officer in these circumstances set himself to enquire what lands in the village were in the possession of mortgagees and on what terms. If he had intended to prepare only a list of mortgages redeemable at the time when the list was drawn up, I think there would have been some enquiry into the dates of the various mortgages and the admissions of the parties on the point would have been recorded. I do not feel myself able to infer form those documents that the question whether or not any mortgage entered in this list was at that moment 60 years old was present at all to the mind of the Settlement Officer. What he drew up was a list of lands which had passed into the possession of the persons then holding them by way of a contract of mortgage, and he recorded the essential terms of that contract, *i. e.*, the names of the mortgagors and the mortgagees, the amount of the mortgage, the terms of the agreement between the contracting parties

as to the method of redemption. I do not believe that he intended to record an admission that each and every one of these mortgages was necessarily redeemable, in view of the recently passed Statute on the subject, on the date on which he drew up that list. His silence on the point, and the absence of any enquiry as to the date of any of the mortgages, seem to me almost conclusive. I am of opinion, therefore, that the admission of the mortgagees in this particular instance is no more than an admission that their possession in the year 1863 had its origin in a contract of mortgage, to which certain persons had been parties and of which the covenanted mortgage debt was a certain specified sum.

For these reasons I do not feel able to draw from the entry in question the inference which has commended itself to Mr. Justice Banerji.

As regards the subsequent conduct of the mortgagee it leaves me cold. Entries of this sort are ordinarily continued from Settlement to Settlement. The Settlement Officer sets himself to enquire who are the present holders of the mortgagee rights and on whom the proprietary rights, *i. e.*, the equity of redemption, have since devolved. He would in all probability consider it entirely outside his function to enter upon an enquiry as to whether or not any one of these mortgages had become Statute-barred. The case already referred to as *Fatimatulnissa Begum* v. *Sundar Das* (4) may be mentioned once more as an instance in which such entries were continued for many years after the right of redemption had in fact become barred. So far as my experience goes, I know literally of no case in which a mortgagee has raised, either before the Settlement Officer at Settlement or before the Revenue Authorities by way of application for correction of records, the point that his mortgagee possession has now ripened into full proprietary possession for want of redemption within the prescribed period of 60 years. So far as the ordinary Revenue Courts are concerned, I am confident that they would refuse to entertain such an application or to make any kind of enquiry into it. They would refer the person making it to the Civil Court; and I cannot say that in my experience I have even come across a case in which a mortgagee, under the circumstances suggested, has taken the initiative and find a suit for a declaration to the effect that he has acquired full proprietary rights. In the partition to which reference has been made, the co-sharer who was also the principal mortgagee, or perhaps the sole mortgagee, of the lands in question in this case was seeking to have his rateable share in the proprietary rights of the Mahal separated from the rest and made into a separate Mahal. The mortgage which we are considering was not a mortgage of a fractional share in the Mahal. It was a mortgage of specified plots. I find it very difficult to conceive of an application for partition so drawn up as to ask the Partition Court to form into a separate Mahal lands representing the applicant's fractional share in the proprietary rights of the Mahal as a whole and at the same time to take out of the Mahal of the non-applicants for partition certain specified plots and add them to the Mahal of the applicant, on the ground (1) that they were in possession of the applicant, and (2) that he had become by virtue of prescription the owner of those specified plots, over and above his rateable share in the proprietary rights of the Mahal as a whole. I am not prepared to say that such an application would be impossible under the Local Revenue Act, although I conceive it would raise serious difficulties regarding the apportionment of revenue between the two Mahals, but it is sufficient for my present purpose to say that I think it very unlikely that the applicant for partition would have thought of coming before the Partition Court with such a claim and that his failure to do so does not seem to me a piece of conduct on his part which in any way suggests an admission that the mortgage in question was still redeemable.

For these reasons I must record my opinion that this appeal ought to be allowed, the order of remand set aside and the decree of the first Court dismissing the plaintiff's suit restored with costs throughout.

WALSH, J.—In my judgment this is a plain case. The question of law arises in an appeal from a remand order. The plaintiffs sued for redemption of a mortgage the date of which neither they nor anybody else knows. They alleged that it was made between the years 1833 and 1839. It was, therefore, *prima facie* Statute-barred. In

order to overcome this difficulty they further alleged that the mortgagees had given an acknowledgment within section 19 of the Limitation Act which took the case out of the mischief of the Statute both in 1839 and in 1863. The case on the acknowledgment of 1839 broke down. An acknowledgment was given by the mortgagees in 1853. The question is whether there is any evidence that that acknowledgment was given within sixty years of the date of the mortgage or whether it was otherwise sufficient in law. The Munsif held that the plaintiffs had failed to prove the mortgage relied upon and had failed to prove a valid acknowledgment. The lower Appellate Court disagreed with him and remanded the case for other issues to be determined. The question is whether that order is right. The lower Court decided, to quote its own language, that "There is no oral or documentary evidence worth the name to prove the exact or approximate date of the mortgage. There is no doubt the mortgage was in existence in 1839, but there is no evidence that it was executed between the years 1833 and 1839. It has not found as a fact that the mortgage was executed within 60 years of 1863." It could hardly with propriety have done so, having held that there was no evidence to support such a finding. It merely held that the acknowledgment was given within 60 years of 1839 when the mortgage was subsisting and that such an acknowledgment was sufficient. This is a conclusion of law and, in my opinion, is untenable, and, therefore, the appeal ought to be allowed. All the evidence in the case is equally consistent with a mortgage which was 60 years old and also with a mortgage which was not 60 years old in 1863. The principle involved was settled in 1889 in *Paramanand Misr* v. *Sahib Ali* (1), when a Full Bench decided that in a case for redemption which pre-supposes the lawful possession of the defendant, the plaintiff must show in his plaint and prove at the trial that he had a subsisting title at the date of the suit. In that case the plaintiffs alleged a mortgage-deed which they did not produce and of which they were unable to give the date. It was held that there was no *prima facie* evidence that the mortgage had been made in 1826, which date alone would have brought it within 60 years of the suit. Similarly in this case there is no *prima facie* evidence that the mortgage alleged by the plaintiffs was made between 1833 and 1839 or within sixty years of the acknowledgment relied upon. That Full Bench case has been followed in several others, and, in my opinion, is binding upon this Court. It is at any rate too late to depart from it even if one were disposed to do so, which I am not. The same principle was applied to a case of an acknowledgment in *Khiali Ram* v. *Taik Ram* (5) by my brother Piggott and Mr. Justice Lindsay. I can find nothing in the cases cited to us on behalf of the respondents which is inconsistent with the principle thus affirmed.

If it is said that the Full Bench case reported as *Paramanand Misr* v. *Sahib Ali* (1) did not deal with the question of acknowledgment. The answer seems to me to be this. When the plaintiff sues for redemption, it does not matter for the purpose of limitation whether he relies upon the original mortgage contract or upon an acknowledgment which has given him a fresh lease of life. In either case he has to show that his claim is not barred by efluxion of time. The dicta in *Dip Singh* v. *Girand Singh* (6) also relied upon by the respondents merely stated on whom, in the special circumstances of that particular case, the burden of proof lay. The more recent case relied upon of *Kamla Devi* v. *Gur Dayal* (3), reported not in the authorised reports but in 17 Allahabad Law Journal, page 330, is in my opinion a finding of fact which lays down no principle. The lower Courts had held that the acknowledgments were not shown to have been made within 60 years of the date of the mortgage. The High Court by a two-Judges Bench consisting of the Hon'ble the Chief Justice and my brother Banerji overruled the Courts below and said, to quote the exact terms of the judgment, "Under the circumstances...we ought to hold that the acknowledgments were given before the expiration of sixty years from the date of the mortgage". I agree with my brother Piggott that the express language of section 19 of the Limitation Act contemplates the possibility of an

(5) 36 Ind. Cas. 452; 33 A. 540; 14 A. L. J. 834.
(6) 26 A. 313; 1 A. L. J. 1; A. W. N. (1904) 53.

acknowledgment of liability given after the expiration of the statutory period and shows by its terms that a plaintiff, before he can succeed upon an acknowledgment at all, must establish that it was made before the expiration of the statutory period. In this case it is not suggested that he has established that fact by any direct evidence. In my opinion no inference can be drawn from the acknowledgment, however fully it may have admitted liability, so far as the actual date of the original mortgage is concerned. It ought not to be presumed that people of the agricultural class in 1863 could not have done otherwise than know the terms of the recent Statute of Limitation of 1859. As is pointed by their Lordships of the Privy Council in a somewhat similar case to this, reported as *Fatimatulnissa Begum* v. *Sundar Das* (4), people may admit liability even though a Statute has actually barred it, but such an admission is ineffectual in law by the express terms of the Statute which we have to apply. The only inference which I feel at liberty to draw from the argument of the case before us, and I have no hesitation myself in drawing it, is that so far from this mortgage having been made, as the plaintiff consistently alleged, between 1833 and 1339, it was almost certainly made, as appears from the Settement Records, anterior to 1833. I cannot resist the feeling that to uphold the decision of the Court below would be to introduce uncertainty and vacillation as to the evidence requisite for making an accurate guess of a date which is not proved in evidence and would leave the decision of these cases largely a matter of chance. I would further observe that inferences as to the probable conduct of people in matters of business in the year 1863 are not particularly easy to draw by those who are living under the conditions of 1920, and there is always a danger of inferring that the only probable and reasonable conduct of an individual is the course which you yourself would have taken. It is for this reason that I think my brother Piggott, certainly I, concurred in referring the discussion of this case to a larger Bench. In my judgment the appeal ought to be allowed and the suit dismissed with costs.

BY THE COURT.—In accordance with the decision of the majority of the Bench the order of the Court is that this appeal be allowed, the order of the Court below be set aside and the decree of the Court of first instance be restored with costs in all Courts.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1331 OF 1918.

May 26, 1920.

Present:—Mr. Justice Das.

RAMYAD PANDE—PRINCIPAL DEFENDANT—APPELLANT

versus

GENDA TEWARI AND OTHERS—PLAINTIFFS AND HARIHAR PROSAD TEWARI—DEFENDANT—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 105A, 109—Decision under s. 105A, whether bars suit for ejectment against person not party to proceedings.

A decision in a proceeding under section 105A of the Bengal Tenancy Act, that certain persons are tenure-holders, does not bar a suit by those persons against certain other persons who were not parties to the proceeding under section 105A for ejectment of the latter on the ground that they are mere trespassers. [p. 993, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Appellant.

Mr. *Parmeswar Dyal*, for the Respondent.

JUDGMENT.—The defendants are the appellants before me and they were recorded as *raiyats* in the finally published Record of Rights, the plaintiffs having been recorded as tenure-holders. The Maharaja of Dumraon as the superior landlord brought a proceeding under section 105 of the Bengal Tenancy Act for settlement of rent against the plaintiffs in respect of the land of which they were recorded as tenure-holders. In that proceeding the plaintiffs complained under section 105A of the Bengal Tenancy Act that although they were in fact *raiyats* and not tenure-holders, they were wrongly shown in the Record of Rights as tenure-holders and invited the Revenue Officer to try and determine the issue as to which class of tenants they, the plaintiffs, belonged,

RAMYAD PANDE *v.* GENDA TEWARI.

The Revenue Officer tried the issue as to the status of the plaintiffs under section 105A of the Act and came to the conclusion that the plaintiffs had been properly recorded as tenure holders. It is important to remember that the proceeding just mentioned was a proceeding between the Maharaja and the plaintiffs to which the defendants were not parties, and the only point decided in that proceeding under section 105A of the Act was that the plaintiffs were tenure-holders and not *raiyats*. The status of the defendants was not in issue in the proceeding before the Revenue Officer and was not adjudicated upon by him.

On the 13th January 1912 the plaintiffs instituted a suit against the defendants and also the Maharaja of Dumraon for the following reliefs:—

(1). That the Court may be pleased to hold that 10b. 13c. 13d. of land, as per numbers and boundaries given below, situated in Mauza Pandeypur Phek, Perganna Bhojepur, out of the *guzashta* land, forms the exclusive share of the plaintiffs, that they, the plaintiffs, are the *kashtkars* (cultivators) and *guzashtadars* of the said land and not tenure-holders, that the Settlement Officers have found the plaintiffs' tenure-holders contrary to law and custom and have improperly and contrary to the real state of things declared the defendants Nos. 1 and 2 as *raiyats* and have fixed a nominal rent, that the plaintiffs are entitled to recover possession of the land and to have their names recorded as *raiyats* in the *khata* papers, etc., that the entry made by the Settlement Officers is wrong and that the *khewat* has been wrongly and improperly prepared.

(2). That on the adjudication of the above points a decree for recovery of possession of the land in suit and for expunction of the name of the defendants Nos. 1 and 2 from the *khanapuri* papers and registration of the names of the plaintiffs as *kashtkars* and *guzashtadars* in the Record of Rights, by invalidating the *khewat* already prepared, may be passed in favour of the plaintiffs.

(3). That Rs. 176-10 6, the amount of produce for 1318 F. S. as per account given below, may be awarded against the defendants and that an order may be passed awarding future mesne profit up to the date of recovery of the possession, after ascertaining the same and realising Court-fees thereon.

That suit succeeded in the Court below, but was dismissed in this Court on the ground that section 109 of the Bengal Tenancy Act constituted a complete bar to the maintenance of that suit. The decision of Mr. Justice Atkinson, who delivered the judgment of this Court in the appeal arising out of the suit of the 13th January 1912, is reported as *Ram Dayal Pandey* v. *Genda Tewari* (1). It is quite clear that Mr. Justice Atkinson construed the plaint in that suit as a plaint for the rectification of the entry in the Record of Rights as regards the status of the plaintiffs, and in his view such a suit did not lie having regard to the clear provision of section 109 of the Act. It will be noticed that Mr. Pugh on behalf of the plaintiffs did put forward the argument that although he was not entitled to a declaration as to his status in opposition to the decision of the Revenue Officer in the proceeding under section 105A of the Act, still he was entitled to maintain an action in ejectment against the defendants on the ground that they were mere trespassers and had no title to the land. This argument was negatived by Mr. Justice Atkinson on the ground that every averment in the plaint was inconsistent with the relief, as, in his arguments, claimed by Mr. Pugh. Mr. Justice Atkinson took the view that the main relief sought in the plaint was declaration of the status of the plaintiffs as tenure holders, and he repudiated the suggestion of Mr. Pugh that the plaintiffs were entitled to let the plaint go by the board, and claim in the suit a relief which is after all a subsidiary relief. But the learned Judge did concede that if the plaint could be read as a plaint in an action in ejectment, section 109 of the Act would constitute no bar to such an action and the Court would be bound to try such a suit. In other words, the learned Judge left the question relating to the status of the defendants open as between the parties.

It is clear, therefore, that the question, whether the defendants have any title to the disputed land of which they are in possession or are mere trespassers and are liable to be ejected, has never yet been tried

(1) 37 Ind. Cas. 641, 1 P. L. J. 479; 3 P. L. W. 69.

in any of the Courts. In the proceeding before the Revenue Officer the defendants were not parties and their status was not drawn into controversy between the parties. The question was undoubtedly raised in the suit of 1912, but Mr. Justice Atkinson, having regard to the frame of the suit, refused to adjudicate on it and left the matter expressly open between the parties.

On the 31st of July 1916 the plaintiffs commenced the present action claiming therein the following reliefs: —

1. That it may be adjudicated by the Court that the principal defendants are trespassers in respect of the said land. The plaintiffs never admitted the principal defendants Nos. 1 to 3 as *raiyats*.

2. That the entry in the survey papers that the defendants Nos. 1 to 3 are *raiya's* in respect of the said land may be declared as wrong.

3. That the possession of the plaintiffs over the said lands, which they have acquired under a writ of delivery of possession after the decision of the Sub Judge, may be confirmed. If in any way it is proved that the plaintiffs are out of possession, their possession with mesne profits may be awarded.

3 (*a*). That *khas* possession may be awarded to the plaintiffs over the lands in dispute and that mesne profits from the date of dispossession up to the date of possession may be awarded on ascertainment thereof in the miscellaneous department.

4. That having regard to the survey proceedings if the possession of the plaintiffs and the *pro forma* defendants be considered joint, then the joint possession of the plaintiffs and the *pro forma* defendants may be confirmed. If they be found to be out of possession, then joint possession may be awarded to them.

5. That an injunction may be issued against the principal defendants restraining them until the disposal of this suit from interfering with the possession of the plaintiffs, which they had acquired under a judgment of the Court.

This suit was contested mainly on the ground that the decision of this Court in the previous suit operated as *res judicata* and was a complete bar to the maintenance of the present suit. The learned Munsif who tried the suit gave effect to the plea of *res judicata* and dismissed the plaintiffs' action. On appeal the learned Subordinate Judge has taken a different view on the question of *res judicata* and has remanded the suit to the Court of first instance for trial on merits. It is against this order of the learned Subordinate Judge remanding the case to the Court of first instance that this appeal is directed.

In this Court Mr. Susil Madhab Mullick on behalf of the appellants put forward two grounds as defeating the right of the plaintiffs to maintain the present suit. His *first* contention was that section 109 of the Act barred further inquiry into the subject and *secondly*, that the previous decision of Mr. Justice Atkinson operated as *res judicata* between the parties.

So far as the objection based on section 109 of the Bengal Tenancy Act is concerned, I am of opinion that it must be overruled. The present action is an action in trespass against the defendants. In such an action the status of the defendants is the relevant issue to be tried by the Courts. Now the defendants were not parties to the proceeding before the Revenue Officer, nor was the matter in controversy in this suit the subject of the proceeding before the Revenue Officer. I am of opinion, therefore, that section 109 does not constitute any bar to the maintenance of this suit. On the second question, the decision of Mr. Justice Atkinson may be relied upon either as an authoritative decision of this Court on a question af construction and therefore binding on me or as evidence in the case operating as *res judicata*. I have, however, to construe the plaint which has been filed in this action, and not the plaint which was filed in the suit of 1912. The plaint as filed in this action is clearly a plaint as in an action in ejectment. Mr. Susil Madhab Mullick asked me to compare the plaint filed in this suit with the plaint filed in the suit of 1912 and asked me pointedly where the difference between the two plaints was. The essential difference between the two plaints is that in the plaint of 1912 the plaintiffs asked for a declaration of their status as

cultivators and *guzashtadars* of the said land and made a distinct attempt to get behind the decision of the Revenue Officer in the proceeding under section 105A of the Act. No doubt they asked for recovery of possession of the land from defendants Nos. 1 and 2, but they asked for this relief as necessarily following or flowing from the declaration they sought, namely, that they were cultivators and not tenure-holders. Rightly or wrongly Mr. Justice Atkinson held that if it was incompetent to the plaintiffs, having regard to the proceeding under section 105A of the Act, to ask for a declaration of their status as *raiyats*, it was impossible for the Court to give any relief at all to the plaintiffs in a suit framed on the cause of action that they were *raiyats* and not tenure-holders. In the plaint in this suit they ask for ejectment of the defendants on the ground that the defendants are not *raiyats* but are trespassers. They do not ask for a declaration of their status as tenure-holders, and that is the essential difference between the two plaints. It is because they asked for such a declaration in the plaint of 1912 that Mr. Justice Atkinson dismissed their suit. Here they do not ask for that declaration but they seek to eject the defendants on the ground, not that the plaintiffs are *raiyats*, but that the defendants are not *raiyats* but are trespassers. It is, to my mind, clear that this issue, not having been allowed to be raised in the previous suit, must now be tried. I hold that the decision of the Subordinate Judge on this point is entirely correct. I would dismiss this appeal with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 52 OF 1918.

March 1, 1920.

Present:—Mr. Mittra, A. J. C., and Mr. Prideaux, A. J. C.

GULABDAS—PLAINTIFF—APPELLANT

versus

Musammat DHARMIN BAI AND ANOTHER —DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Mundit chela, *right of, to succeed—Adoption*—Mundit chela, *whether adopted son—Joint family*-*Father or manager, power of, to make Will—Son, birth of, effect of*—Girhast Bairagis—*Son, position of.*

There is no custom which authorises the succession of a *mundit chela* to the estate of the person making him a *chela*. [p. 998, col. 1.]

The fact that a person is made a *mundit chela* does not constitute that person an adopted son, and the mere fact that his father was present at the ceremony of his initiation as a *chela* does not convert the ceremony into one of adoption. [p. 998, col. 2.]

Where the head of a Hindu family governed by the Mitakshara Law makes a Will, the subsequent birth of a son, who thereupon becomes a co-parcener in the family estate, has the effect of rendering the Will inoperative and absolutely void and not merely voidable. [p. 998, col. 2.]

Among Girhast Bairagis a son acquires an interest by birth in the ancestral property of the father. [p. 1000, col. 2.]

Appeal against the decree of the Additional District Judge, Bilaspur, in Civil Suit No. 74 of 1916, decided on 31st March 1918.

The Hon'ble Sir *B. K. Bose*, Messrs. *V. Bose* and *S. C. Fone*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—Mahant Ramkrishnadas of Morza Lormi, Tahsil Mungeli, a Girhast Bairagi, owned the 28 villages in suit. He died on the 1st September 1912. The plaintiff's case is that he was born the second son of one Mohandas, also a Girhast Bairagi. Ramkrishnadas had lost several sons and he, therefore, asked Mohandas to give his son, the plaintiff, to him to be affiliated as a son and a Mundit Chela according to the law and practice obtaining in the community to which the parties belong. Accordingly on the 31st August 1907 the plaintiff was given by his natural father and mother to Ramkrishnadas, who adopted him as his son and made him a Mundit Chela. All necessary religious and ceremonial rites were performed, plaintiff

being given his present name Gulabdas. On the 13th November 1907 Ramkrishnadas executed a document in favour of the plaintiff, in which he stated that having in accordance with family custom and practice and usage made the plaintiff his Mundit Chela on 31st August 1907, he appointed him his successor and agreed that the plaintiff should have a right to his *ilaka* and all his moveable and immoveable property. The document states:—

"He will continue to hold such a right until I have children from my own wife and in case I have a son, by God's grace, from my own wife and he remains alive, he being my real son will have a right to the property mentioned above and the said Mundit Chela, namely, the said Gulabdas will not have a right to get the same. The said Gulabdas shall have a right of maintenance in this way: that Mouza Kudurtal in the aforesaid *ilaka*, which is this day in my possession, will be given to him in *muafi* on which he will maintain himself. That village will continue *muafi* among the children of Gulabdas also; Gulabdas and his children will have no right to any other thing but to the said village. * * * * If I am not alive and I do not leave any real son, my wife *Musammat* Rajkuarbai will be the owner of the villages in my possession and of the moveable and immoveable property. After her death the Mundit Chela, Gulabdas, will be the owner of it. This writing of my own will be lawful after my death. No one will have any right during my lifetime.

Signature of Mahand Ramkrishnadas

(He will be entitled to the *muafi* on my death. I will maintain him during my lifetime).

Signature of Ramkrishnadas."

A few months before Ramkrishnadas's death a son named Bhagwatdas was born to him by his wife *Musammat* Rajkuarbai. This Bhagwatdas died in or about December 1912 when only a few months old, and on his death his mother *Musammat* Rajkuarbai took possession of the estate as his heir, plaintiff continuing to live with her as a member of the family. She died on the 16th September 1913 and on her death the first defendant *Musammat* Dharminbai, another wife of Ramkrishnadas, a step mother of Bhagwatdas, took possession of the village in suit.

The plaintiff alleges that by virtue of his adoption the plaintiff became the brother of Bhagwatdas and on the mother's death was entitled to succeed to the property. The second defendant *Musammat* Falkuwar is the mother of the deceased Ramkrishnadas. As plaintiff is informed that defendant No. 2 had recently filed a suit against defendant No. 1 for the possession of the 23 villages on the ground that she is the nearest heir of the deceased Bhagwatdas, she is joined as a party here. Plaintiff asks for possession of the 28 villages: he in the alternative prays that if he is not entitled to this relief, he be awarded possession of Mouza Kudurtal.

The first defendant denied that the plaintiff had been adopted or taken as a Mundit Chela by Ramkrishnadas. It is admitted that Bhagwatdas was the heir-at-law of his father but defendant and her co-widow *Musammat* Rajkuar had been in joint possession of the property left by their husband on his death and continued to be in possession till *Musammat* Rajkuarbai's death, since when this defendant has been in sole possession. Ramkrishnadas was a Gharbari Bairagi and had long ceased to belong to the fraternity of Nihang or celebate Bairagis and consequently had no right to take a Chela and change the course of natural succession. Even supposing that Gulabdas had been taken as a Chela, he could not succeed to his Guru's property. Assuming that Ramkrishnadas had executed the document, Exhibit P-1, that document is a Will and as property was ancestral in Ramkrishnadas's hands, he had no authority to alter its legal and natural devolution. It was further contended that if the plaintiff had been adopted by Ramkrishnadas, then on the birth of Bhagwatdas his share in his adoptive father's property came to only 1/4th and he could claim nothing more than that.

For the second defendant the execution of Exhibit P-1 was denied and she adopted the statement of the first defendant with regard to the question of adoption and the making of a Mundit Chela. Bhagwatdas got the whole estate by survivorship on the death of his father and the second defendant succeeded to that estate on the death of *Musammat* Rajkuarbai. She had sued *Musammat* Dharminbai for possession of the estate

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Exhibit P-1 is the Will and, therefore, could not affect the ancestral property of the testator.

The lower Court finds that the plaintiff was not adopted as a son of Ramkrishnadas. The registered document of 13th November 1907 was held to be duly proved. Dealing with the contention that a Mundit Chela succeeds to the estate of the person making him such a Chela, the Court finds that this has not been established; the alleged custom was held not proved. The Judge considered that the case must be decided on the assumption that the parties are governed by the Mitakshara School of Hindu Law in respect of survivorship, and this rule prevented the document of the 13th November 1907 from operating on the death of Ramkrishnadas. Bhagwatdas got the entire estate by the right of survivorship; at his death it went to his mother Rajkuarbai and at her death to the paternal grandmother Fulkuwar. The plaintiff's case was dismissed.

We may note that the dispute between the defendants was decided in Suit No. 60 of 1916 on the file of the Additional District Judge, Bilaspur, Fulkuwar being held entitled to get the estate, and *Musammat* Dharminbai got Rs. 60 per mensem as maintenance therefrom. *Musammat* Dharminbai died during the pendency of this appeal which proceeded against *Musammat* Fulkuwarbai alone.

It is admitted in argument here that if the adoption is not proved, the plaintiff-appellant has no right to 27 villages but to only the village of Kudartal. It is not now disputed that Ramkrishnadas made the appellant his Mundit Chela, and it is argued that this fact is sufficient to constitute him an adopted son: the simple rites performed are sufficient to make him a son of Ramkrishnadas. We are not pressed by this argument. It rested on the appellant to show that the ceremonies of making him a Mundit Chela also made him an adopted son and his evidence certainly does not prove that.

The lower Court has in paragraphs 5, 6, 7, 8, 9 and 10 analysed the evidence produced to prove that the plaintiff was adopted by Ramkrishnadas. We have read that evidence. It is far from satisfactory and we agree with the lower Court that it does not prove the fact of adoption. The mere fact that appellant's father was present on the ceremony of initiation as a Chela does not convert the ceremony into one of adoption. Giving and taking as an adopted son is different from giving and taking as a Chela. It is clear from Exhibit P-1, the Will, that Ramkrishnadas never regarded the appellant as his adopted son but as a Chela. This finding concludes the appellant's case as regards the 27 out of 28 villages.

It is not here contended that the appellant's claim to the village of Kudartal rests on his position as a Mundit Chela. The claim is based on Exhibit P-1 dated 13th November 1907. We have no doubt that that document is a Will intended to take effect after the death of Ramkrishnadas. If the case is governed strictly by the Mitakshara Law applicable to a house holder and if Bhagwatdas by birth became a co parcener in the family estate, then the Will will cease to be operative; it was absolutely void and not merely voidable.

It is pressed upon us that even in a Hindu family governed by Mitakshara the head of a house can make provision for a pious object and can give away the co-parcenary property to a person having only a moral claim on the family. There are doubtless cases in which these gifts have been upheld: see *Appan Patrachariar* v. *Srinivasachariar* (1), *Anivilla Sundaramayya* v. *Oherla Sitamma* (2), *Narayana Annavi* v. *Ramalinga Annavi* (3), *Pugalia Vettor-ammal* v. *Vettor Goundan* (4), *Bachoo* v. *Mankorebai* (5). We concede that the father or manager of a joint family is competent to make a gift of a small portion of the property in favour of a male or female member of the family. But the principles enunciated in the cases above mentioned do not apply to a Will but only to a gift *inter vivos*.

(1) 40 Ind. Cas. 118; 40 M. 1125; 32 M. L. J. 364; 5 L. W. 544; (1917) M. W. N. 355; 21 M. L. T. 403.
(2) 10 Ind. Cas. 56; 21 M. L. J 695; 9 M. L. T. 469; (1911) 1 M. W. N. 422; 35 M. 628.
(3) 36 Ind. Cas. 48; 39 M. 587.
(4) 13 Ind. Cas. 475; 22 M. L. J. 321; (1912) M. W. N. 89; 11 M. L. T. 103.
(5) 29 B. 51; 6 Bom. L. R. 268.

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It is further contended that the infant Bhagwatdas was the only person who could contest the Will and that right of challenge died with him. Grandmother, not being a co-parcener nor a survivor but only an heir, cannot question the document. The answer to this is that if the strict Mitakshara Law applies, Bhagwatdas was a co-parcener with a right of survivorship and the Will, therefore, became inoperative on the testator's death. A member of an undivided family cannot bequeath his own share of the joint property, because on his death the right of survivorship is at conflict with the right of devise and the title of survivorship being prior title takes precedence to the exclusion of that of devise: *Vitla Butten* v. *Yamenamma* (6); and *Hanmant Ramchandra* v. *Bhimacharya* (7).

The difficult question remains whether a son of a Gharbari Gosain acquires an interest by birth in the property inherited by his father from the grandfather. If he does then the deceased had no right to make a Will giving one village to appellant and the suit must fail; if no such interest is acquired by the son, there is no reason why the effect should not be given to the wishes of the testator.

It is contended that it is very doubtful whether the doctrine of special accrual of right by birth applies to Bairagis. Ramkrishnadas's ancestors were admittedly Nihange, that is ascetics, and the question is if they take to marriage, do they accept the principles of ordinary Hindu Law?

It is argued that as a Bairagi can dispose of his property as he likes, no Chela having any right to such property and there being no acquired interest by right of Chelaship in the case of ascetic Bairagis, it would be unsafe to hold that a son acquires a vested right by birth. We think that a specific issue on this point should have been framed and, therefore, remit the following issue for trial:—

"Whether or not among Gharbari Gosains a son acquires an interest by birth in the ancestral property of the father?

The lower Court will take pleadings bearing on this issue and such evidence as the parties may adduce and then return the record with its finding. We decide no question as to the question of burden of proof at present as the matter has not been argued. Parties should be asked to give instances where right to partition has been enforced by a son in the lifetime of his father. The record will be returned by the 23rd December 1919; objections will be filed within 7 days from that date and the appeal will be heard on the 6th January 1920.

After the record was returned to the Judicial Commissioner's Court by the lower Court with a finding on the issue framed and submitted to it, the former Court delivered the following

JUDGMENT.—The facts of the case are sufficiently given in our judgment dated 29th October 1919. The issue we framed, namely, whether or not among Gharbari Gosains a son acquires an interest by birth in the ancestral property of the father, has now been decided, the lower Court holding that on the evidence on record the issue must be decided in the negative. The parties to this suit are really Bairagis and not Gosains. These are two different sects, the former being the worshippers of Vishnu and the latter of Shiva. In the arguments before us the terms Bairagis and Gosains have been treated as synonymous. We should have framed an issue whether or not among Girhast Bairgis a son acquires an interest by birth in the ancestral property of the father, but the mistake has misled nobody. The parties knew exactly what had to be established and what evidence in favour of or against the point put in issue was wanted.

The first witness for the plaintiff after remand, Gokuldas, states that in the sect a son cannot take his share of his father's property during the father's lifetime. He mentions two instances where sons demanded their shares but had been refused. Witness seems to have no personal knowledge. He states that Bairagis follow all the ceremonies in marriages and other functions as the Brahmins. Mohandas (P. W. No. 14) knows of no such right appertaining to Bairagis' sons and no case of partition in the lifetime of the father. He refers to one Dhirandas who partitioned the ancestral

(6) 8 M. H. C. R. 6.
(7) 12 B. 105; 12 Ind. Jur. 274; 6 Ind. Dec. (N. S.) 156.

property with his brother. The next witness is Rameharandas (P. W. No. 15). He gives much the same evidence, but he is a Nihang Bairagi and admittedly knows nothing about Girhast Bairagis. He is apparently not a resident of the Bilaspur District. Balbhadraban (P. W. No. 16) is a cousin. He states that among Gosains a son has no right to partition ancestral property in the father's lifetime. He speaks to a Gosain mortgaging his share with him and the witness got his share foreclosed. He says that 20 or 22 years ago there were two suits where sons had demanded a partition of the ancestral property in their fathers' lifetime and both these suits were dismissed.

For the defendant five witnesses were examined after remand. Laldas (D. W. No. 13) states that Govardhandas, Girhast Bairagi of Gidhua, divided his six ancestral villages with his brother Laludas. Govardhandas had two sons, Jagannathdas and Dayaramdas. These insisted on getting their shares of the ancestral property from the father and the father and two sons got a village. He says that there was one Dharamdas of Khairwa who had 5 sons and who gave a share of his village to each son. He does not know whether mutation had been effected in the cases referred to. The next witness Ram Ratandas (D. W. No. 14) is a Bairagai. He says that he has a field of 53 acres. He has also three sons who separated from him three years ago, and they insisted on having their shares in the property. He states that it is a custom of the family that when the members begin to fight among themselves a partition is effected. Sons have vested rights in the ancestral property. The man is an insolvent. Sitaramdas (D. W. No. 15), who is not a born Bairagi but has become a Girhast Bairagi, states that Girhast Bairagis follow the Hindu Shastras. He cannot quote chapter or verse in support of his statement, The next witness is one Ganeshprasad (D. W. No. 16), the Pleader's clerk whose father was in the service of the late Mr. S. C. Mittra, Pleader. He speaks to a copy of the plaint in Civil Suit No. 6 of 1901 in the Court of the Civil Judge, Bilaspur, which was signed by Ramkrishnadas. He sued for a declaration that he was the sole owner of the Lormi Taluq. In the plaint it is stated that the villages were undivided property. Ramkrishnadas's signature is also spoken to by Madho Babu (D. W. No. 17). Ganeshprasad also refers to a rejoinder in Civil Suit No. 82 of 1911, This rejoinder is dated the 12th October 1911 and is written by the witness and is signed by the agent of Ramkrishnadas and Mahant Gurubdas and by the Pleader Mr. Mitra. This rejoinder is on behalf of the plaintiff in that case and states *inter alia* in paragraph 7 that it is denied that Laxmidas by a Will dated the 18th November 1896 made the grant of the village absolute in favour of defendant No. 1 and as the Taluqa of Lormi was the ancestral property of Laxmidas and not his self-acquired property he had no power to make any disposition of the villages by a Will. Exhibit 2 D 10 is a copy of the Will dated the 9th April 1892, referred to in Exhibit 2 D 19, the plaint in Civil Suit No. 6 of 1901. The Will admitted in the plaint of 18th November 1896 and denied in the rejoinder is not on record.

We think the rejoinder amounts to an admission by Ramkrishnadas that because the Ilaqa was ancestral property Laxmidas could not will it away. Therefore, as far as the present case is concerned we start with an admission by the predecessor of the plaintiff that there is no power to will away ancestral property when there are sons in existence. Looking at the evidence in this light we find the plaintiff has failed to prove the custom relied upon, namely, that a son has no vested interest by birth in ancestral property, so far as this family is concerned. That being so, the claim as regards the village of Kudurtal also fails.

The result is that the appeal is dismissed. We consider that in the circumstances of the case the parties should bear their costs in both Courts.

Appeal dismissed.

JITENDRA KUMAR PAL *v.* MUKSHODA CHARAN DAS.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2808 OF 1916.

January 30, 1920.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

JITENDRA KUMAR PAL CHOWDHURI —DEFENDANT No. 14—APPELLANT

versus

MUKSHODA CHARAN DAS AND OTHERS —PLAINTIFFS—RESPONDENTS.

Appeal—Appellate Court, finding by, that transaction is not benami*—Remand—Same Court, finding by, that transaction is* benami*—Second finding, whether justified.*

Plaintiff sought to recover possession of certain lands on the strength of a Patni Settlement in his favour. His suit was dismissed on the ground that the Patni was a *benami* transaction. The Appellate Court, however, found for the plaintiff that the Patni was not a *benami* transaction. Defendant appealed to the High Court, which remanded the case for a finding whether the Patni fell within the class of tenures described in section 71 (*b*) of the Assam Land and Revenue Regulation. The lower Appellate Court found that the Patni was not *bona fide* and, therefore, did not come under the foregoing section. The plaintiff objected that that Court, having already found that the Patni was not *benami*, had no power to arrive at a contrary finding:

Held, that the finding was justified, inasmuch as in arriving at its previous finding the Court apparently had not taken all the facts into consideration. [p. 1003, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, 1st Court, Sylhet, dated the 30th of August 1916, reversing that of the Munsif, 1st Court at Habiganj, dated the 5th of July 1915.

FACTS appear from the judgment.

Babu *Brojalal Chakrabarty* (with him Babu *Hemandra Kumar Das*), for the Appellant—Defendant No. 14 is the appellant. The plaintiff sought to recover possession of the disputed land as *putnidar*, under a *putni patta* granted by the proprietors of the estate in Jaista 1320 B. S., corresponding to May 1913. The estate was sold for arrears of revenue in 1907 and was purchased free from incumbrances by one Garucharan and others. In 1909 the estate was again sold for arrears of revenue and the outgoing proprietors purchased it in the *benami* of one Prokash. In 1912 Prokash executed a conveyance in favour of the outgoing proprietors. In September 1913 the estate was sold for arrears of revenue for the third time and was purchased free of incumbrances by one Sham Sundar and two others.

These purchasers recognised the plaintiff's *patni* by receiving rents from him. The defendants were in adverse possession of the disputed land for more than 25 years. Neither the purchasers of the estate of 1907 nor those of 1913 chose to annul this incumbrance.

I submit that the plaintiff as *putnidar* has no right to annul the incumbrance of the defendants. The purchasers of 1909 had no right to annul incumbrances and, therefore, their lessee, the plaintiff, had no such right. The purchasers of 1913, by recognising the *putni* right of the plaintiff, did not confer any right on him to annul incumbrances.

[CHATTERJEA, J.—The plaintiff can now take a grant from Sham Sundar and drive you out.]

That might be so. But the title with which the plaintiff came to Court failed.

The *putnidar* (plaintiff) has not acquired the right of the auction-purchaser so as to be able to annul the incumbrances. The *putni* is simply allowed to stand. There is no fresh grant from the auction-purchaser to the *putnidar*. The auction-purchaser could have passed such an interest only by a registered instrument. Whatever interest the *putnidar* had was the interest which he acquired by the lease of Jaista 1320. The position of the *putnidar* is as good or as bad as mine. He has acquired no special advantage by the subsequent revenue sale. The purchasers at that sale have only accepted rent from him and thereby merely recognised his *putni*.

The defendants have acquired a good title by adverse possession which could not be defeated by the plaintiff.

Babu *Ramchandra Mazumdar* (with him Babu *Gopal Chandra Das*), for the Respondents.—Accepting for the sake of argument that Prokash was a *benamdar* of the outgoing proprietors, the right of the auction purchaser of 1907 continued in themselves and was not affected by the revenue sale of 1909 because the position of the original proprietors was not changed. And, therefore, the *putnidar* had the same right Recognition of the *putni* by the purchasers at the third revenue sale amounted to a recognition by the purchasers of the right of the *putnidar* to annul incumbrances.

JITENDRA KUMAR PAL *v.* MUKSHODA CHARAN DAS.

[CHATTERJEA, J.—By the revenue sale of 1913 only the purchasers had the right to annul incumbrances. How does this right of the purchasers pass to the *putnidar*?]

As soon as the right of the *putnidar* is confirmed by the purchasers, their right to annul incumbrances passes to the *putnidar* because the right to annul incumbrances is a right conferred on the *putnidar* by the *putni* grant itself.

The adverse possession set up by my learned friend is an incumbrance which is voidable and not void. Had it not been voidable but void, a fresh grant from the purchasers of 1913 would have been necessary to enable the *putnidar* to exercise the right to annul incumbrances. The right to annul incumbrances is a part of the *putni* right and not a separate right.

[CHATTERJEA, J.—*A* grants a *putni* to *B* by which he gives *B* the right to annul incumbrances which he himself had. If the right of *A* if sold at a revenue sale, does the right of *B* to avoid incumbrances continue?]

That would depend, I submit, upon the terms of the *putni* grant.

[CHATTERJEA, J.—Does the right to annul incumbrances subsist in the proprietor after a revenue sale?]

I submit, not.

[CHATTERJEA, J.—If then the right of the proprietor does not subsist, how can the right subsist in the *putnidar*?]

That would depend, as I have already submitted, upon the will of the auction-purchaser.

[CHATTERJEA, J.—The effect of your argument would be that the new purchaser at the revenue sale would have no such right?]

I submit that would not be so, because the new purchaser could have avoided the *putni* itself and along with it the right of the *putnidar* to avoid incumbrances.

Refers to *Mohim Chandra Deb* v. *Pyari Lal Das* (1). Limitation would run from the date of the sale of 1913 and Article 142 of the Limitation Act would apply.

As regards the finding by the Court below after remand, I submit that the Court below had no power to arrive at the finding that the *putni* settlement was not a *bona fide* one, in the face of the finding by the lower Appellate Court (before remand) that the *putni* was not *benami*. Moreover the defendant cannot question my *putni patta* and say that it was without consideration.

(1) 39 Ind. Cas. 218; 21 C. W. N. 537; 44 C. 412; 25 C. L. J. 99.

Babu *Hemandra Kumar Das* briefly replied.

JUDGMENT.—The plaintiff-respondent sought to recover possession of the disputed land as *putnidar* under the *putni patta*, dated the 23rd May 1913, granted by the then proprietor of the estate. It appears that one Prokash Saha purchased the estate at a sale for arrears of revenue in 1909 and sold the same to one Diwanat Ram and others. The plaintiff obtained the *patni* from the latter, and brought the suit out of which this appeal arises, to recover possession of the disputed land from the defendants who were in adverse possession thereof for about 25 years, alleging that Prokash Saha had purchased the estate free from incumbrances. The suit was dismissed by the Court of first instance on the ground that Prokash Saha was *benamdar* for the outgoing proprietors, and that the plaintiff's *patni* was also a *benami* transaction. On appeal the lower Appellate Court, not dissenting from the finding of the Court of first instance on the first point, was of opinion that the defendants' incumbrance had been annulled by a previous sale which took place in 1907 which was within 12 years of the suit, and as there was no reliable evidence to show that the plaintiff was *benamdar* for Diwanat Ram and others, decreed the suit.

It appears that subsequent to the revenue sale held in 1909 and the Patni settlement under which the plaintiff claims, there was another revenue sale held on the 24th September 1913 at which certain other persons were the purchasers and they had recognized the plaintiff's *patni* by receiving rent from him. In second appeal by the defendant No. 14, it was contended that even if the purchaser at the sale held in 1913 could have avoided the incumbrance of the defendants, the mere receipt of rent from the *patnidar* did not confer any rights upon the plaintiff which would entitle him to question the rights of the defendants, whatever they may be. On behalf of the plaintiff respondent it was contended that he derived his rights under the Patni settlement from the assignee of the purchaser at the previous sale (held in 1909) and that the *patni* was a tenure which could not be

avoided under section 71 (*b*) of the Assam Land and Revenue Regulation. The case was, therefore, remanded for a finding whether the *patni* of the plaintiff falls within the class of tenures described in section 71 (*c*) of the Assam Land and Revenue Regulation.

The Court below has arrived at the finding that the Patni settlement was not *bona fide*, and, therefore, does not come under section 71 (*c*) of the Assam Land and Revenue Regulation. It is contended on behalf of the respondent that the Court below had no power to arrive at the finding that the Patni settlement was not a *bona fide* one, in the face of the finding of the lower Appellate Court (before remand) that the *patni* was not *benami*. It is true that the lower Appellate Court before remand did find that the *patni* was not *benami*, but that Court (before remand) does not appear to have taken into its consideration all the facts upon which the Court of first instance found that the transaction was not *bona fide*. On remand the learned Subordinate Judge, in deciding the question whether the *patni* falls within the class of tenures described in section 71 (*c*) of the Regulation, took all the facts into his consideration. It is further contended on behalf of the respondent that it is not for the defendant to impeach the Patni settlement merely on the ground that there was no consideration for it. But the learned Subordinate Judge has found that the "Creation of the *patni p tta* was merely a contrivance to secure the land in suit, so that any subsequent auction purchaser of the estate may not venture to stretch his hands on the same, it being valuable property in the heart of a town and yielding an income from the several Casha holders."

But apart from that, we think the decision of the lower Appellate Court is erroneous. It holds (differing from the finding of the Court below on the point) that the purchasers at the sale of 1907 were not *benamdars* for the outgoing proprietors, and that the incumbrance of the defendants came to an end in 1907; so that the suit having been brought within 12 years of the auction-sale was not barred. But incumbrances are not *ipso facto* annulled by a sale, and the purchasers at the sale held in 1907 did not annul the incumbrance. So far as the defaulters (*i. e.*, the purchasers at the sale held in 1907) were concerned, their right came to an end by the sale of 1909, and along with it the power to annul incumbrances. If the purchasers at the sale held in 1909 had not purchased the estate free from incumbrances, we do not see how they could exercise the right of annulling incumbrances which the purchasers at the previous sale (held in 1907) had, and which, as stated above, came to an end by the sale held in 1909. And if they could not exercise such rights, the plaintiff cannot have such right by virtue of a Patni settlement obtained from their assignees. The plaintiff can only claim the right if their lessors who derived title under the purchase of 1909 had purchased the estate free from incumbrances.

It is true the purchasers at the last sale (of 1913) acquired the estate free of incumbrances, but they merely recognised the plaintiff's *patni* by receiving rent from him. They themselves did not exercise the right to annul incumbrances, nor confer such right on the plaintiff. The plaintiff's *patni* was confirmed by receipt of the rent, but he acquired no right to annul incumbrances.

We are accordingly of opinion that the decree of the lower Appellate Court must be set aside, and that of the Court of first instance restored with costs.

Appeal accepted.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 264 OF 1920.

May 25, 1920.

Present:—Mr. Shadi Lal, Chief Justice.

NUR MOHAMMAD—DEFENDANT—APPELLANT

versus

GAURI SHANKAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 23, Sch. I, Art. 120—Injunction, suit for—Continuing wrong—Limitation—Terminus a quo.

Article 120 of the Limitation Act, being the residuary Article, prescribes the period of limitation for a suit for injunction, but the *terminus a quo* is the date when the right to sue accrues. [p. 1004, col. 1.]

AMJAD HUSSAIN v. SHYAM LAL.

Plaintiffs sued for the issue of a perpetual injunction restraining defendant from discharging rain water on to the roof of the plaintiffs' shop through a *parnala*:

Held, that the plaintiffs had a fresh cause of action on each occasion when the defendant discharged water through the *parnala* on the plaintiffs' roof and that they were entitled to rely upon the last occasion when this was done as the starting point of limitation.

Second appeal from the decree of the District Judge, Ludhiana, dated the 25th August 1919, affirming that of the Honorary Munsif, 1st Class, Ludhiana, dated the 22nd April 1919.

Syad *Mohsin Shah* for the Appellant.

Mr. *Jai Gopal Sethi*, for the Respondents.

JUDGMENT.—The District Judge, concurring with the Munsif, has granted the plaintiffs a permanent injunction restraining the defendant from discharging the water of his *chobara* through a *parnala* on the roof of the plaintiffs' shop. The District Judge finds that the *parnala* was constructed probably before 1903, but that the defendant had failed to establish that it existed more than 20 years prior to the institution of the suit, or that he has acquired a prescriptive right of easement by user.

The defendant has preferred a second appeal to this Court, and the crucial point for consideration is whether on the findings set out above the suit brought by the plaintiffs was barred by time. Mr. Mohsin Shah for the appellants contends that the suit is governed by the provisions of Article 120, and that as it was brought after the expiry of six years from the date when the *parnala* was first used by the appellant for discharging the water, it was barred by time. Now it is true that Article 120, being the residuary Article, prescribes the period of limitation for a suit for injunction; but the *terminus a quo* is the date when the right to sue accrues. Now, section 23 of the Limitation Act provides that in the case of a continuing wrong a fresh period of limitation begins to run at every moment of the time during which the wrong continues. It seems to me that the plaintiffs had a fresh cause of action on each occasion when the defendant discharged water through the *parnala* on to the plaintiffs' roof, and that they are entitled to rely upon the last occasion when this was done as the starting point of limitation, unless the defendant has acquired an indefeasible right of easement by 20 years' enjoyment. A case very similar to the present one is to be found in *Ramphul Sahoo* v. *Misree Lall* (1), where a suit brought to have a drain closed on the ground that it passed through the plaintiffs' land was held to be within time, because each trespass on the plaintiffs' land was found to constitute a fresh cause of action. To the same effect is a judgment of the Allahabad High Court in *Sheo Prasad Sonar* v. *Mangar Manhar* (2). Accordingly I hold that the suit is within time.

Mr. Mohsin Shah further urges that as the plaintiffs have not suffered any substantial injury, they should have been granted, not a mandatory injunction, but a monetary compensation. This point was not raised in either of the Courts below, the reason probably being that an injunction was the proper remedy in a case of this kind; and it cannot be raised for the first time in the Court of Second Appeal. It is to be observed that the contention does not find any express mention even in the memorandum of appeal preferred to this Court.

For the aforesaid reasons, I dismiss the appeal with costs.

Appeal dismissed.

(1) 24 W. R. 97.
(2) 25 Ind. Cas 185; 12 A. L. J. 1150.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 274 OF 1919.

May 4, 1920.

Present:—Mr. Justice Das.

Syed AMJAD HUSSAIN AND OTHERS—APPELLANTS

versus

SHYAM LAL AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 181—Execution of decree—Sale set aside—Fresh application for execution—Limitation—Appeal, pendency of, whether bar to applying for execution.

Where a sale held in execution of a decree is set aside, the decree-holder has a period of three years

from the date of the order setting aside the sale to again apply for execution. The fact that the order forms the subject of an appeal is no bar to the making of an application for execution during the pendency of the appeal within the aforesaid period of three years [p. 1005, col. 2; p. 1006, col. 1.]

Appeal against the order of the District Judge, Gaya.

Mr. *Nawal Kishore Prasad II*, for the Appellants.

Mr. *L. N. Singh*, for the Respondents.

JUDGMENT.—This appeal is directed against an order of the District Judge of Gaya allowing execution to proceed and disallowing an objection of the judgment-debtors that execution was barred by limitation. It appears that on the 14th July 1909 the decree-holders presented their second application for execution. On the 14th December the properties were sold in execution of the decree which had been obtained by the decree-holders on the 24th May 1904. On the 13th January 1910 the judgment-debtors applied for setting aside the sale and on the 12th February 1910 the sale was actually set aside and the execution case was dismissed. On the 10th December 1912 the decree-holder presented his third application for execution by a sale of the identical properties which had once been sold. On the 14th December 1909 the judgment debtors objected to this execution proceeding on the ground that it was barred by limitation under section 48 of the Code of Civil Procedure. While that objection was actually being discussed in the Courts, the execution proceeded and the properties were actually sold in execution of the decree. It was ultimately decided by the High Court on the 21st December 1916 that the decree-holder's application for execution presented on the 10th of December 1912 was not barred by limitation inasmuch as that application was to be regarded as a continuation of the second application for execution. The late Chief Justice of this Court delivering the judgment said as follows: "It may often happen that proceedings taken upon an application for execution remain pending in an original Court or Court of Appeal for several years and may result in an order setting aside a sale of immoveable property many years after the application for execution was presented and many years after any of the dates indicated in the third column of Article 182 of the First Schedule to the Limitation Act. This has often been pointed out by the Courts and in order to get over the difficulty, some Courts have held that a subsequent application should be treated as an application made in continuation of the application made before the sale and other Courts have held that such an application is governed by Article 181 of the First Schedule to the Limitation Act and that the decree-holder is entitled to three years from the date on which the sale is set aside within which to make a further application. It seems certain that the Legislature could not have intended that further execution of a decree should be prevented by the fact that execution proceedings remained pending in the Courts for many years." It seems to me that that decision is based on the fact that the third application for execution was regarded as a continuation of the second application for execution and as it was filed within three years from the date when the sale was set aside, the Court properly regarded the application as within time.

Although the question of limitation was discussed from Court to Court until it was finally decided by this Court on the 21st of December 1916, the execution, as I have said before, proceeded with the result that the properties were sold in pursuance of the petition presented by the decree-holder. That sale was again set aside on the 5th August 1913, that is to say, long before the question of limitation was actually decided by this Court. The present application for execution was filed on the 19th December 1918.

It seems to me that this application is clearly barred by limitation. The sale was set aside on the 5th August 1913 and under Article 181 of the Limitation Act the next application for execution should have been filed within three years from the 5th August 1913 It was urged, however, on behalf of the decree holder that as the question of limitation was not finally decided until the 21st of December 1916, it would have been of no use to the decree-holder to present an application for execution until that question was finally set at rest. In my view, this argument is not a sound one. The fact that the question of limitation had not been decided by this Court

constituted no bar to the decree holders' proceeding with their application for execution. It was no bar in law and it could not be a bar in fact. There was nothing to prevent the decree-holders from presenting their application for execution asking the Court not to actually deal with it until the question was decided by the High Court. As a matter of fact the question of limitation had been raised by the judgment-debtor as soon as the decree-holders presented their third application for execution on the 10th of December 1912. But notwithstanding the objection raised by the judgment debtor, the decree-holders did proceed with the execution with the result that the properties were actually sold in execution of the decree, a sale which was ultimately set aside on the application of the judgment-debtor. In my view as there was no bar at all to the decree holders' proceeding with their execution at any time within three years from the 5th August 1913, it must be held that their application presented on the 13th of December 1918 was barred by limitation. I would set aside the judgment pronounced by the learned District Judge and dismiss the application for execution. The appellants are entitled to their costs, which I assess at two gold *mohurs*.

Application dismissed.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 295 OF 1919.

May 5, 1920.

Present:—Mr. Justice Tudball and Mr. Justice Sulaiman.

BALWANT SINGH—DECREE HOLDER—APPELLANT

versus

BUDH SINGH AND OTHERS—OBJECTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 181—Execution of decree—Interposition of bar to execution—Fresh application, when to be made—Limtiation.

Where a bar is interposed which prevents the holder of a decree from carrying on execution, as for instance, where execution is restrained by injunction, he must, to save execution being barred by limitation, come into Court within three years of the removal of the bar under Article 181 of Schedule I to the Limitation Act. [p. 1007, col. 1.]

Execution first appeal against the decree of the Subordinate Judge, Meerut, dated the 5th May 1919.

Dr. *S. N. Sen* and Mr. *N. Upadhya*, for the Appellant.

Mr. *P. L. Banerji*, and Dr. *P. N. Katju*, for the Respondents.

JUDGMENT.—This appeal arises out of an application in execution proceedings. The appellant obtained a decree No. 38 of 1912 for sale of the hypothecated property on the 8th of July 1912. This was made absolute on the 29th August 1913. The first application for execution was made on the 18th of April 1914. While this application was pending, the objectors instituted a suit No. 523 of 1914 on the 8th of December 1914 for a declaration that the decree in Suit No. 38 of 1912 had been obtained by fraud. On the 9th of December 1914 they applied for and obtained an injunction restraining the opposite party from executing the decree in Suit No. 33 of 1912. This suit was dismissed on the 26th of April 1915, and with that dismissal the bar of the injunction came to an end. An appeal was filed in the High Court on the 30th of November 1915. It was finally dismissed on the 19th of April 1917. The present application for execution, which may be taken as an application in continuation of the former application (which was struck off pending the decision of the Suit No. 523 of 1914), was made on the 11th of June 1918. Objection was taken that the application was barred by time. The lower Court upheld this objection and dismissed the application. It has relied upon a long series of decisions of both this and the Bombay and Calcutta High Courts. The last decision is that in *Ruddar Singh* v. *Dhanpal Singh* (1). If we compare this last case with the case which is now before us, it is impossible to distinguish the one from the other. The decision referred to exactly covers the present case. Our attention was called to the decisions reported as *Moinuddin Khan* v. *Ohajju Singh* (2) and *Shaikh Kamar-ud-din* v.

(1) 26 A. 156; A. W. N. (1903) 221.
(2) 2 A. L. J. 276.

Jawahir Lal (3), but a careful examination of both these decisions will show that they are not on all fours with the facts of the present case and do not help us. If we assume (and we think that it may fairly be assumed) that the present application is one in continuation of the former, even then Article 181 of the Limitation Act must apply and it was necessary for the appellant to come into Court within three years of the removal of the bar which prevented his carrying on the execution of his decree. That bar was removed by the decision of the first Court on the 26th of April 1915. We are asked to give the appellant a further extension of time and to calculate the three years from the 19th of April 1917, the date on which the High Court dismissed the appeal. We cannot see how this can possibly be done. The learned Counsel for the appellant admits that on the 27th of April 1917 his client could legally have applied for execution as he has now applied and that there was nothing to prevent him carrying on the execution from that date onwards. It is, therefore, clear that time began to run against him after the decision of the 26th of April 1915. We would point out that he is not entitled to much sympathy, for though the High Court had dismissed the appeal on the 19th of April 1917, he still waited till the 11th of June 1918 before he came to Court. He has been negligent of his rights and the law does not look with favour on persons or litigants of that description. The appeal, therefore, fails and is dismissed. We direct that each party pay its own costs in this matter in view of the circumstances of this case and the dishonest conduct of the opposite party.

Appeal dismissed.

(3) 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 27 A. 334; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 185 OF 1918.

August 26, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

BEJOY KUMAR ADDYA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SATISH CHANDRA GHOSE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 16—Mortgage—Interest, high rate of—Court, power of, to reduce rate of interest—Undue influence—Hard and unconscionable bargain.

In the absence of any thing to show that undue advantage was taken of a mortgagor, or that his will was dominated or that the terms of the mortgage were extorted from him in any way, the mortgagee is entitled to interest at the contract rate, and the Court ought not to come to the conclusion that the stipulation in the mortgage-deed as to interest is hard and unconscionable. [p. 1008, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, 24-Pergunnas, dated the 26th of February 1918.

Babus *Ram Chandra Majumdar*, *Ramendra Mohan Majumdar* and *Promotha Nath Bandopadhya*, for the Appellants.

Babus *Brojolal Chakraberty*, *Anilendra N. Roy Chowdhuri* and *Gour Mohon Dutt*, for the Respondents.

JUDGMENT.

CHAUDHURI, J.—The only question raised in this appeal is that of interest.

The learned Subordinate Judge, relying on the authority of *Abdul Majid* v. *Ksherode Chandra Pal* (1) and *Chhallaphroo* v. *Banga Behary* (2) has reduced the rate from 15 per cent. with quarterly rests to 12 per cent. simple interest upto the date of suit. He disallowed interest after that date. He says: "The security seems to be quite sufficient. Regard being had to the cases above mentioned and other rulings, the circumstances above noted, namely, that the suit had been delayed and interest had accumulated would go to show that the stipulation as to interest is hard and unconscionable."

So far as those two cases are concerned, they have not always been accepted by

(1) 29 Ind. Cas. 843; 19 C. W. N. 809; 42 C. 690.
(2) 31 Ind. Cas. 394; 20 C. W. N. 408; 22 C. L. J. 311.

this Court as correct. The recent Privy Council decision in *Aziz Khan* v. *Duni Chand* (3) lays down that unless it can be shown that undue advantage had been taken, the Court ought not to come to the conclusion that the transaction is hard and unconscionable.

These matters are matters of contract between the parties. The learned Vakil appearing for the respondent urged that there was undue influence and that the onus was upon the mortgagee to show that there was none. But one of the requisites for that contention is that the person in whose favour the document stands was in a position to dominate the will of the executant. There is nothing to show that the money-lender dominated the will of the debtor in this case. No issue was raised on that point, no evidence was given; there is no evidence on the record that any advantage was taken of the lady, or that she did not borrow at the ordinary rate of interest prevailing at that time. In fact, there is evidence that the executor of her husband's Will borrowed at the same rate of interest on his personal account. He was a man of business and he had to pay the same rate of interest.

Then we have the evidence of Girish Chandra Ghose, witness No. 2, for the defendant, that at that time the usual rate of interest was Re. 1 or Re. 1-4-0 per cent. per month, that rarely it was Re. 1 annas 8 and that it was usual to enter compound interest with quarterly rests.

It must not be overlooked that this was a transaction with a Mitakshara lady and that the security, which the learned Subordinate Judge thought was sufficient, may not have been so considered when the money was advanced. However that may be, there is nothing to show that undue advantage was taken of this lady, that her will was dominated or that the terms were extorted from her in any way.

It has also been urged that in respect of mortgages executed by Hindu widows, where the Court has found that there was no necessity to borrow at a high rate of interest, such rate has been reduced. The cases in *Kameswar Pershad* v. *Run Bahadur Singh* (4), *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (5) and *Nawab Nasir Begam* v. *Rao Baghunath Singh* (6) have been relied upon. But in this case, the title of this lady is the title of an owner and, therefore, those cases do not appear to have anything to do with the matter.

The learned Subordinate Judge has relied upon the delay. It appears, however, from the Kabala of defendant No. 2 that at the time when that Kabala was executed, the debt which was due by this lady to the plaintiff was calculated at Rs. 2,800. This sum the defendant undertook to pay but he kept the money with him and did not pay. He waited for 9 years and kept the money in hand. He is responsible for the delay; he knew the rate of interest which was charged when he took the Kabala and kept the money with him, and yet he took no steps to pay the debt. For him to say that since he has purchased both the widow's interest and the interest of the reversioners, he ought to be relieved from paying at such a high rate of interest, seems to us to be absurd. It is not correct that he has purchased from the reversioners.

The appeal is, therefore, allowed with costs in both Courts. We assess the hearing fee at five gold *mohurs*. The plaintiff would be entitled to interest at the contract rate up to the date fixed for payment, namely, three months from this date. After that there will be interest at 6 per cent. If there is no contest as regards the amount, the decree may be drawn up here.

CUMING, J.—I agree.

Appeal allowed.

(3) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1918; 165 P. W. R. 1918 (P. C.).

(4) 6 C. 842; 8 C. L. R. 361; 8 I. A. 8; 4 Shome L. R. 81; 4 Sar. P. C. J. 210; 5 Ind. Jur. 157; 3 Ind. Dec. (N. S.) 545.

(5) 18 C. 311; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar. P. C. J. 642; 9 Ind. Dec. (N. S.) 207.

(6) 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 709; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 66; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49; 41 A. 571; 11 L. W. 188 (P. C.).

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An acknowledgment of a debt only enures to the benefit of the creditor for the purpose of saving limitation if it is made before the original debt is time-barred but the basis of a suit is always the original debt. No suit can be maintained upon a mere acknowledgment of a debt.

"An account stated" is one where several cross-items are set off one against the other and the balance is struck off in favour of one of the parties In such a case the law implies a new promise by the other party to pay the balance in consideration not merely of past debts but also of the extinguishment of the old debts on each side, and hence it is not necessary that a statement of account should be made within the period of limitation for the recovery of several cross-items **P** [illegible] SURAJ PRASAD PANDEY *v* BROUCKE, P. L. T. [illegible]; P L J [illegible] U P L R Pat 65 **379**

ct of ourt—Party, whether can be prejudiced by act of Court *See* IVIL PROCEDURE ODE, s [illegible] **4**

Acts—General.

Act 18 8—XXXIV. *See* LUNACY ACT.
—— 1859—XIII. *See* WORKMAN'S BREACH OF CONTRACT ACT.
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—— 8 1—V. *See* POLICE ACT.
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Acts—General—concld.

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—— 1882—IV. *See* TRANSFER OF PROPERTY ACT.
—— 1882—VI. *See* COMPANIES ACT.
—— 1882—XIV. *See* CIVIL PROCEDURE CODE.
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—— 1899—II. *See* STAMP ACT.
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—— 1899—IX. *See* ARBITRATION ACT.
—— 1907—III. *See* PROVINCIAL INSOLVENCY ACT.
—— 1908—V. *See* CIVIL PROCEDURE CODE.
—— 1908—IX. *See* LIMITATION ACT.
—— 1908—XVI. *See* REGISTRATION ACT.
—— 1909—III. *See* PRESIDENCY TOWNS INSOLVENCY ACT.
—— 1910—II. *See* PAPER CURRENCY ACT.
—— 1911—III. *See* CRIMINAL TRIBES ACT.
—— 1913—III. *See* ADMINISTRATOR GENERALS ACT.
—— 1915—XVI. *See* BENARES HINDU UNIVERSITY ACT.
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Acts—(Local)—Bengal.

—— 1865—VIII. *See* BENGAL RENT RECOVERY ACT.
—— 1884—III. *See* BENGAL MUNICIPAL ACT.
—— 1885—VIII. *See* BENGAL TENANCY ACT.
—— 1897—V. *See* BENGAL ESTATES PARTITION ACT.
—— 1899—III. *See* CALCUTTA MUNICIPAL ACT.
—— 1911—V. *See* CALCUTTA IMPROVEMENT ACT.
—— 1917—I. *See* BENGAL GHEE ADULTERATION ACT.

Acts—(Local)—Bihar and Orissa.

—— 1904—IV. *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT.

Acts—(Local)—Bombay.

—— 1874—III. *See* BOMBAY HEREDITARY OFFICES ACT.
—— 1896—XX. *See* SIND ENCUMBERED ESTATES ACT.
—— 1901—III. *See* BOMBAY DISTRICT MUNICIPAL ACT.

Acts (Local)—Burma.

—— 1917—V. *See* BURMA EXCISE ACT.

Acts—(Local)—C. P.

—— 1898—XI. *See* C. P TENANCY ACT.

Acts—(Local)—Madras.

—— 1908—I. *See* MADRAS ESTATES LAND ACT.

Acts—(Local)—Punjab.

—— 1887—XVI. *See* PUNJAB TENANCY ACT.
—— 1905—II. *See* PUNJAB PRE-EMPTION ACT.

Acts—(Local)—U. P.

Act 1911—III. *See* PUNJAB MUNICIPAL ACT.
—— 1914—III. *See* PUNJAB COURTS ACT.
—— 1919—IX. *See* PUNJAB COURTS ACT.
—— 1886—XXII *See* OUDH RENT ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
—— 1901—III. *See* U. P. LAND REVENUE ACT.
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—— 1825—XI. *See* BENGAL ALLUVION AND DILUVION REGULATION.
—— 1892—III. *See* SIND FRONTIER REGULATION.

Statutes.

1915—(5 & 6, GEO. V, C. 61). *See* GOVERNMENT OF INDIA ACT.
1916—(6 & 7, GEO V, C. 37). *See* GOVERNMENT OF INDIA (AMENDMENT) ACT.

Administrator Generals Act (III of 1913), s. 11, *applicability of, where Administrator-General appointed executor.*

The fact that the Administrator-General is appointed to be the executor of a Will, is no bar to his obtaining, under section 11 of the Administrator-General's Act, an order to take possession of the assets before applying for Probate of the Will. **C** PASUPATI MUKHERJEE, *In the goods of*, 24 C. W. N. 326 **431**

Admission, *effect of.*

What a party himself admits to be true may reasonably be presumed to be so, and, until the presumption is rebutted, the fact admitted must be taken to be established. **L** VIR SINGH *v.* HARNAM SINGH, 1 L. 137 **191**

Adverse possession *between co-sharers—Sole possession and non-payment of rent, whether enough, effect of—Burden of proof.*

In order to establish adverse possession as between co-sharers, there must be evidence of an open assertion of a hostile act on the part of the co-sharers setting up adverse possession with notice to the others, and mere non-participation in the profits by one party and exclusive occupation by the other party is insufficient.

Plaintiffs sued for a declaration that certain land belonged to them and that the entry in the revenue records showing defendants as owners of 1/3rd of this land was wrong. It appeared that the plaintiffs had been long in possession of the land in suit and had paid no rent:

Held, that the fact that the plaintiffs had held sole possession and had paid no rent was not sufficient to prove that defendants were not co-sharers, nor was it sufficient to establish the plaintiffs' adverse possession. **L** BALAK RAM *v.* KAURA, 2 U. P. L. R. (L) 94 **169**

——— ——— *between tenants-in-common—Non-participation in rents and profits, effect of.*

In order to establish adverse possession by on

Adverse possession—concld.

tenant-in-common against his co-tenants, there must be exclusion or ouster of the co-tenants and the possession subsequent to that must be for the statutory period. What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to adverse possession but such non-participation or non-possession may, in the circumstances of a particular case, amount to adverse possession Regard must be had to all the circumstances, the most important element being the length of time. **C** GOVINDA CHANDRA *v* DINA NATH, 23 C. W. N. 977: 30 C. L. J. 512; 47 C. 274 **141**

———*Person in continuous possession without title for over 12 years, status of—Under-proprietary rights, acquisition of.*

Where a person who has lost all his rights in certain land retains possession thereof, to the knowledge of the superior proprietor, without any title whatever, and is continuously recorded for more than 12 years as under-proprietor, he acquires the status of under-proprietor by adverse possession. **O** NADIR SINGH *v.* ANPURNA KUNWAR, 7. O. L. J. 282; 2 U. P. L. R. (J. C.) 113 **759**

———*Trespasser, position of—Surface working, whether gives title to sub-soil rights.*

A wrong-doer's rights by adverse possession must be confined to the land of which he is in actual possession.

Where an owner of land sells it reserving to himself the minerals, he retains possession of the minerals in the same way as if he had not sold the surface. Non-user is not an abandonment of possession. Consequently, no matter how long mines remain unworked by the owner, his right is not barred so long as they are not worked by some one else.

There may be cases in which a title by adverse possession can be made out in respect to minerals, but it does not follow that by working a part of the minerals or opening up particular quarries possession over a continuous field of minerals or of quarries of which the portion worked forms part can be obtained.

A mere surface working cannot give any claim by adverse possession to the whole of the coal seam or to any portion of it beyond that which is actually extracted. **Pat** KUMAR PREMATHA NATH MALIA *v.* MEIK, (1920) Pat. 146; 5 P. L. J. 273; 1 P. L. T. 360 **184**

Agra Tenancy Act (II of 1901), s. 10 (1)—*Transfer of proprietary right*—Sir *land, lease of, validity of.*

Proprietors, when selling or about to sell their property, cannot be allowed to deprive themselves by any trickery or subterfuge of the rights which section 10 (1) of the Agra Tenancy Act was framed to give them.

Therefore, a collusive lease of *sir* land intended to defeat the law is entirely void. **U P B R** HEM KUAR *v.* SEWA RAM, 2 U. P L. R. (B R) 15 **645**

——— **s. 14**—*Hindu joint family, holding let to member of—Ejectment—Holding let to other members of family—Tenancy, whether continuous.*

A member of a Hindu joint family taking land on lease from a landholder in his individual capacity

Agra Tenancy Act—contd.

is the sole tenant of that landholder to the exclusion of the other members of the joint family and when he is ejected from the holding, and the holding is immediately let to his brothers, the latter are not entitled to count the period of cultivation when their brother was recorded as tenant towards the period necessary for acquiring occupancy rights. **U P B R** WIDHYA RAM *v.* SOBHA RAM, 2 U. P. L. R. (B. R.) 43 **764**

——— **s. 34**—*Grove brought under cultivation—Grove-holder, status of—Landlord, right of, to eject*

When grove land is brought under cultivation, the holder thereof loses his rights and is liable to be treated by the land-holder as a tenant under section 34, Agra Tenancy Act, and to be ejected. **U P B R** KISHORI SARAN *v* RAMESHWAR, 2 U P L R (B. R.) 67 **980**

——— **s. 47**—*Enhancement of rent provided for in lease, whether enlarges period of tenancy.*

A lease for a term of years which provides for a rise in the rent in the last year of the lease confers no right on the tenant to continue in possession after the termination of the period of the lease. To such a case section 47 of the Agra Tenancy Act does not apply. **U P B R** HANIF-UN-NISA *v.* RAM DAYAL, 2. U P. L. R. (B. R.) 36 **46**

——— **s. 58**—*Ejectment suit—Proprietary title, question of—Appeal, forum of.*

In an ejectment suit in which the defendant pleads that he is not holding the land as tenant of the plaintiff but as his own *khudkasht* without liability to pay rent to anybody, a question of proprietary title is raised and an appeal lies to the District Judge, and not to the Commissioner. **U P B R** CHANDAN SINGH *v.* BHORA LAL, 2 U. P. L. R. (B. R.) 53 **549**

——— **s. 79**—*Suit to recover possession of holding—Jurisdiction of Civil and Revenue Courts—Revision—High Court, interference by.*

Where a person seeks to recover possession of his holding the suit should be brought under section 79 of the Agra Tenancy Act and over such a suit the Revenue Court alone has jurisdiction

The High Court has jurisdiction to interfere in revision where a Civil Court has wrongly entertained a suit cognizable by a Revenue Court. **A** TAJAMAL HUSSAIN *v.* ALI BAHADUR KHAN **946**

——— **s. 177 (e)**—*"Question f proprietary title"—Defendant holding as proprietor—Appeal, forum of.*

The question whether a defendant is holding as a sub-tenant or is cultivating the land as *khudkasht* with no obligations to pay rent to anybody is a real question of proprietary title within the meaning of section 177 (*e*) of the Agra Tenancy Act, and in such a case an appeal lies to the District Judge and not to the Commissioner. **U P B R** BADAMI *v.* KARORI, 2 U. P. L. R. (B. R.) 46 **601**

——— **s. 185**—*Material irregularity, what amounts to—Burden of proof, wrong allocation of.*

The failure to consider a finding on remand and basing an order upon a wrong allocation of the burden of proof are material irregularities within the meaning of section 187 of the Agra Tenancy Act. **U P B R** CHAKARPAN *v.* NATHUA, 2 U. P. L. R. (B. R.) 22 **287**

Agra Tenancy Act—concld.

——— **s. 194 (1)**—Lambardari mahal—Lambardar, *duty of, to realise arrears of rent, extent of.*

In a *lambardari mahal* the *lambardar* is, from the date of his appointment, the agent appointed to act on behalf of the co-sharers and he is the only person who has a right to institute a suit against a defaulting tenant for the recovery of any arrears of rent not statute-barred, whether of his time or prior to his appointment as such. **A** MOJIZ FATIMA *v.* ALI AKBAR, 18 A. L. J. 435; 42 A 414 **112**

Appeal (Civil)—*Appellate Court, finding by, that transaction is not* benami—*Remand—Same Court, finding by, that transaction is* benami—*Second finding, whether justified.*

Plaintiff sought to recover possession of certain lands on the strength of a Patni Settlement in his favour. His suit was dismissed on the ground that the Patni was a *benami* transaction The Appellate Court, however, found for the plaintiff that the Patni was not a *benami* transaction. Defendant appealed to the High Court, which remanded the case for a finding whether the Patni fell within the class of tenures described in section 71 (*b* of the Assam Land and Revenue Regulation. The lower Appellate Court found that the Patni was not *bona fide* and, therefore, did not come under the foregoing section. The plaintiff objected that that Court having already found that the Patni was not *benami* had no power to arrive at a contrary finding:

Held, that the finding was justified, inasmuch as in arriving at its previous finding the Court apparently had not taken all the facts into consideration. **C** JATINDRA KUMAR PAL *v.* MUKSHODA CHARAN DAS **1001**

——— Connected suits—Appeal in one—Appellate Court, whether can arrive at conflicting findings. *See* JURISDICTION **282**

——— *Costs, question of—Judgment not involving question of principle.*

An appeal which raises a question of costs only and in which no question of principle is involved is not competent. **C** UMESH CHANDRA DUTT *v.* BHIBUTI BHUSAN PAL, 47 C. 67 **334**

——— *Finding of first Court not concurred in by Appellate Court—Duty of Appellate Court.*

Where an Appellate Court does not find itself in agreement with the finding of the trial Court, it should come to an independent finding of its own upon the evidence on the record. **C** MAJARADDIN KABIRAJ *v.* MAJIBAR RAHMAN **248**

——— Further investigation necessary—Appellate Court, duty of. *See* CIVIL PROCEDURE CODE, O. XLI, R. 23 **516**

——— Gift, validity of, not questioned in trial Court, whether can be questioned in Court of Appeal—Procedure. *See* PLEADINGS **179**

——— *New point, whether can be raised at hearing.*

A point not taken in the trial Court, nor raised in the memorandum of appeal, may be urged at the hearing of an appeal if it goes to the root of the matter and raises the question of the competency of the Court to grant the relief claimed. **C** RAM KISSEN JOYDOYAL *v.* POORAN MULL, 51 C. J. 259 **571**

Appeal (Civil)—concld.

——— *to his Majesty in Council—Practice of Privy Council—Point, fresh, whether can be raised.*

It is not in consonance with the practice of the Privy Council upon the hearing of an appeal to entertain a point not raised in either of the Courts below nor presented upon the appeal. **P C** IDRIS *v.* MRS. JANE SKINNER, 82 P. R. 1919; 45 P. W. R. 1919 **723**

——— *to Privy Council—Death of respondent—Appeal heard in ignorance—Decree, whether can be ignored.*

Where, pending the hearing of an appeal before the Privy Council, one of the respondents dies and his legal representatives are not brought upon the record and the appeal is heard in ignorance of the fact of death, the decree pronounced by the Privy Council cannot be ignored by the Courts in India. **Pat** DEONANDAN PRASAD SINGH *v.* JANKI SINGH, 5 P. L. J. 314; 1 P. L. T. 325; 2 U. P. L. R. (Pat) 108; (1920) Pat 266 **322**

——— **(Criminal)**—*Pleader appearing for accused without* vakalatnama—*Procedure.*

Where an accused person is represented by a Pleader in an appeal, but the latter has no *vakalatnama*, the proper course is to adjourn the hearing of the appeal until one is forthcoming, and thus afford the accused an opportunity of being represented. **C** JASIR KHAN *v* EMPEROR, 21 Cr. L. J. 413 **61**

——— **(Second)**—*Document, admissibility of—Objection, whether can be taken in second appeal—Finding by trial Court—Appellate Court, difference by—Reasons for finding*

An objection to the admissibility of a document cannot be taken for the first time in second appeal where an answer to the objection involves an enquiry into facts.

An Appellate Court, in arriving at a conclusion different from that of the Court of first instance, should state its reasons for the same in order to enable a Court of second appeal to see whether the conclusion has been legally drawn **C** RAJ MOHON DHUPI *v.* HARENDRA CHANDRA **816**

——— *Finding of fact based on no evidence, whether binding*

Where a finding of fact is arrived at by a wrong construction of the pleadings, and upon no evidence, the finding is liable to be set aside in second appeal. **Pat** RAGHUNATH CHATTERJI *v.* JUTHU CHATTAR, 2 U. P. L. R. (Pat) 97 **466**

——— ———*Finding of fact, when can be questioned in.*

A finding of fact is binding on a Court of second appeal, but when no reasons are given for such finding and no reference is made to the evidence on which it is based, the finding can be questioned in second appeal. **U P B K** SHEIKH MOHAMMAD *v.* JANKI, 2 U. P. L. R. (B. R.) 55 **529**

——— ——— *Point involving question of fact not raised at trial, whether can be taken in second appeal.*

A point which ought to be, but is not, taken in the trial Court and in respect of which no direct evidence is given cannot be taken in second appeal, especially if it involves a question of fact. **C** ANWAR BEWA *v.* SURENDRA NATH **844**

Appellate Court, *duty of—Failure to consider weight of evidence.*

The failure by an Appellate Court to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the defendant amounts to a substantial error of procedure. **Pa**t BHIKHAN *v.* MARDAN ALI **40**

——— , power of, to remand case for further inquiry —Inherent powe of ourt to make inquiry. *See* CRIMINAL PROCEDURE CODE, s. 195 (6) **511**

Appropriation, doctrine of, applicability of, to contribution. *See* CO-SHARERS **49**

Approver—*Statement made at end of trial, value of—Corroboration—Statements extorted by Police under threat of implication, value of.*

An approver's evidence is in itself tainted evidence though in some cases it may be worthy of belief for various reasons, but the uncorroborated statement of an approver taken at the end of the trial is of no value whatever.

Statements of witnesses extorted by the Police under threats of implication in the crime cannot fail to detract from the value of their evidence especially where they had no reason for refraining from deposing against the culprits. **L** SUNDAR SINGH *v.* EMPEROR, 105 P L. R. 1920; 21 Cr. L. J. 507 **667**

Arbitration—*Award embodying agreement between parties, validity of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings, when should be allowed.*

The fact that an award embodies an agreement arrived at between the parties does not prevent it being a valid and binding award

An award when delivered is binding upon the parties

The law relating to the amendment of pleadings, as contained in Order VI, rule 7 of the Civil Procedure Code, confers a plenary authority upon the Court to allow a party to alter or amend his pleadings in such manner and upon such terms as may be just, and the amendment may be allowed at any stage of the proceedings

An amendment should always be allowed if thereby the real substantial question can be raised between the parties and multiplicity of legal proceedings avoided.

Plaintiffs sued their *quondam* partner for rendition of accounts of the partnership and for recovery of money due to them. It appeared that the dispute had been referred to the arbitration of one *L.* who had given an award on 30th September 1914, which award was accepted by the parties and signed by them in token of their assent. The suit was instituted on 1st October 1914:

Held, (1) that the award was binding on the parties and the suit could not be maintained;

(2) that the plaint could be amended so as to embody a prayer for a decree in accordance with the award and that such decree could be passed. **L** DARBARI LAL *v.* WASU MALIK **115**

——— *Award - Minor not properly represented—Guardian, negligence of—Award, whether binding on minor—Agreement between parties, award based on, validity of - Guardian, whether can bind ward's reversionary interest.*

Where a reference to arbitration is made on behalf of a minor but the latter is not properly represented in the arbitration proceedings and his guardian fails grossly and fraudulently in his duty to protect his interests, the award passed by the arbitrators is not binding on the minor.

The rule that an award is not open to objection on the sole ground that it merely reproduces an agreement come to between the parties, applies only where the consent of the parties is regarded by the arbitrators as evidence that the settlement proposed is fair to all.

A guardian is incompetent to bind his ward's reversionary interest by a reference to arbitration. **M** KANATALA VENKATA KRISHNAMA CHARLU *v.* KANDALA PERUNDEVAMMA **593**

——— *clause, construction of—Disputes, several—Awards, successive, whether permissible.*

Where in a commercial contract there is a clause with the words "*any dispute whatsoever* arising on or out of this contract shall be referred to arbitration," it means that *each and every dispute* as it arises, on or out of the contract, shall be referred to arbitration. The fact that one of the parties to the contract has obtained an award as regards a portion of his claim does not prevent him from proceeding with arbitration in respect of matters arising out of subsequent breaches of the contract.

Where there are several and separate contracts, the right conferred by the arbitration clause is not fully exhausted as soon as a complete award is made upon the first reference.

There may be successive awards even in the same matter. **C** BALMUKAND KINA *v.* GOPIRAM BHOTICA, 31 C. L. J. 391 **828**

——— *Contract, clause in, providing for arbitration—Cross-contract in precisely similar terms, effect of, on contract—Arbitration, whether may be claimed*

Where there is a contract and a subsequent cross-contract on the same printed form, containing the same clauses, for the same quantity of goods of the same kind and for the same delivery, the obligations under the earlier contract are extinguished, being cancelled by the latter cross-contract, which has the effect of fixing the difference to be paid by one party to the other, and it is not open to either of the parties to the earlier contract to claim arbitration, there being no difference which is referable to arbitration, mere non-payment not amounting to such a difference. **S** FIRM OF POKERDAS KISHINDAS *v.* FIRM OF VISHINJI GORDHANDAS, 14 S L. R. 18. **514**

——— *Notice to parties, whether essential—Arbitrator, proceeding* ex parte, *duty of—Award against firm, validity of—Award, how to be enforced.*

When arbitrators assume the burden of their duty, their first duty is to see that the parties have had notice, and sufficient notice, to enable them to appear before the tribunal and put their case. If they do not appear before them, it is the duty of the arbitrators to make sure that they have no sort of excuse for not appearing. When the arbitrators have failed to discharge this duty, their award must be set aside

An award of arbitrators is not bad because it is made against a firm. Under the Arbitration Act an award is not a decree, but it is to be enforced as though it were a decree. The provisions which relate to the execution of a decree against a firm apply in the case of an award which has been filed, the award having been made against the firm.

Arbitration—concld.

C PURUSOTTUM DAS NARAIN DAS *v.* LOUIS DREYFUS & Co. 47 C. 29 **325**

——— *Withdrawal of one arbitrator, effect of, on arbitration—Court, duty of—Procedure.*

Where two arbitrators are appointed to decide a case and one of them withdraws before the arbitration is completed, the remaining arbitrator cannot proceed with the case and file an award. It is the duty of the Court in such a case to appoint another arbitrator in place of the arbitrator who has withdrawn or to supersede the arbitration and decide the case on the merits. **L** THAKAR DAS *v.* NARAIN **644**

Arbitration Act (IX of 1899), s. 14—*Award, suit to impeach, maintainability of.*

When an award has been made and filed, and has become enforceable as a decree of Court, a party affected thereby can maintain a suit to impeach it on grounds not included within the scope of section 14 of the Arbitration Act, and to investigate and determine the controversy according to the procedure prescribed by law, especially where the ground of the attack goes to the root of the matter. **C** RADHA KISSEN KHETRY *v.* LUKHMI CHAND JHAWAR, 31 C. L. J. 243; 24 C. W. N. 454 **541**

——— **s. 19**—*Agreement to refer dispute to arbitration—Suit, institution of—Stay of suit—Duty of Court—Onus—Questions of law and fact, competency of arbitrators to decide—"Merchant," meaning of—Broker, whether merchant.*

Where there is an agreement to refer matters in dispute to arbitration, and one of the parties institutes a suit relating to those matters, it is the *prima facie* duty of the Court, on receiving an application under section 19 of the Arbitration Act, to stay the suit, the onus being on the plaintiff to show why he should not be bound by his agreement to refer to arbitration.

Arbitrators are competent to decide questions of law and fact; the fact that a difficult question of law is involved is not ordinarily a good ground for refusing to stay a suit.

The term "merchant" according to Karachi mercantile usage is synonymous with a member of the mercantile community of Karachi and covers the case of brokers as well as those dealing in the actual sale and purchase of goods. **S** ABDULLAH HAROON *v.* SASSOON & Co., 13 S. L. R. 201 **76**

——— **s. 19**—*Agreement to refer suit filed after reference, maintainability of——Award after institution of suit—Reference and award, whether bar suit—Stay of suit.*

Where the parties to a dispute agree to refer matters in dispute to arbitration, the fact that arbitration proceedings are pending is no bar to the entertainment of a suit relating to the matters referred to arbitration. The defendant's remedy in such a case is to apply for a stay of the suit, and if he fails to do so, the Court can proceed to adjudicate upon the matters covered by the reference and its jurisdiction is not taken away because the arbitrators proceed to make an award after the filing of the suit, even though such award may not have been made before any written statement is filed. **S** RAMCHAND GURDASMALL *v.* GOBIND-RAM, 13 S. L. R. 193 **150**

Arbitrators, *settlement by, when liable to be re-opened—Fraud, proof of.*

A settlement made by arbitrators cannot be re-opened except on the ground of fraud. **M** RAMANATHAN CHETTIAR *v.* MUTHIAH CHETTY, 38 M. L. J. 247; 21 L. W. 405; 43 M. 423; (1920) M. W. N. 270 **358**

Association—*Membership, expulsion from—Procedure—Duty of association.*

Where an association, which is empowered to expel members for misconduct, decides to expel a member after making a fair inquiry into the truth of the facts alleged against him and after notice to him that his conduct is about to be inquired into and giving him an opportunity of stating his case, and its decision is arrived at in good faith with a view to the common interest of the association, its decision cannot be successfully challenged in a Court.

Tribunals which exercise a punitive jurisdiction on an alleged charge of misconduct, whereby a man may be deprived of his property, must act in accordance with the ordinary rules of justice and fairplay and fairly listen to both sides. In order to determine whether a tribunal of this character in the exercise of *quasi*-judicial powers has given a decision which cannot be successfully challenged, the Court has to investigate whether they have observed the rules of natural justice and also the particular statutory or other rules, if any, prescribed for their guidance.

The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with to his disadvantage, without having a fair and sufficient notice of what is alleged against him and an opportunity of making his defence, and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions are satisfied, a Court of justice will not interfere with the decision **C** MOHAMED KALIMUDDIN *v.* STEWART, 31 C. L. J. 247; 47 C. 623 **556**

Attachment before judgment—Release of property on security being furnished—Execution against property given as security—Preferential right, whether exists. *See* CIVIL PROCEDURE CODE, O. XXXIX, r. 6 **267**

Batwara map *prepared in partition proceedings between proprietors, admissibility of, as evidence against tenants—Objection as to admissibility, time for taking*

A *batwara* map prepared in a partition proceeding between the proprietors of an estate is no evidence against tenants of the estate, if it was prepared after their tenancy was created. But where a Commissioner is appointed to make an inquiry with reference to the map and no objection is taken to its admissibility, it is too late to object after he has made his report. **C** BANAMALI PAUL *v.* SATIS CHANDRA DUTT **138**

Benami *transaction—Bond taken by creditor in name of concubine's mother, whether enforceable—Immoral consideration.*

Where a bond executed for repayment of a loan

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is taken by the creditor in the name of his concubine's mother, the debtor is not entitled to plead that the consideration for the bond is tainted with immorality and that the bond is, therefore, unenforceable.

Where the bond has been taken *benami* in the name of the creditor's concubine's mother, the latter or her assignee is entitled to sue as such *benamidar* and in that view it cannot be treated as involving the enforcement of an immoral contract between the executant and his creditor. **M** PONNAMBALA MUDALI *v.* VASUDEVA PILLAI **616**

Benares Hindu University (Act XVI of 1915), s. 20 **335**

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4 (1)—*Gradual accession, what is—"Gained," meaning of—Common Law of England, applicability of, to India—Possession and dispossession—Land in condition unfit for actual enjoyment.*

The word "gained" in clause (1) of section 4 of the Bengal Alluvion and Diluvion Regulation does not mean land washed away and afterwards identified as having reformed on its old site.

A case under clause (1) of section 4 of the Bengal Alluvion and Diluvion Regulation is not made out where the land in dispute is shown to have reformed on its old identifiable site.

The rules of the Common Law of England have no application to the Mofassil towns of India, except as rules of justice, equity and good conscience.

Where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that the state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. **Pat** BRAHMANAND SINGH *v.* DUND BAHADUR SINGH, 1 P. L. T. 229; (1920) PAT 245; 2 U. P. L. R (Pat) 111 **344**

Bengal Estates Partition Act (V B. C. of 1897), ss. 65, 119—*Partition—Deputy Collector, power of, to make order under s. 65—Jurisdiction of Civil Court to disturb.*

A Deputy Collector can only pass an order under section 65 of the Bengal Estates Partition Act, during the making of a partition and before he has submitted the same for the sanction of the Collector.

Where a partition has been effected, the Civil Courts have no jurisdiction to disturb the same. **Pat** KESARI SAHAI SINGH *v.* HITNARAYAN SINGH, 1 P. L. T. 607 **149**

Bengal Ghee Adulteration Act (I B. C. of 1917), s. 2 (2)—*Calcutta Municipal Act (III B C. of 1899) s. 495 A (1)—Standard of genuineness—Statutory provision, absence of—"Commercial Ghee," adulteration of.*

As the Bengal Ghee Adulteration Act does not lay down a standard raising a presumption that Ghee alleged to be adulterated is not genuine, and no standard having been fixed for the purpose by any board of experts similar to the Butter Commission in England, Courts of law have to decide questions of

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adulteration upon such evidence as is available in each individual case. As there is no statutory provision, every case must depend upon its own evidence.

Where a certain sample of "Commercial Ghee" or buffalo Ghee was found to contain some foreign fat substituted in part for genuine Ghee:

Held, that the Ghee was adulterated within the meaning of section (2), sub-clause (2), of the Bengal Ghee Adulteration Act. **C** GRANDE VENKATTA *v.* CORPORATION OF CALCUTTA, 24 C. W. N. 388; 47 C 633; 21 Cr. L. J. 490 **586**

Bengal Municipal Act (III of 1884), s. 85—*Tax—Assessment, liability to—Criterion for determining liability—"Within", meaning of.*

In order to enforce the liability of a person to be assessed with tax under section 85 of the Bengal Municipal Act, the Municipality must show that he not only has a holding within the limits of the Municipality, but that he has circumstances or property within those limits. The fact that he is in receipt of an income from property situate outside the limits of the Municipality and spends that income within those limits would not satisfy the requirements of the section. The word "within" in section 85 of the Bengal Municipal Act refers not only to property but also to circumstances. **Pat** MUHAMMAD ALI *v* CHAIRMAN, MUNICIPALITY OF BEHAR, 1 P. L. T. 561 **821**

Bengal Patni Regulation (VIII of 1819), s. 11 (3)—*Bengal Rent Recovery Act (VIII of 1865), s 1[6]—Sales under Acts—Purchaser, right of*—Khudkasht raiyats, *whether can be ejected*—Khas *possession, suit for—Alternative relief claimed—Procedure—Court, duty of.*

In sales under the Bengal Patni Regulation and the Bengal Rent Recovery Act, the purchaser acquires the property free from incumbrances but he is not entitled to eject *khudkasht raiyats* or resident and hereditary cultivators.

Where in a suit to recover *khas* possession or in the alternative for the assessment of fair and equitable rent, the Court finds that the plaintiff is not entitled to *khas* possession, it ought to determine fair and equitable rent payable in respect of the lands in suit. **Pat** BRAJA SUNDAR DAS *v.* JAGANNATH DHAL, 1 P. L. T. 258, (1920) Pat. 181 **678**

Bengal Tenancy Act (VIII B. C. of 1885), s. 22 (3), 178—Thikadar, *purchase of occupancy right by, effect of—Purchase made before 1907, validity of—Purchase made after expiry of* thika—*Agreement in lease not to set up occupancy rights, validity of.*

Prior to the Bengal Tenancy (Amendment) Act of 1907 the acquisition by a *thikadar* of an occupancy right by purchase was not barred by section 22 (1) of the Bengal Tenancy Act, and the amendment of the Act in 1907 did not take away rights of occupancy which had already vested in a *thikadar*.

Section 22 (3) of the Bengal Tenancy Act relates only to acquisitions of occupancy rights made by a *ijaradar* while still holding the *ijara*. It has no application to purchases of such rights made after expiry of the *ijara*.

Bengal Tenancy Act—contd.

A *thikadar* who purchases an occupancy holding acquires it as a non-occupancy holding

Any agreement in a lease not to set up rights of occupancy in lands in which such rights have accrued is void under section 178 of the Bengal Tenancy Act. **Pat** PIERPONT MORGAN *v.* RAMJEE RAM, (19 0) Pat. 168; 5 P. L. J. 30 ; 1 P. L. T. 310 **366**

——— **s. 23**—*Tenant, right of, to cut trees—Landlord, right of, to timber*

Although under section 23 of the Bengal Tenancy Act a tenant has the right to cut trees growing on his holding, the landlord is entitled to the timber of the trees when cut, unless the tenant can establish a custom to the contrary. **Pat** RAHMIT SAHU *v.* MAHADEO CHAUDHURI, 1 P. L. T. 14?; 2 U. P. L. R. (Pat) 4 ; (92?) Pat. 129 **126**

——— **s. 40**—*Commutation of rent—Compromise by some landlords, whether binding on others*

Commutation of rent under section 40 of the Bengal Tenancy Act on the basis of a compromise between the tenants and some of the landlords is not binding on those landlords who were not parties to the compromise. **Pat** SCRAT MARAIN SINGH *v.* NATHUNI RAI **538**

——— **s. 49**—*Notice to quit - Mode of service—Tenants-in-common – Duty of Court—Civil Procedure Code (Act V of 1908), O. V, r. 15.*

A notice to quit under section 49 of the Bengal Tenancy Act should be served in the manner prescribed in the Civil Procedure Code for the service of a summons. Where such a notice is issued to tenants-in-common, and one of the tenants receives the notice for all, the Court should, in deciding whether service has been properly effected on all, consider the facts with reference to Order V, rule 15, of the Civil Procedure Code, or with reference to the rule that service upon one joint tenant is *prima facie* evidence that it reached all **C** HARICHARN MANDAL *v.* BIGHORE GAIN **127**

——— **ss. 50, 115**—*Enhancement of rent, suit for, after publication of Record of Rights—Tenant, whether entitled to presumption under s 50—S. 115, effect of, on s 50.*

Where after the publication of a Record of Rights a landlord brings a suit for enhancement of rent against an occupancy *raiyat*, the latter is precluded from relying upon the presumption raised in section 5 of the Bengal Tenancy Act, because the provisions of that section are controlled by section 115 of the Act **Pat** ABDUL BAQI *v* KUNJA BEHARI **818**

——— **ss. 50, 52 (6)**—*Landlord and tenant—Additional rent for additional area, suit for—Burden of proof Standard of measurement*

In a suit for additional rent for additional area, the landlord must, under section 52 of the Bengal Tenancy Act, prove that there has been an increase in the area for which rent was previously paid and in order to do so, he must show that the land was measured at the time of the inception of the tenancy by a particular standard of measurement, and that there has been an increase in the area on measurement by the same standard.

The words "at the time the measurement on which the claim is based was made' in sub-section (6) of section 52 of the Bengal Tenancy Act refer to the measurement made at the time of the original settlement, and not to the measurement upon which the excess area is found out before the institution of the suit for additional rent. **C** UMED ALI *v.* HABIBULLAH, 31 C. L. J. 68; 47 C 268 **38**

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——— **s. 103B**—*Record of Rights, entry in, value of—Presumption of correctness, rebuttal of—Evidence prior to publication, whether admissible.*

Evidence of a date prior to that of the publication of a Record of Rights is admissible in evidence and ought to be taken into consideration by a Court and weighed in determining whether the presumption created by an entry in the Record of Rights has been rebutted. **Pat** BHIKHAN *v.* MARDAN ALI **40**

——— **ss. 105A, 109**—*Decision under s. 105A, whether bars suit for ejectment against person not party to proceedings*

A decision in a proceeding under section 105 A of the Bengal Tenancy Act, that certain persons are tenure-holders, does not bar a suit by those persons against certain other persons who were not parties to the proceeding under section 105A for ejectment of the latter on the ground that they are mere trespassers. **Pat** RAMYAD PANDE *v* GENDA TEWARI **993**

——— **ss. 161, 170 (3)**—*Rent decree—Occupancy holding, sale of—Usufructuary mortgagee, whether entitled to deposit decretal amount to prevent sale.*

A usufructuary mortgagee in possession of a non-transferable occupancy holding, which has been advertised for sale in execution of a rent decree obtained against the mortgagor, has an encumbrance which is an interest voidable on the sale of the holding, and is entitled to deposit the decretal amount under section 170 (3) of the Bengal Tenancy Act and prevent the sale. **Pat** SHEIKH AZMAT *v.* BIBI TAMZAN, 1 P. L. J. 3; 1 P. L. T 10?; (1920) (Pat) 49; U. P. L. R Pat) 9 **490**

Bihar and Orissa Public Demands Recovery Act (IV of 1904), s. 26

—*Arrears in respect of whole holding—Certificate in respect of part holding against one of several tenants—Purchaser, position of—Priority over purchaser under money decree*

If a decree-holder in execution of a rent decree chooses to sell part of a holding, although the decree is against the whole, the decree loses the character of a rent decree

If all the tenants of a holding are not made parties to a rent suit, the decree obtained will not be a rent decree, but will be a money decree

Where in respect of the arrears of rent of a holding which stood in the name of several tenants, a certificate under the Bihar and Orissa Public Demands Recovery Act was issued against only one of the tenants and only a portion of the holding was sold in execution of the certificate:

Held, that the purchaser was in the position of a purchaser in execution of a money decree and had no priority over a previous purchaser of the holding under a money decree. **Pat** RAMNANDAN RAM KANDU *v.* HARNANDAN PRASAD **463**

Bombay District Municipal Act (III of 1901), s. 167—*"For anything done or purporting to have been done," meaning of—Injunction, suit for—Notice, when not necessary.*

The expression "for anything done or purporting to be done" in section 167 of the Bombay District Municipal Act means that the section applies where something has been done, and not where there is an apprehension only that something will be done. A suit, therefore, against a Municipality to restrain an apprehended injury is not bad merely because the notice required by the section was not given: in such a case no notice is necessary. **S** VIRJI *v.* KARACHI MUNICIPALITY, 14 S. L. R. 46 **527**

Bombay Hereditary Offices Act (III of 1874), s. 15—*Settlement of village—Survey number, exclusion of—Burden of proof—*Inams *and* saranjams, *grant of—Presumption—Grant of royal share of revenue or of soil.*

Where a *sanad* evidencing a settlement under section 15 of the Bombay Hereditary Offices Act mentions a whole village, a party who alleges that a particular survey number of that village is outside the scope of the settlement must prove his allegation.

In the case of *inams* and *saranjams* in the Bombay Presidency the ordinary presumption in respect of such a settlement as the foregoing is in favour of the grant being limited to the royal share of the revenue, in the absence of any words to indicate a grant of the soil, but the absence of such words would not necessarily establish that the grant is of the royal share of the revenue only. **B** AMRIT VAMAN *v* HARI GOVIND, 22 Bom. L. R. 275, 44 B 237 **411**

Bond, *suit on, against representative of deceased executant—Decree, form of*

Where, in a suit upon a bond against the representative of the executant, the Court finds the bond to be genuine, it ought not to dismiss the suit on the ground that the deceased has left no assets, but should pass a decree against the assets of the deceased, if any, in the hands of the defendant **A** BASTI RAM *v.* RUSTAM SINGH, 2 U. P. L. R. A 146 **518**

Buddhist Ecclesiastical Law—Ayanzoungs, *who are* - Ayanzoung, *right of, to sue to recover property of* kyaung.

"Ayanzoungs" are persons who are in charge of a Kyaung and its precincts, and are entitled to sue to recover possession of land alleged to form part of a Kyaung. **L B** UPYINNYA THIHA *v.* PO THIN, 12 Bur. L. T. 264 **939**

Buddhist Law, *Burmese—Adoption—Giving and taking, evidence of - Presumption—Proof necessary.*

Under Burmese Buddhist Law it is not essential in adoption cases that direct evidence should be given of the actual giving and taking in adoption. No documentary evidence is necessary and no particular ceremony or formality is required Where it is clearly proved that the child was brought up with a view to inherit, the actual giving and taking may be presumed; but where the giving and taking is not actually proved, it is incumbent on the adopted child to prove his case by clear and unambiguous evidence as to the publicity and notoriety of his status as *kittima* child. **L B** MAUNG SEIN *v.* U Po Ko, 12 Bur. L. T. 236 **954**

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———, *Burmese - Inheritance—Daughter taken away by divorced mother, right of, to inherit as member of natural father's family.*

It is a well-established rule of Buddhist Law in both Upper and Lower Burma that a daughter taken away by her mother on divorce loses her right of inheritance as a member of her natural father's family. **L B** LE MAUNG *v.* MA KWE, 10 L. B. R. 107; 13 Bur. L. T. 3 **681**

———, *Burmese—Joint and separate property—Obligation incurred during marriage but discharged after death of husband, whether can be debited to joint account—Gift of separate property by one party during marriage—Property inherited during marriage—Profits, division of, rule of—*Nissayo *and* nissito, *rule of, applicability of—Civil Procedure Code (Act V of 1908), O. XXVI, r. 14 (2)—Commissioner, report of— Objection not taken before trial Court, whether can be taken in appeal.*

In deciding what is joint property under Burmese Buddhist Law, all payments of money the obligation for which was undertaken during coverture must be debited to the joint account, even though the actual payment was made by the survivor after the death of the other party to the marriage.

A gift of the separate property of one of the parties to a marriage, even though the name of the other party is joined as donor, must be held to be made out of the separate property of the party to whom the property belongs.

Profits of property inherited by either of the parties to a marriage during coverture are to be divided equally between the parties, and the same rule applies to the profits of the separate property brought by either party to the marriage.

The rule of *nissayo* and *nissito* does not apply to the profits during coverture of the separate property of either of the parties.

The proper time for an aggrieved party to object to the findings of a Commissioner is when the parties are called upon to state their objections for the consideration of the trial Court, and if either party fails without sufficient cause to state his objections, he cannot be heard on those points in the Appellate Court. **L B** MA DWE *v.* MA TIN LUN, 12 Bur. L. T. 228 **972**

Burden of proof, *question of, when not pertinent.*

Where in a controversy the relevant facts are before the Court, and all that remains for decision is, what inference should be drawn from them, the question of the burden of proof is not pertinent. **P C** SETURATNAM AIYAR *v.* VENKATACHALA GOUNDEN, (92) M W. N 6 : 27 M L T. 102; 11 L. W 399; 38 M. L. J 476; 22 Bom L. R 578; 18 A L. J. 707; 43 M 567 **117**

———, wrong allocation of. *See* AGRA TENANCY ACT, s. 185 **287**

Burma Excise Act (V of 1917) ss. 41 (c), 63 (1) (a) - *Offence under s.* 41 (c)—*Sanction for prosecution by Collector, form of.*

A mere order by the Collector sanctioning the prosecution of a person under section 41 (*c*) of the Burma Excise Act on the report of the District Superintendent of Police is not a sufficient compliance with the provisions of section 63 (1) (*a*)

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of the Act. The Collector must authorise some particular Excise Officer to make the report or complaint. **U B** KAUNG KI *v.* EMPEROR, 3 U. B. R. (1919) 197; 21 CR L. J. 452 **436**

Calcutta Improvement Act (V of 1911), ss. 41, 42, 69, 81—*Improvement scheme—Land acquisition—Recoupment principle—Land affected by execution of scheme. what is.*

Under section 41 of the Calcutta Improvement Act, 1911, an improvement scheme may provide for the acquisition, by the Board of Trustees appointed under the Act, of any land comprised in the scheme which will in their opinion be affected by the execution of the scheme.

It is not necessary that the land should be physically affected by the operation of the scheme, or that it should be injuriously affected by severance or otherwise.

Land is affected by the execution of a scheme whenever its value is thereby enhanced or diminished

Even though the land is only taken for the purposes of recoupment, the Board has the same powers of compulsory acquisition and the assessment of the value is regulated by the same principles, as if the land were required for the actual working of the scheme. If it is required for any of the purposes of the Act, whereof recoupment is one, the provisions for compulsory acquisition apply. **P C** TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA *v.* CHANDRA KANTA GHOSH, 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 22 Bom. L. R. 586; 47 C 500; 32 C. L. J. 75; 24 C. W. N. 881; 2 U. P. L. R. (P. C.) 98 **32**

Calcutta Municipal Act (III of 1899), ss. 299, 575, *proceedings under—Stay of proceedings—Proceedings, revival of, after long delay, effect of.*

Criminal proceedings under section 575 of the Calcutta Municipal Act were initiated against the petitioner on the 15th August 1916, but at his request the proceedings were stayed pending negotiations between himself and the Municipal Corporation. Nothing came of these negotiations, and on the 28th February 1919 application was made to revive the proceedings and on the 20th November 1919, the petitioner was sentenced to pay a daily fine for 0 days from the 16th May 1916:

Held, that, in view of the special circumstances of the case and the very great delay that had occurred, it must be taken that the proceedings had been abandoned, and that the conviction for an offence from the 16th May 1916, made on 20th November 1919, was invalid. **S** NANDO LAL GUHA *v.* CO-PORATION OF CALCUTTA, 24 C. W N. 487; 31 C. L. J. 342; 21 CR. L. J. 568 **862**

Cantonment, *land in—Permanent tenancy, whether can be acquired—Burden of proof—Consideration which do not create presumption of permanency—Denial of title—Estoppel - Landlord and tenant—Tenant building on land—Ejectment—Compensation, whether can be awarded.*

Where in a case of eviction from lands which formed a Cantonment the defendants allege that they have acquired a permanent tenancy, the burden of proving such tenancy lies upon them; the facts that they and their predecessors held the lands without a lease for a very long time, that the rent was never altered, that succession to the lands by transfer and inheritance has been established, and that buildings have been erected on the lands, do not by themselves establish a permanent tenancy, nor do such circumstances raise any presumption of ownership in favour of the defendants or their predecessors-in title.

The fact that permanent structures are constructed on such lands to the knowledge of the plaintiff would not estop him from denying the permanent character of the tenancy of the defendants.

Where a person with full knowledge of the limited interest which he possesses in land constructs permanent structures upon the same, he is not entitled upon eviction to any compensation. **Pat** ONKAR MAL MARWARI *v.* SECRETARY OF STATE FOR INDIA, 2 U. P. L. R. (Pat.) 124 **813**

C. P. Tenancy Act (XI of 1898), s. 56 (2), applicability of. *See* KOTWAR **749**

——— s. 81, *decree under—Appeal—Valuation—Civil Procedure Code (Act V of 1908), ss. 2 (2), 102, O. IX, r. 8—Suit for rent of malik makbuza field—Amount less than Rs. 500—Appeal, second, whether lies—Decree passed on "admission", meaning of—Appeal, whether lies - Jurisdiction—Court, whether can pass decree against party against whom plaintiff does not seek decree.*

The criterion for determining whether an appeal lies from a decree under section 81 of the Central Provinces Tenancy Act is the nature of the suit as originally framed, and not the form it may subsequently assume.

Although a suit for rent due by a tenant of *malik makbuza* fields is not triable by a Small Cause Court, it is nonetheless one of a nature cognizable by a Court of Small Causes and unless the subject-matter involved in the suit exceeds Rs. 500 in value, there is no second appeal from a decree in such a suit.

The word "decree" in Order IX, rule 8 of the Civil Procedure ode, is governed by the definition thereof given in section 2 (2) of the Code; a decree, therefore, passed upon the admission of the defendant is appealable by the person aggrieved thereby.

A Court has no jurisdiction to pass a decree against a person against whom the plaintiff does not seek one, and who is joined as a defendant on his own application.

The position of a person who is made a defendant on his own application and that of a person who is so made without any such application are very different, in that the former has to make out a *prima facie* case before the plaintiff can be asked to meet it **N** RAMKRISHNA *v.* NARAIN **845**

Champerty—Champertous agreement, validity of—Agreement to share property obtained by litigation in consideration of promisee providing funds, whether can be enforced. *See* CONTRACT ACT, s. 23 **272**

Chose-in-action, *mortgage of—Mortgagee, right of, to sue - Mortgagor, whether necessary party --Liability of mortgagee—Transfer of Property Act (IV of 1882), s. 134.*

The mortgagee of a chose-in-action is entitled to institute in his own name a suit to recover the

amount due, and he is bound in such suit to implead the mortgagor as a party defendant. If the mortgagee, owing to his default, fails to recover the money, he will be liable to the mortgagor to account for his failure. **M** ARUNACHELLAM CHETTIAR *v.* MADASWAMI, 1 L. W. 238 **146**

Civil Procedure Code (Act XIV of of 1882), s. 244—*Execution of decree—Sale of share of co-parcener in joint Hindu family—Purchaser, position of—Suit for partition and allotment of share, maintainability of.*

A suit by the auction-purchaser of the share of a Hindu co-parcener in joint family property for partition of the joint property and delivery to him of what might be allotted to the share of the judgment-debtor would not be barred by the provisions of section 244 of the Civil Procedure Code of 1882. The mere fact that the decree-holder himself is the purchaser would make no difference. **L** BRIJ LAL *v.* DURGA, 1 L 134 **254**

——— **s. 443**—*Minor—Mother, as guardian of minor, consenting to arbitration and decree—Omission by Court to appoint guardian, effect of—Decree, whether binding on minor.*

An arbitration can be entered into on behalf of a minor by his natural guardian, provided it is for his benefit, or reasonable and proper for the protection of his property, but the award would not be binding if that were not the case.

Where a mother, as the natural guardian of her minor son, consented to a reference to arbitration and accepted the award on behalf of the minor and raised no objection to the passing of a decree in terms of the award, but no appointment of the mother as guardian of the minor had been made, as required by section 443 of the Code of Civil Procedure, 1882, and the subsequent result of the decree was a sale of the property in dispute for an undervalue:

Held, that the minor's interests had not been duly protected; that the omission to appoint a guardian was not a mere irregularity which could be condoned, and that the decree based on the award and the sale of the property were null and void. **B** SADASHIV RAM CHANDRA DATAR *v.* TRIMBAK KESHAV VAZE; 22 BOM L. R. 266; 44 B. 202 **399**

Civil Procedure Code (Act V of 1908), s. 2 (2), 47—*"Decree"—Sale proclamation—Order rejecting application as to valuation, whether decree—Decision under s. 47, when amounts to "decree."*

An order made in execution proceedings rejecting a petition objecting to the valuation given by a decree-holder for the purposes of a sale proclamation is not a "decree" within the meaning of section 2 (2), Civil Procedure Code, and is, therefore, not appealable.

In order that a decision under section 47 of the Code may be included within the definition of "decree" and be appealable, it must in some way determine the rights of the parties with regard to all or any of the matters in controversy in the suit. **Pat** SAURENDRA NATH MITRA *v.* MRITUNJAY BANARJI, 5 P. L. J. 270; (1920) Pat. 227; 1 P.L. T. 645 **452**

——— **ss. 2 (2), 47**—*Execution of decree—Order made in execution proceedings, whether decree—Order negativing decree-holder's right to proceed against certain property, nature of—Appeal, whether lies.*

It is not every order made in execution proceedings which is a decree.

An order granting or refusing a process for the examination of witnesses or an order merely determining a point of law arising incidentally or otherwise in the course of execution proceedings and not refusing or granting relief is not a decree and is, therefore, not appealable.

An order finally negativing the right of the decree-holder to proceed against the land of the judgment-debtor comes within the purview of section 47 of the Civil Procedure Code and is appealable. **L** DATAR KAUR *v.* RAM RATTAN, 2 U. P. L. R. (I.) 96; 115 P. L. R. 1920 **173**

——— **s. 9**—*Right of worship, nature of—Suit to enforce rights of worship and carrying processions, whether of civil nature.*

The ordinary right of a citizen to worship, according to his own belief, any deity and in such manner as his belief requires him to do so long as he does not prevent others from carrying on similar worship according to their own belief, is a right of a civil nature and any interference with that right is a matter in respect of which relief would, in a proper case, be granted by a Civil Court.

The right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others or cause a public nuisance or interfere with the ordinary use of the streets by the public and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. The right to carry on the worship of any deity in any manner that a person pleases, subject to similar conditions, is also a right inherent in every person. **B** WAMAN BALVANT KASHIKAR *v.* HARSHET SHETE, 22 Bom. L. R. 307; 44 B 410 **419**

——— **s. 11**—Res judicata—*Appeal, disposal of, on points independent of those decided by trial Court, effect of.*

When an appeal is filed and admitted, the matters decided by the lower Court cease to be *res judicata* and are left open between the parties for argument before, and decision by, the Appellate Court. If the Appellate Court disposes of the appeal on points independently of those on which the lower Court rested its decision or in terms of a compromise between the parties, the findings of the lower Court do not operate as *res judicata* in regard to the matters dealt with by it. **M** VENGANAT RAJA VASUDEVA *v.* NAITHILATH MATATHIL, 27 M. L. T. 54 **199**

——— **s. 11**—Res judicata—*Revenue sale—Purchaser, position of—Decree obtained by ex-proprietor, whether can be taken, advantage of—Tenants, position of.*

The purchaser of an estate at a revenue sale is not bound by the act of the ex-proprietor. He gets the estate as it stood at the time of the permanent settlement. But it is open to the purchaser, if he wishes, to accept a previous decision between the ex-proprietor and his tenants as binding on himself and take advantage of it. If he does so, the tenants cannot object, because the purchaser is not in any worse position than the ex-proprietor and

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may elect to take advantage of the decree obtained by the latter, although the decree is not *res judicata* as between the purchaser and the tenants. **C** NAKUL CHANDRA BARUA *v.* SASTI CHARAN BISWAS, 24 C. W. N. 899 **390**

——— **s. 11 Expl. IV,** *applicability of—Failure to raise a point in previous suit*—Res judicata.

Explanation IV to section 11, Civil Procedure Code, applies even where the matter in dispute was not heard and finally decided in the former suit

The determination of the question whether a person ought to have raised a point in a suit so that his failure to raise it should preclude him from raising it in a subsequent suit, must depend on the particular facts of the case. **N** PYARELAL *v.* PANNALAL **193**

——— **s. 11, O. IX, r. 9**—*Landlord and tenant—Suit for possession by tenant, dismissal of, for default—Abatement of rent on ground of dispossession, claim for, whether barred in subsequent suit for rent*—Res judicata—*Munsif's decision, whether operates as* res judicata, *in subsequent suit brought in Subordinate Judge's Court.*

The dismissal for default of a suit against his landlord for recovery of possession of certain property comprised in the plaintiff's *dar-mourashi* tenure does not preclude him, in a subsequent suit for rent brought by the landlord, from claiming abatement of rent owing to dispossession by the landlord

The decision on a question in the Court of a Munsif does not operate as *res judicata* on the same question in a subsequent suit between the same parties brought in the Court of a Subordinate Judge. **C** PROMOTHA BHUSAN DEB ROY *v.* NARENDRA BHUSAN ROY **932**

——— **s. 20 (c)**—*Place of suing—Goods, purchase of, at one place to be delivered at another—Cause of action, accrual of, at place of delivery.*

Where upon the purchase of goods, it is agreed between the parties that payment for, and delivery of, the goods would be made and taken at a place other than the place where the purchase is effected, a suit arising out of the transaction on account of non-delivery of a portion of the goods may be brought in a Court exercising jurisdiction in the place where delivery and payment were to be made.

A purchased certain goods from *B* at Bombay, who agreed to deliver and receive payment at Cawnpore: after taking delivery *A* sued *B.* at Cawnpore for the price of certain of the goods not received by him:

Held, that the cause of action accrued at Cawnpore, and the Cawnpore Courts had jurisdiction to try the suit. **A** ABDUL RASHID *v.* SIZING MATERIAL CO., LTD, 2 U. P. L. R. (A) 126; 18 A. L. J. 516, 42 A 480 **192**

——— **s. 20 (c)**—*Place of suing—Sale of goods—Payment to be made where goods purchased—Cause of action, accrual of, place of.*

The cause of action in a suit to recover the price of goods sold arises where the purchaser stipulates to make payment. Thus, where a person at *N.* sells goods to a firm at *P.*, it being agreed that payment is to be made at *N*, the cause of action for recovery of the price of the goods accrues at *N.* and the

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Court at *N* has jurisdiction to entertain the suit. **M** NAINA MARAKAYER *v.* SOMASUNDARAM CHETTIAR, 11 L. W. 593 **604**

——— **s. 22**—*Transfer of case, application for—Jurisdiction of Court, whether can be questioned—High Court, power of, to determine, whether suit shall be tried by Court subordinate to another High Court—Order, whether final.*

A defendant cannot raise an issue as to the jurisdiction of the Court in which the suit is pending and at the same time apply for transfer of the case under section 22 of the Civil Procedure Code, which contemplates that the suit may be properly instituted in the Court in which it is pending as well as in some other Court.

Under section 22 of the Civil Procedure Code a High Court has power to determine whether a suit shall proceed in a Court subordinate to itself or in some Court subordinate to another High Court, and an order by a High Court that a suit shall proceed in a ourt subordinate to another High Court will be final and it will not be open to the latter Court to refuse the suit being tried in the Court subordinate to it having jurisdiction to try it. **Pat** RAM KUMAR SHEO CHAND *v* TULA RAM NATHU RAM, 1 P. L. T. 277, (1920) Pat 235 **920**

——— **s. 47**—*Execution of decree—Property attached in execution—Purchaser from discharged defendant, whether party.*

A person who, prior to the passing of a simple money decree, purchases from a discharged defendant property against which the decree is sought to be executed but which is not affected by the decree itself, is not a representative of that defendant within the meaning of section 47 of the Civil Procedure Code. **N** KASHI RAO *v.* MOHAMMAD ALI **809**

——— **ss. 47, 66, O. II, r. 2, O. XXI, rr. 69, 96**—*Mortgage decree—Execution of decree—Purchase by* benamidar *for decree-holder, validity of*—Benamidar, *suit by, to recover possession, maintainability of—Mortgagee, whether necessary party—Leave to bid not obtained by mortgagee, effect of—Suits against different persons in respect of distinct properties at different times, maintainability of.*

Where in execution of a mortgage decree the property is purchased by a *benamidar* for the mortgagee, the former is entitled to sue in his own name to recover the property vested in him as a *benamidar*, and the original mortgagee for whom he is alleged to have purchased the property at the Court sale is not a necessary party to the suit.

Such a suit is not barred by the provisions of section 47 of the Civil Procedure Code, inasmuch as the plaintiff-purchaser is not the decree-holder himself but a third person. For purposes of procedure the auction-purchaser, even though a *benamidar* for the decree-holder, is a third party.

Where in such a case it appears that the mortgagee did not obtain any leave to bid for or purchase the property, the omission would not render the purchase by the *benamidar* void. The purchase is merely liable to be set aside at the instance of the judgment-debtor in proceedings properly framed for that purpose and until so set aside, holds good.

An auction-purchaser brought a suit to recover

possession of certain property included in his purchase and obtained a decree. Subsequently he brought another suit against a different set of defendants to recover possession of certain other property which was also included in his purchase:

Held, that the suit was not barred by the provisions of Order II, rule 2, of the Civil Procedure Code. **B** RAMCHANDRA VITHAL BHAT *v.* GAJANAND NARAYAN DESHMUKH, 22 Bom. L. R. 296; 44 B. 352 **349**

——— ss. 47, 104 (2), O. XXI, r. 89, O. XLIII, r. 1 (j)—*Execution of decree—Application to set aside sale, dismissal of—Appeal, second, whether lies.*

No second appeal lies from an appellate order dismissing an application under Order XXI, rule 89, of the Civil Procedure Code to set aside an execution sale. The accident of the auction-purchaser being the decree-holder makes no difference **B** KACHU RAVJI MINDHE VANJARI *v.* TRIMBAK KHEM HAND GUJRATHI, 22 Bom. L. R. 383; 44 B. 472 **597**

——— s. 47, O. XXI, rr. 16, 22, *nature of—Failure to comply with directions of rule* 16, *effect of—Separate suit for declaring execution proceedings void, whether maintainable.*

The provisions of Order XXI, rule 16, that notice shall be given to the judgment-debtor of the transfer of a decree are of a mandatory nature and the failure to comply with the directions of the rule makes all subsequent proceedings void.

On 6th July 1914 one *B.* obtained a decree for Rs. 250 against three brothers *F*, and *G.* majors and *A.* minor under the guardianship of *F.* Execution was taken out on the 16th December 1914 and a house belonging to the three brothers was attached. It was mortgaged at the time and the rights of redemption were sold in April 1915 to the son of *J.* The purchase money not having been paid, the sale was not confirmed. The decree-holder then transferred his rights in the decree to *J.* and the house was again brought to auction and bought by *J.* in November 1915. Notice of the transfer of the decree to *J.* was served on *F.* for himself and as guardian of *G* and *A.* *G.* having been misdescribed as a minor. On the 2nd December 1915 *G.* and *A.* sued for a declaration that the execution proceedings were not binding against them owing to the misdescription of *G.* and the failure of *F.* to effectively represent *A*:

Held, (1) that execution having been taken out within a year, no notice was necessary to the judgment-debtors;

(2) that inasmuch as *G.* knew of the transfer of the decree to *J.* he could not equitably raise an objection on account of want of personal service on him under rule 16;

(3) that the question of the irregularity or illegality of the notice issued under rule 16 and its effect was one arising between the parties to the suit and could have only been properly determined under section 47, Civil Procedure Code;

(4) that under the circumstances the suit was not maintainable. **L** GUL MUHAMMAD *v* BANDU **461**

——— s. 47, O. XXI, r. 90—*Application to set aside sale—Appeal, second, whether competent—Non-transferable occupancy holding—Objection to sale of holding, when to be taken—Mortgagee, objection by, subject to equities against judgment-debtor.*

There is no second appeal against an order passed on an application under Order XXI, rule 90 of the Civil Procedure Code.

Although a tenant is entitled to get a sale of his holding in execution of a decree set aside on the ground that the holding is non-transferable, he, nevertheless, is bound to take the objection at the earliest possible moment; such an objection cannot be entertained in second appeal after the sale has taken place.

A mortgagee from a judgment-debtor is a representative of the judgment-debtor for the purpose of an application under section 47 of the Code of Civil Procedure, and he cannot raise an objection which the judgment-debtor is incompetent to raise, as he is bound by all the equities enforceable against the judgment-debtor. **Pat** SRI-KISHNA RAI *v.* RAM SARAN RAI, 1 P. L. T. 267 **646**

——— s. 48, O. XXXIV, r. 5. *See* LIMITATION ACT, SCH. I, ART. 181 **563**

——— s. 60—*Attachment of debt—Security deposit for carrying out contract, whether debt and liable to attachment.*

An attaching creditor can attach a debt although the debt is not then payable, but it must be an existing debt.

Money deposited as security for the due performance and completion of a contract, as well as monies deducted from sums already earned and retained till completion of the work, although liable to forfeiture, are debts due to the contractor until they became liable to be forfeited, and are attachable in execution of a decree against him. **L B** S. B. DAS *v* MUTHIA CHETTY, 12 Bur. L. T. 247 **948**

——— s. 60 (b)—*Execution of decree—Attachment—Agriculturist—Cattle, whether can be attached.*

The question whether cattle belonging to an agriculturist are necessary to enable him to earn his livelihood, arising out of an attachment in execution, is one for the executing Court to decide. **S** GUL MAHOMED *v* FAIZ MAHOMED, 13 S. L. R. 210 **69**

——— s. 66, *object of—Court sale—Agreement by purchaser to convey property purchased, whether enforceable.*

The object of section 66 of the Code of Civil Procedure is to put an end to purchases at Court auctions by one person in the name of another.

An agreement by an auction-purchaser subsequent to the purchase to convey a portion of the property to another is not affected by section 66 of the Civil Procedure Code and is enforceable. **P** RAMATHAI VADIVELU MUDALIAR *v* PERIA MANICKA MUDALIAR, 24 C. W. N 699; 18 A. L. J 584; 28 M. L. T. 13; 39 M. L. J. 11; 12 L. W. 1; (1920) M. W. N. 389; 2 U. P. L. R (P. C.) 90; 43 M. 613 **395**

——— s. 92, *suit under—Plaintiff not having interest—Joinder of other plaintiffs with requisite interest—Suit, whether maintainable*

A suit under section 92 of the Civil Procedure Code was instituted by a person who was found to have no interest such as that required by the section. Two other persons who had the requisite interest obtained the sanction of the Collector and were added as plaintiffs. It was objected that the suit laid was not maintainable:

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Held, that the suit had been properly instituted and was maintainable. **M** JAKKAMREDDI SESHADRI REDDY *v.* SUBRAMANIA IYER, 11 L. W. 536; (920) M. W. N. 337; 38 M. L. J. 504; 43 M. 720 **450**

——— **s. 103, O. XLI, r. 25**—*Appeal—Finding on particular issue, absence of—High Court, power of, to remit issues for trial and to determine questions of fact.*

Where a Court from whose decree an appeal is before the High Court omits to determine a question of fact essential to the right decision of the suit on the merits, the High Court has jurisdiction, under Order XLI, rule 25 of the Civil Procedure Code, to frame issues and refer them for trial by that Court.

Where a lower Appellate Court fails to determine an issue of fact, the High Court in second appeal has power to deal with it under section 103 of the Civil Procedure Code. **P C** SETURATNAM AIYAR *v* VENKATACHALA GOUNDEN, (1920) M W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom L. R 578; 18 A. L. J 707; 43 M 567 **117**

——— **s. 107 (2), O. VII, r. 10,**—*Order returning memorandum of appeal for presentation to proper Court—Appeal, whether lies.*

No appeal lies against an order returning a memorandum of appeal for presentation to the proper Court. A revision is, however, competent against such an order. **L** KARM ILAHI *v.* HAKIM SHAH **865**

——— **ss. 109, 110**—*Arbitration Act (IX of 1899), s. 19—Appeal to Privy Council—Final order, what is - Order refusing to stay suit, whether final.*

An order is "final" within the meaning of section 109 of the Civil Procedure Code only if it finally disposes of the rights of the parties

An order refusing to stay a suit under section 19 of the Arbitration Act does not finally dispose of the rights of the parties, but leaves them to be determined by the Courts in the ordinary way. It is not, therefore, a "final order" within the meaning of section 109 of the Civil Procedure Code **P C** FIRM OF RAMCHAND MANJIMAL *v.* FIRM OF GOVERDHANDAS VISHINDAS RATANCHAND, 24 C. W N. 721 18 A. L. J. 591; 22 Bom L. R 606; 29 M. L. J 27; 12 L. W. 15; 2 U. P L. R. (P. C) 94; (1 20) M. W. N. 407; 28 M. L. T. 87 **302**

——— **s. 109 (c), O. XLV, r. 3** *Decree obtained by perjured evidence - Suit to set aside decree, maintainability of—Case, whether fit one for appeal to Privy Council.*

The mere fact that an appeal involves questions of law does not bring it within the scope of section 109 (*c*) of the Civil Procedure Code.

The question whether a suit is maintainable to set aside a decree obtained by perjured evidence is not one of such public importance as to bring a case in which it arises within the scope of section 109 (*c*) of the Civil Procedure Code **Pat** KRIPA SINDHU PANIGRAHI *v.* NANDA CHARAN PANIPATU, (1920) Pat 209 **615**

——— **s. 110**—*Appeal to Privy Council - Question of general importance, what is*

Where there is a conflict of opinion as to what was intended to be laid down in a decision of the Privy Council, and what was the effect of the observations in that case, the question is one of

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general importance to justify the grant of a certificate under section 110 of the Civil Procedure Code for leave to appeal to His Majesty in Council. **A** BRIJ NARAIN RAI *v.* MANGLA PRASAD RAI, 2 U. P L. R (A) 149 **526**

——— **s. 115**—*Interlocutory order deciding preliminary issues—Revision, whether entertainable.*

An application for revision is not entertainable from an order deciding preliminary issues in a suit, where such order would be appealable when the suit is finally decided **A** AIDAL SINGH *v.* PEARY LAL, 2 U. P. L R (A) 157 **248**

——— **s. 115**—*Legal Practitioners Act (XVIII of 1879), ss. 36, 39—Proceedings under Legal Practitioners Act—Revision—High Court, interference by—Enquiry, nature of.*

A High Court has no power under section 115, Civil Procedure Code, to interfere with an order under section 36 of the Legal Practitioners Act

The enquiry under section 39 of the Legal Practitioners Act is of the nature of a departmental enquiry, and it is enough if it is conducted in such a way that the officer enquiring acts with substantial justice and gives the person against whom proceedings are being taken an opportunity to show cause. **S** MULCHAND, *In re*, 13 S. L. R. 212: 21 CR. L J. 449 **433**

——— **s. 115** *Revision—Finding not based on evidence - Material irregularity.*

It is the duty of a Court to found its decision upon a consideration of the evidence adduced before it, and where it omits to do so but founds its decision on a consideration that has no basis, it acts in the exercise of its jurisdiction with material irregularity, and its decision is liable to be set aside under section 115 of the Civil Procedure Code. **Pat** JANARDAN MISSIR *v* BRIJNANDAN SINGH **982**

——— **s. 115**—*Revision—High Court, power of, to interfere with interlocutory orders.*

The High Court will not interfere under section 115, Civil Procedure Code, with an interlocutory order when there is another remedy open to the applicant and no irreparable harm will be suffered by the interlocutory order. **Pat** LACHMIBATI KUMARI *v* NANDKUMAR SINGH, 1 P. L. T 268; 5 P. L. J 400 **649**

——— **s. 115, O. XLI, r. 27**—*Appellate Court, order by, directing evidence to be produced before it—Revision, whether competent.*

If an Appellate Court makes a mistake in law in directing evidence to be tendered before it which it is not competent to receive in accordance with the provisions of the Civil Procedure Code, it commits an error of law but that will not give the party aggrieved by the order the right to invoke the interference of the High Court under section 115 of the Code of Civil Procedure. **Pat** GAYA SINGH *v.* NAME SINGH, 5 P. L. J. 263 **983**

——— **s. 141, O. IX, r. 13**—*Application for setting aside* ex parte *decree—Dismissal for default—Application for restoration, whether entertainable—Limitation Act IX of 1908), Sch. I, Art 181.*

Plaintiff obtained an *ex parte* decree on the 15th January 19 9. On the 4th July the defendant applied to have it set aside, but the application was dismissed for default on the 16th October. On the 25th November the defendant made a fresh application

Held, that the application of the 27th November should be treated as one for the restoration of the application of the 4th July and as such was entertainable, the procedure laid down in Order IX, rule 13, Civil Procedure Code, being applicable to it by the operation of section 141 of the Code;

(2) that the application was governed by Article 181 of Schedule I to the Limitation Act and was within time. **L** MAULA BAKHSH *v.* RAM DAS **25**

——— **s. 148**, *applicability of, to Provincial Small Cause Court.*

The provisions of section 148 of the Civil Procedure Code cannot be applied to extend the time for doing an act prescribed by the Provincial Small Cause Courts Act. **Pat** RAM CHARITAR RAM *v.* HASHIM KHAN, (1920) Pat 203; 1 P. L. T. 313 **810**

——— **s. 149**, *applicability of—Revision converted into appeal—Court-fee made up after expiry of limitation—Appeal, whether barred—Order in Chambers allowing Court-fee to be made up, effect of.*

An appeal must be taken to be filed on the date on which the memorandum of appeal is properly stamped.

An appeal was decided by a District Judge on 3rd March 1915. A petition for revision against that decision was filed on 4th June 1915. On 7th February 1916, after hearing both parties, the Judge in Chambers held that an appeal lay in the case and gave time to the appellants to make up the deficiency in Court-fees on the memorandum of appeal. The deficiency was made up on 11th February 1916. On the appeal coming on for hearing before a Division Bench, the respondent objected that the appeal was barred by time:

Held, (1) that the order of the Judge in Chambers must be taken to have been made subject to all just exceptions;

(2) that the memorandum of appeal must be taken to have been filed on the date on which the deficiency in Court-fees was made up, and was, consequently, barred by time;

(3) that section 149 of the Civil Procedure Code was inapplicable to the case. **L** UMED ALI *v.* MUNICIPAL COMMITTEE, JHANG-MAGHIANA **143**

——— **s. 149**—*Time for paying Court-fees, extension of—Appeal—Order, whether can be interfered with—High Court, power of interference of.*

An Appellate Court cannot question the propriety of an order under section 149 of the Civil Procedure Code for the payment of deficit Court-fees. If the order is not objected to when it is made, or in the Court which made it, it cannot be objected to in second appeal **Pat** SURAJ PAL *v.* UTIM PANDEY, 2 U. P. L. R. (Pat) 45 **47**

——— **s. 151**—*Act of Court—Party, whether can be prejudiced by act of Court—Judge, duty of—Inherent power of Court to make order required by justice.*

On an appeal coming before the High Court that Court suggested that the matters in dispute should be investigated in a separate suit; this was accepted by both parties, with the result that the appeal was not heard on the merits. It transpired, however, that the matters could not be so investigated, and the parties were thus relegated to the position of not having the matters in controversy between them decided by the High Court. In these circumstances an application was made to the High Court for restoration of the appeal so that it might be heard on the merits:

Held, that the Court had inherent power to make the restoration in order to enable it to discharge the duty cast upon it as a Court of Justice to determine the controversy between the parties, and that applying the maxim *actus curiæ neminem gravabit* (an act of the Court shall prejudice no man), the failure of the Court to decide a case after submission could not be permitted to defeat the substantial rights of the litigants. **C** KALYAN SINGH *v.* RAMGOLAM SINGH, 31 C. L. J. 48 **4**

——— **s. 151**—*Inherent power of Court, when to be exercised—Appeal—Remand, order of, when to be made.*

An order under section 151 of the Civil Procedure Code must show on the face of it that it is necessary for the ends of justice or to prevent abuse of the process of the Court.

An Appellate Court has inherent power to remand a case, but it is a power which can only be exercised for the ends of justice.

The mere fact that there has not been a proper trial of the case, apart from other circumstances in the case, is not sufficient to vest the Appellate Court with jurisdiction to remand the case in the exercise of its inherent power.

The rule is that if the trial has not been proper owing to some neglect on the part of the Court, the Appellate Court has power to remand the case, bw nthere the neglect or default is on the part of a party to the litigation, the Appellate Court has no such power. **Pat** BISHUN DUTT *v.* RAMJI PROSAD, 2 U. P. L. R. (Pat) 136 **834**

——— **s. 151**—*Inherent power—Misapprehension as to result of suit—Substitution of parties—Appellate Court, power of.*

A Judge sitting on the Original Side of the High Court, under a misapprehension as to the result of a suit, disallowed an application for substitution of parties On appeal:

Held, that as under section 151 of the Civil Procedure Code the Court had inherent power to make such order as may be necessary for the ends of justice, the application for substitution should be allowed. **C** NILKANTA GHOSE *v.* SWARNAMOYEE DASSI, 31 C. L. J. 120 **726**

——— **s. 151, O. XXI, r. 19**—*Decree entitling two persons to recover unequal sums from each other—Party entitled to execution—Method of executing decree.*

Where under a decree two persons are entitled to recover two unequal sums from each other, execution can only be taken out, under Order XXI, rule 19, of the Civil Procedure Code by the person entitled to the larger sum, and for so much only as remains after deducting the smaller sum. If execution is taken out without making this deduction, the Court has power, under section 151 of the Code, to compel a refund of the sum taken in excess. **C** ANNADA MOHAN ROY *v.* ATUL CHANDRA CHAKRABARTI 24 C. W. N. 465 **753**

——— **s. 151, O. XLI, r. 23**—Ex parte *decree—Appellate Court, power of, to remand case—Inherent power, when to be exercised.*

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An Appellate Court has inherent power not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case.

The question whether it is necessary for the ends of justice to exercise such power of remand must depend upon the circumstances of the particular case and in exercising such jurisdiction, the Court must be careful to see that its decision is based on general legal principles and subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. **U B** MA ON ME *v.* MA PYA GYI, 3 U. B. R. (1919) 198 **255**

——— **O. II, r. 2**, *conditions of applicability of —Identity of causes of action—Plaitiff, whether bound, to sue for relief—Joint property—Partition, right to sue for, nature of.*

The cardinal condition of the applicability of Order II, rule 2, Civil Procedure Code, is that the cause of action in both cases shall be identical. Moreover, it is essential that the plaintiff should have been bound to sue in the earlier case for the relief for which he prays in the subsequent suit.

The right of an owner in joint property to sue for partition at any time so long as the property shall remain undivided is a continually recurring right and once the immoveable property in suit has been declared to be common property the plaintiff has a right to come in at any time and ask for partition.

On the 17th February 1912 plaintiff sued defendant for rendition of account and dissolution of partnership alleging a partnership of long standing and purchase of certain immoveable property out of the profits of the partnership. The suit was valued at Rs. 130 only and on the defendant's objection as to valuation the plaintiff's Pleader stated that the suit was not in respect of immoveable property but only in respect of the profits arising out of it. The matter was referred to arbitration and the award declared the property to be partnership property and the plaintiff to be entitled to one-half share in it. A decree was eventually passed in accordance with this award.

On the 11th June 1914 the plaintiff instituted the present suit for rendition of accounts of the property decreed in the former suit and for its partition. The Court gave the plaintiff a decree for possession of one-half of the property in suit and directed that accounts be taken of the mesne profits. The defendant appealed to the High Court and contended that the suit was barred by Order II, rule 2, Civil Procedure Code:

Held, (1) that though in the first case the plaintiff was bound to sue for partition of the immoveable property, he was not bound to sue for its partition by metes and bounds;

(2) that the award and the decree passed in accordance therewith did in fact deal with the right of the parties in the immoveable property by declaring it as their property in common tenancy in equal shares;

(3) that the present suit was not one between partners for dissolution of partnership and for rendition of partnership accounts, but was one between tenants-in-common for mesne profits and partition of the common property;

(4) that under the circumstances the first suit was no bar to the present suit because there was no identity of causes of action in the two suits. **L** ZIA-UL-HAQ *v.* MUHAMMAD IBRAHIM **701**

——— **O. II, r. 2**—*Contract—Separate covenants, breach of, whether constitutes one cause of action —Suit in respect of one breach—Subsequent suit in respect of other breach, whether maintainable.*

Where in a contract there are two covenants to be performed at different times, but both secured in the same manner, a breach of both the covenants constitutes one cause of action, and if a suit is brought in respect of one breach only, a subsequent suit in respect of the other breach is barred under rule 2 of Order II of the Civil Procedure Code. **L B** SHWE HMAN *v.* MA E MYA, 10 L. B. R. 111; 12 Bur. L T. 251 **653**

——— **O. II, r. 2**, *scope of—Mortgage—Suit for possession of mortgaged land—Subsequent suit for return of mortgage money, whether barred.*

Order II, rule 2, of the Civil Procedure Code is directed against two evils, the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it: if he omits one of his remedies, he cannot afterwards pursue it.

Plaintiffs sued defendants for recovery of mortgage money with interest, alleging that the land of *B*, defendant No 1, was originally mortgaged with possession to *C*., defendant No 2, by three deeds, but that these mortgages were transferred to their father *I*. by *C*. They also alleged that *B*. orally mortgaged this land to *I*. for Rs. 1,000 and that mutation of this mortgage was effected but was set aside on appeal. It appeared that *I* had sued *B* for possession of the land alleged to have been orally mortgaged to him, but his suit was dismissed on the ground that the mortgage was not proved:

Held, (1) that the plaintiffs ought to have sued for both the remedies—the possession of the land or the return of the mortgage money—in the alternative in one suit.

(2) that having omitted to sue for the mortgage money in the first suit, they were precluded from suing for it now by Order II, rule 2, Civil Procedure Code **L** HARNAM SINGH *v.* BHOLA SINGH, 2 U. P. L R (L) 108 **966**

——— **O. VI, r. 17**—Amendment of pleadings, when should be allowed. *See* ARBITRATION **115**

——— **O. VII, r. 14, O. XI, r. 15**—*Documents on which plaintiff relies—Defendant, right of, to inspect documents.*

A defendant is not entitled, as of right, to inspect documents relied on by the plaintiff and of which a list under rule 14 of Order VII of the Civil Procedure Code is annexed to the plaint, as such documents are not documents referred to in Order XI, rule 15, of the Code. **C** CHANDMULL GONESHMULL *v.* DHANRAJ GANPATROY, 24 C. W N. 302 **457**

——— **O. IX, rr. 3, 4**—*Dismissal for default —Application to set aside order—Forum, proper.*

An order of dismissal for default can, under rule 4 of Order IX of the Civil Procedure Code, be set

aside only by the Court which passed the order. **L** LUCHHMAN DAS *v.* DEVI DIAL, 19 P. W. R. 1920; 100 P. L. R. 1920 **884**

——— O. IX, rr. 3, 8, 9, O. XVII, r. 2, O. XXXII, r. 3—*Suit against several defendants—Minor defendant—Dismissal for default, effect of—Minor not represented by guardian—Subsequent suit against minor, whether barred.*

Where there are several defendants to a suit, the consequences of an order of dismissal for default need not necessarily be the same against all. If the suit is dismissed as against some under rule 8 of Order IX of the Civil Procedure Code and as against the rest under rule 3 of the same Order, a subsequent suit on the same cause of action would be barred as against the former but not against the latter.

The provisions of Order XXXII, rule 3, of the Civil Procedure Code are imperative and without complying with those provisions the Court cannot make any decree between the plaintiff and a minor defendant.

Where a suit was dismissed for plaintiff's default in the presence of the major defendants and there was no appearance on behalf of the minor defendant, no guardian *ad litem* of the minor having been appointed:

Held, that a subsequent suit against the minor on the same cause of action was not barred, inasmuch as, (*a*) the order of dismissal as against the minor must be taken to have been made under Order IX, rule 4, of the Civil Procedure Code and not under rule 8 and (*b*) the minor not being properly represented in the suit, no binding order could be made as between him and the plaintiff. **B** DAMU DIGA *v.* VAKRYA NATHU, 22 Bom. L. R. 328; 44 B. 767 **455**

——— O. IX, r. 13—Ex parte *decree—Suit to set aside decree, whether competent Remedy, proper—Minor—Compromise sanctioned by Court under material misapprehension—Decree, whether binding on minor.*

In order to impeach an *ex parte* decree not tainted with fraud, the proper remedy is by an appropriate proceeding taken in the suit in which the decree was passed, *e. g.*, an application under Order IX, rule 13 of the Civil Procedure Code, to set aside the decree, or an application for review, or an appeal to a superior Court. A separate suit to set aside the decree will not lie.

Where the sanction of the Court is obtained to a compromise on behalf of a minor under a misapprehension of a material fact as to the true position of the minor, a decree based on such compromise is not binding on the minor **L** JHANDA SINGH *v.* LACHHMI, 22 P. W. R. 1920; 68 P. L. R. 1920; 1 L. 344 **878**

——— O. XXI, r. 2—*Applicability of rule to cases of decrees other than those for payment of money—Adjustment relating to partition of immoveable property, whether within rule.*

An adjustment relating to partition of immoveable property provided for by a decree of Court falls within Order XXI, rule 2, Civil Procedure Code. The rule is not restricted in its application to provisions for payment of money. **M** RAMAKRISHNA RAO *v.* BALAKRISHNA RAO, (1920) M. W. N. 261; 43 M. 476 **289**

——— O. XXI, rr. 54, 90—*Execution sale—Publication of sale—Sale, whether vitiated because drum not beaten—Proclamation of sale—Irregularity, whether sufficient to set aside sale—Damage, proof of.*

Under rule 54, Order XXI, of the Civil Procedure Code, it is sufficient if a proclamation of sale is announced by beat of drum. A drum need not be beaten at the time of the sale.

Unless the judgment-debtor is able to prove that an irregularity in a proclamation of sale has resulted in material loss to himself, the Court will not set aside the sale on the ground of such irregularity. **A** BHAGWATI PRASAD *v.* MUKAND SARUP, 2 U P L R. (A.) 147 **523**

——— O. XXI, rr. 62, 63—*Limitation Act (IX of 1908), Sch I, Art.* 11—*Sale in execution—Application to have encumbrance recognised, dismissal of, effect of—Suit to contest order—Limitation.*

The effect of an order dismissing an application to have it recognised that property about to be sold is subject to an encumbrance in favour of the applicant, is that the property is free of the encumbrance, and such order becomes final against both the applicant and the judgment-debtor, unless a suit is brought within one year to contest it. **M** VELU PADAYACHI *v.* ARUMUGAM PILLAI, 11 L. W. 343; 38 M. L. J. 397 **481**

——— O. XXII, rr. 4, 9—*Failure to bring legal representatives of deceased respondent on record within time prescribed by law—Ignorance of law whether sufficient cause—Joint interest of several respondents—Abatement of appeal* in toto.

Mere ignorance of law is not a sufficient cause for not applying within time to bring the legal representatives of a deceased respondent on the record.

Where the interests of defendants-respondents are joint and a decree cannot be reversed without the representatives of a deceased respondent being brought on the record, the whole appeal must abate. **L** FATTA *v* SIKANDAR, 2 U. P. L. R. (L) 112 **927**

——— O. XXIII, r. 1 *Application to withdraw suit with leave to bring fresh suit—Procedure—Court, duty of.*

Where an application is made to withdraw a suit with leave to bring a fresh suit and the Court thinks that permission to file a fresh suit should not be granted, it should dismiss the application and hear the suit on the merits, or dismiss it for want of prosecution if the plaintiff refuses to proceed. **Pat** SHAMANANDAN PRASAD *v.* MULCHAND RAM, 1 P. L. T. 292 **286**

——— O. XXIII, r. 1—*Application to withdraw with leave to bring fresh suit—Procedure—Permission to withdraw granted without leave to bring fresh suit, effect of.*

Where a plaintiff applies for permission to withdraw his suit with leave to bring a fresh suit, the proper order to pass, if the Court does not grant leave to bring a fresh suit, is to dismiss the application.

Ordinarily, an application to withdraw with permission to bring a fresh suit does not mean an

application to withdraw if such permission is not granted Where, therefore, on such application permission to withdraw is granted without leave to bring a fresh suits, this amounts to a refusal of the application. **Pat** SUGGI LAL DURJI *v* MOHAMMAD WALI ULLAH, 1 P. L T. 259 **756**

——— **O. XXIII, r. 1**—*Permission to withdraw suit with liberty to bring fresh suit—Jurisdiction, want of, effect of*—Res judicata.

A Court has no jurisdiction to permit a suit to be withdrawn with liberty to bring a fresh suit except under Order XXIII, rule 1, Civil Procedure Code.

Where an Appellate Court allows a suit to be withdrawn without jurisdiction, the decision of the trial Court operates as *res judicata*. **Pat** RAMA SINGH *v.* JANAK SINGH, 1 P. L. T. 30; (1920) Pat 232; 2 U. P. L. R (Pat) 121 **697**

——— **O. XXIII, r. 3**—*Arrangement between parties before decree to treat decree as in part inexecutable, enforceability of.*

An arrangement between the parties to a suit made before decree to treat the decree as in part inexecutable cannot be given effect to by Courts. **M** ARUMUGAM PILLAI *v.* KRISHNASWAMI NAIDU, 12 L. W. 41; 39 M L. J. 22; 3 M. 725 **976**

——— **O. XXIII, r. 3**—*Compromise—Agreement between parties, when amounts to completed compromise.*

The question when a contract becomes complete depends on the facts of each particular case. If a *consensus ad idem* has been reached between the parties on all the proposed or disputed terms, there is a contract. If, however, two persons agree in writing that, up to a certain point, the terms shall be the terms of the contract, but that the minor terms shall be subjected to a mediator and shall be as are approved by him, or if they are otherwise left unsettled, there is no contract. But if all the terms are agreed to, any stipulation to embody these terms in a formal document will not affect the contract, except when there is a further stipulation, express or implied, that the contract shall not be treated as complete till the formal document is drawn up and signed **M** KAMALAMBAL *v* DORASAMI CHETTIAR, 14 L. W. 179 **26**

——— **O. XXXII, r. 3**—*Guardian* ad litem, *appointment of, provision as to, object of - Court, duty of—Notices to minor and his guardian, whether necessary preliminaries to appointment of guardian* ad litem—*Failure to issue required notices, effect of —Guardian* ad litem, *appointment of, effect of—Irregularity or defect in procedure—Minor, whether bound by decree passed in suit—Decree, when can be avoided by minor—Guardian* ad litem, *powers of, extent of.*

The object of the provision contained in Order XXXII, rule 3 (4), Civil Procedure Code, is that the Court should be able to satisfy itself that the person described as a minor is really a minor and that the proposed guardian is a fit and proper person to represent him and to put in a proper defence and generally to act in the interests of the minor.

Where a lawful guardian *ad litem* has been appointed, any defect or irregularity in the procedure leading up to such appointment cannot operate to render a decree passed in a suit in which

the minor is represented by such a guardian invalid, unless the defect or irregularity has had the effect of prejudicing the interest of the minor or has affected the merits of the case.

Thus, where no notice was issued to the minor or to his mother, but a notice was issued to his proposed guardian who was also his brother and the manager of the joint family of which the minor was a member, and this proposed guardian was appointed his guardian *ad litem*, and the suit having been compromised a decree was passed in terms of the compromise:

Held, that unless there was anything to show that in spite of the appointment of the guardian *ad litem* the interests of the minor had not been duly protected or that the guardian *ad litem* had colluded with the plaintiff or had otherwise acted fraudulently or with gross negligence, the decree passed against the minor, in accordance with the compromise entered into by his guardian *ad litem* with the sanction of the Court, could not be set aside.

The powers of a person who has been appointed guardian *ad litem* are controlled by the provisions of the Code of Civil Procedure, and what he could have done as manager of the joint family, of which the minor is a member, irrespective of the suit, he cannot do when appointed as such guardian. **O** SRIPAL SINGH *v.* JAGDISH NARAYAN, 7 O. L. J. 219; 2 U. P. L. R. J C.) 77 **313**

——— **O. XXXII, rr. 4, 7**—*Next friend of minor having interest in conflict with that of minor, effect of—Compromise, when binding upon minor—Fraud and collusion, effect of—Hindu Law—Mitakshara—Adoption—Infant, whether can be adopted.*

If in a suit the personal interest of the next friend of a minor conflicts with his duty towards the minor, then, unless the next friend shows *uberrima fides*, he is not competent to act as the minor's next friend In such a case the minor is not properly represented and the decree in the suit would not binding upon him.

It is no dereliction of duty on the part of a guardian to refuse to litigate on his ward's behalf a claim which he knows to be false and unfounded in fact.

In giving permission to compromise a suit on behalf of a minor, it is usual and desirable that the Court should record an order stating that it considers the compromise to be for the benefit of the minor, but such an order is not essential to the validity of the compromise. The addition of the words "expressly recorded in the proceedings" in Order XXXII, rule 7, of the Code of Civil Procedure has not changed the pre-existing practice under section 462 of the Code of 1882.

Under the Mitakshara the order of performing *sradh* ceremony has no necessary relation to the order of succession to property.

It is not illegal to adopt an infant in arms, but it is very unusual for a child to be formally taken in adoption at the early age of thirteen days.

Apart from fraud or collusion or any vitiating circumstance, a question settled by a compromise cannot afterwards be revived in Court for judicial determination.

The family to which the plaintiff belonged was governed by the Benares School of Mitakshara Law.

One or other of its members acquired considerable properties in the Chittagong District which devolved on three brothers, Kamala Prasad, Kanta Prasad and Bhagirath. The only living representatives of Kamala Prasad's branch were defendants Nos. 4 and 5 who were the widows of his two sons. Ramdin and defendant No. 2 were two sons of Bhagirath. Ramdin was taken in adoption by Kanta Prasad. Defendants Nos. 1 and 3 were the widows of Ramdin and Kanta Prasad respectively and the plaintiff was the son of defendant No. 2. In 1919 defendant No. 2 on behalf of himself and as next friend of his minor son, the present plaintiff, instituted a suit as members of a joint undivided Mitakshara family and prayed for a declaration of their title as such to the Chittagong properties and as against defendant No. 1 for recovery of possession. In this suit a compromise was arrived at by which the defendant No. 2 and his son, the present plaintiff, got a moiety of the properties in dispute, and the other moiety went to defendant No. 1. After attaining majority the present suit was brought by the plaintiff for a declaration that as the adopted son of Ramdin he was entitled to an 8-annas share of the Chittagong properties and that the consent decree in the previous suit was not binding on him:

Held, (1) that in order to determine whether the plaintiff was bound by the compromise, it was necessary first to ascertain whether he was or was not adopted in fact;

(2) that if the plaintiff was adopted by Ramdin and the adoption was sedulously kept from the knowledge of the Court, then the leave or consent of the Court to the previous suit being compromised would be no true consent and the minor would not be bound by the compromise;

(3) that if the plaintiff was not adopted by Ramdin, he was bound by the compromise decree. **C** BEJOY SINGH *v.* MATHURIYA DEBYA. **97**

——— **O. XXXIII, rr. 2, 5, 15**—*Application for leave to sue as pauper not accompanied by schedule of property, dismissal of—Application, subsequent, whether barred.*

Where an application for leave to sue as a pauper is rejected on the ground that it is not accompanied by a schedule of the property belonging to the applicant, a subsequent application is not barred under rule 15 of Order XXXIII of the Civil Procedure Code. **L** BAL KAUR *v.* SHIB DAS, 1 L. 151 **207**

——— **O. XXXIV, r. 5**—*Mortgage suit—Final decree—Sale not held—Mortgagor, right of, to redeem, whether extinguished.*

The mere passing of a final decree in a mortgage suit does not extinguish the mortgagor's right to redeem, until a sale has actually taken place in pursuance of the decree. **A** SHAH MAHDI HASAN *v.* ISMAIL HASAN, 18 A. L. J. 622, 2 U. P. L. R. (A) 213; 42 A. 517 **172**

——— **O. XXXIV, r. 6**—*Mortgage suit—Decree for sale unexecuted—Mortgagee, whether entitled to obtain decree over.*

A mortgagee who obtains a decree for sale, but fails to execute it, is not entitled to come into Court under rule 6 of Order XXXIV of the Civil Procedure Code, to obtain a decree over, as that rule contemplates that the property should be put to sale in execution of the decree before an application under its provisions can be made. **A** DARBARI MAL *v.* MOOLA SINGH, 2 U. P. L. R. (A) 160; 18 A. L. J. 628; 42 A. 519 **139**

——— **O. XXXIX, rr. 6, 7, 8**—*Attachment before judgment—Release of property on security being furnished—Execution against property given as security—Preferential right, whether exists.*

Where property is attached before judgment, but is released on the defendant giving security, the security comprising certain items of the attached property, the plaintiff on obtaining a decree is entitled to a preferential right, and can execute the decree against the property given as security **M** JANKI NAGASAWMI IYER *v.* T. S RAMASWAMI AIYANGAR, 11 L. W. 6; (1920) M. W. N. 264 **267**

——— **O. XLI, r. 17 (2)**—*Failure of respondent to appear—Duty of Court—U. P. Land Revenue Act (III of 1901), s. 219—Revision—Material irregularity.*

The absence of the respondent on the date fixed for hearing an appeal is no justification for decreeing the appeal. Under rule 17 (2) of Order XLI of the Civil Procedure Code the Court is bound to hear the appeal and record a judgment, and its failure to do so amounts to a material irregularity within the meaning of section 219 of the U. P. Land Revenue Act, involving interference by the Board of Revenue. **U P B R** RAJ RANI *v.* RAM KISHORE, 2 U. P. L. R. (B. R.) 26 **386**

——— **O. XLI, rr. 20, 22**—*Respondent, right of, to file cross-objections against co-respondent—Addition of party for purpose of cross-objections—Power of Court.*

A respondent in an appeal has the right to proceed against a co-respondent by memo. of cross-objections and for this purpose is entitled to apply to make the latter a party, whether, at the time of the presentation of the appeal, he was an interested party or not. **M** PONNUSWAMI ASARI *v.* PALANIANDI MUDALI, 11 L. W. 602 **612**

——— **O. XLI, r. 22**—*Cross-objections against non-appealing party, whether can be urged.*

As a general rule cross-objections can be urged only against the appellant and not against a co-respondent.

No cross-objections can be urged against a defendant who has not filed any appeal from the decree passed against him. **L** SANT RAM *v.* KIDAR NATH **469**

——— **O. XLI, rr. 22, 33**—*Cross-objections against co-respondent when can be entertained—Object of r. 22.*

Order XLI, rule 22 (1), of the Civil Procedure Code, in so far as it relates to a cross-objection, was provided to meet the case where a respondent, although the decree is not entirely in his favour, is content to let matters rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him.

This rule should ordinarily be confined to cases of cross-objections urged against the appellant, but rule 33 of Order XLI gives the Court a very

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wide discretion and cases may arise where justice requires that cross-objections against a co-respondent should be heard, *e. g.*, where the appeal reopens the whole matter in controversy between the respondents *inter se*. Where, however, one of several defendants against whom a decree is passed has allowed the period for appealing to elapse without questioning the decree, rule 22 of Order XLI of the Civil Procedure Code cannot be construed so as to revive his right of appeal merely because a co-defendant has instituted an appeal against the plaintiff on entirely different grounds. **Pat** OFFICIAL TRUSTEES OF BENGAL *v.* SMITH, (1920) Pat 161; 5 P. L. J. 328; 1 P. L. T. 434 **262**

——— **O. XLI, rr. 23, 25, 27, 29**—*Case not decided on preliminary point—Remand, order of—Procedure.*

Where a trial Court has decided a case not upon a preliminary point, but after taking all the evidence and trying all the issues, it is improper for an Appellate Court to remand the case for trial, afresh under Order XLI, rule 23 of the Code of Civil Procedure. In making an order under the rule however, the Court cannot direct the omission of one of the essential issues in the case. If the Court is of opinion that a fresh local investigation should be made or that fresh evidence is necessary on any point, its order should be one under rules 25, 27 and 29, and not under rule 23, of Order XLI. **C** SADAK ALI *v.* SAFAR ALI **984**

——— **O. XLI, r. 23, O. XLIII, r. 1 (u)**—*Remand—Order purporting to be under rule, but which ought not to have been made—Appeal, whether competent—Case not decided on preliminary point—Appeal—Further investigation necessary—Appellate Court, duty of*

An order which purports to be, and is in form and substance, an order under rule 23 of Order XLI of the Civil Procedure Code is appealable, although the order ought not to have been made under that rule.

Where a case is not decided on a preliminary point, it is the duty of the Appellate Court to itself decide the appeal; if it considers that further investigation is necessary or that additional evidence should be taken, it may make an order directing his to be done, but it ought not to remand the case or re-decision under Order XLI, rule 23, of the Code. **C** PROSUNNA CHANDRA *v* BOIDYA NATH, 31 C. L J. 360, 24 C. W. N. 708 **516**

——— **O. XLIII, r. (1) (a)**—*"Plaint" whether includes memorandum of appeal—Revision, maintainability of.*

The word "plaint" in Order XLIII, rule (1) (*a*) of the Civil Procedure Code does not include a memorandum of appeal. **L** KARM ILAHI *v.* HAKIM SHAH **865**

——— **O. XLVII, rr. 1, 4, 7**—*Review—Discovery of new evidence—Order granting review—Appeal, when maintainable.*

Where in granting an application for review on the ground of the discovery of new evidence, the Court does not come to any finding whether there was a discovery of new evidence, or that the evidence was of such an important nature that a review ought to be granted, nor does it come to any finding whether due diligence was exercised with regard to the production of such evidence at the trial, the order granting review contravenes rule 4 of Order XLVII of the Code of Civil Procedure and is appealable and liable to be set aside **C** CHIRANJILAL RAMLAL *v.* TULSIRAM JANKIDASS, 31 C. L. J. 134, 47 C 568 **734**

Civil Procedure Code—1908—concld.

——— **Sch. II, para. 12**—*Arbitration—Dissolution of partnership—Arbitrator, power of, to award interest on sums due.*

Where in a suit for dissolution of partnership and for accounts, the plaintiff claims interest which the defendant says he is not liable to pay and the matter in dispute is referred to arbitration, one of the points referred being whether the defendant is liable for any money and, if so, the amount due, it is not an error on the part of the arbitrator to include in his award the sum payable by the defendant as interest both on sums advanced to the firm, and on those advanced to the defendant for his personal use, and also for the period before and after the suit and up to the date of the award. **C** JAHARMAL-DEBI DUTTA *v* BIRINCHI BHUSAN **941**

——— **Sch. II, para. 16**—*Award—Parties dissatisfied—Remedy proper—Suit to set aside award, whether maintainable*

Where an arbitrator is appointed under the Second Schedule to the Civil Procedure Code a suit to set aside the award is not maintainable as being contrary to the plain intention of the law. The proper remedy in such a case is an application submitted to the Court to set aside the award. **L B** SHWE HPAN *v* MA CHIT NYEIN, 10 L. B. R. 106; 13 Bur. L. T. 34 **677**

——— **Sch III**—*Decree for joint possession—Revenue paying estate—Allotment of share and delivery of possession—Collector, duty of—Reference to Civil Court, validity of—Rights of parties after partition.*

Where a decree for joint possession of an estate assessed to revenue is passed by a Civil Court, it is for the Collector not only to make allotment but to complete the partition by delivery of possession, and where he refers the parties to the Civil Court for this purpose he fails to exercise a jurisdiction vested in him by law.

After the allotment has been made, the parties cannot claim to be joint owners of the property even though the partition proceedings have not been completed according to law. **N** MUNAWAR ALI *v.* TAIYABALI **806**

Common Law of England, *applicability of, to India.*

The rules of the Common Law of England have no application to the Mofassil towns of India, except as rules of justice, equity and good conscience. **Pat** BRAHMANAND SINGH *v.* DUND BAHADUR SINGH, 1 P. L. T. 229; (1920, Pat 245; 2 U. P. L. R (Pat) 111 **344**

Company In liquidation—*Solvency, test of—Interest after commencement of liquidation, liability to pay—Proof of interest, whether necessary.*

If a company in liquidation is, or ultimately turns out to be, solvent, interest is payable upon any debts which carry interest, or upon which a right to interest has been acquired, out of the surplus assets remaining after payment of principal and interest up to the date of the winding-up order.

Company in liquidation—concld.

The solvency of a company is established by the fact that after the payment of the principal and interest up to the date of the winding-up, there are some assets which may be realized and will be sufficient to meet the liability on account of interest which accrued due after the commencement of the liquidation.

No proof is necessary for interest after the commencement of the winding-up, the creditor, if his debt is one that bears interest, gets it, if there is a surplus, as incidental to his debt, irrespective of the question whether any mention of the interest was made in the order adjudicating upon his claim. **L** GHANSHAMDAS *v.* PUBLIC BANKING AND INSURANCE Co., 1 L. 154 **251**

Companies Act (VI of 1832), s. 68—*Charge in favour of officer of company—Non-registration, effect of—Charge, whether enforceable—"As such," effect of—Appeal—Enlargement of time—High Court, power of.*

An officer of a Limited Company cannot avail himself of a mortgage or charge in his favour, which has not been registered in accordance with section 68 of the Companies Act, 1882.

The words "as such" in the Explanation to section 68 of the Companies Act of 1882 are superfluous.

The lower Court decided that want of registration did not prevent the enforcement of a charge against a Company by one of its officers. The debenture-holders, although bound by the judgment, did not appeal. More than a year after the time for appeal had elapsed, when it was sought to enforce the charge, the debenture-holders, on appeal to the High Court, were allowed by that Court to raise the point of non-registration:

Held, that the High Court had by implication enlarged the time for appeal. **P C** KRISHNA AYYANGAR *v.* NALLAPERUMAL PILLAI, 38 M. L J. 444; 18 A L. J. 489; 22 Bom. L R. 568; 28 M. L. T. 28; 12 L. W. 92; (1920) M. W. N. 419; 43 M. 550; 2 U. P. L. R. (P. C.) 118; 47 I. A 33 **163**

——— **ss. 147, 169**—*Company in liquidation, when becomes solvent—Bankruptcy rules, applicability of.*

A company in liquidation becomes solvent as soon as it has paid off its liabilities existing at the date of the winding-up order.

Ordinary bankruptcy rules are applicable to companies in liquidation and when the liabilities existing at the date of the winding-up order have been discharged, creditors, when debts carry interest, are entitled to subsequent interest. **L** DEVI DITTA MAL *v.* OFFICIAL LIQUIDATOR, AMRITSAR BANK, LTD., 1 L. 368 **69**

Complaint *dismissed without complainant's evidence—Complainant, order for prosecution of, whether justified.*

When a complaint is dismissed upon the report of the Investigating Officer without taking the complainant's evidence, it is improper to direct the prosecution of the complainant under section 211, Penal Code. **A** MEWA LAL *v.* EMPEROR, 18 A L J. 620; 21 Cr. L. J. 416; 2 U. P L. R. A) 213 **64**

Compromise—Agreement between parties, when amounts to completed compromise. *See* CIVIL PROCEDURE CODE, O. XXIII, R. 3 **26**

Consent decree—*Limitation, plea of, waiver of—Appeal, whether lies.*

Where a suit is time-barred but the defence of limitation is waived and a decree is passed, such decree is a consent one, and no appeal lies therefrom. **P C** RAMCHANDRA DEO GARU *v.* CHAITANA SAHU, 18. A. L. J. 625; (1920) M. W. N. 366; 39 M. L. J. 68; 28 M L T 97; 12 L. W 260; 24 C. W. N. 1055, 2 U. P L. R. P. C.) 122; 22 BOM. L. R 1313 **539**

Construction of decree—*Appellate decree, ambiguity in—Decree of first Court and pleadings, whether can be looked into—Executing Court, powers of.*

A decree must be construed in a fair and reasonable spirit so as to advance and not to impede its execution

An executing Court cannot vary or alter a decree under execution, but it must be satisfied as to what it is called upon to execute, and in order to find that out, when the decree is not clear and it is an appellate decree, the Court is justified in referring to the pleadings and the decree of the trial Court. **Pat** TRALOKHYA NATH *v.* SARAT KUMAR SINGH, 1 P. L. T. 526 **283**

Construction of document—Ambiguity—Intention of parties—Oral evidence, admissibility of. *See* EVIDENCE ACT, S. 92, PRO. (2) **476**

——— Shankalap, *grant by way of—Grantor reserving no right to herself—Property to be held* bila lagan *with heritable and transferable rights—Under-proprietary rights.*

Where a deed of grant declared that the grant was made by way of *shankalap*, that after the date of the deed the grantor was to have no sort of right or claim to the granted property, and that the grantee was to hold it for ever *bila lagani* with heritable and transferable rights:

Held, that the deed conferred under-proprietary rights on the grantee. **O** GANESH PRASAD *v.* BISHWANATH, 7 O. L. J. 188; 23 O. C. 30 **354**

——— Shankalapnama *with power of transfer—Grant in perpetuity—Transaction, whether amounts to sale—Pre-emption, right of, whether arises.*

A document, described as a *shankalapnama* with powers of transfer, recited that the grantors had received from the grantees a certain sum of money as *zar-i-peshgi yani baithki*, and that in consideration of this payment they had openly put the grantees in possession of a certain piece of land, and declared that the grantees would remain in possession for ever subject to an annual payment on account of Government revenue. The proprietors and under-proprietors in the village brought this suit for pre-emption, contending that the document amounted to an out-and-out sale of an under-proprietary right. The defendants pleaded that the document was merely a lease and did not give rise to a right of pre-emption in favour of the plaintiffs, and the lower Courts, accepting this view, dismissed the claim. On appeal by the plaintiffs:

Held, that the document amounted to an out-and out sale, because the stipulation therein making the grantees liable for the payment of the Government revenue necessarily imported the grant of an under-proprietary right and that consequently, a right of pre-emption did arise in favour of the plaintiffs. **O** RAM SUCHIT *v.* SHEO SEWAK SINGH, 23 O. C. 50 **629**

Construction of Statutes—*Speech in Legislative Council, whether can be referred to.*

When the construction of an Act is in question, no statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words. **PC** KRISHNA AYYANGAR *v.* NALLAPERUMAL PILLAI, 38 M. L. J. 444; 18 A. L. J. 489; 22 Bom. L. R. 568; 28 M. L. T. 28; 12 L. W. 92; (19 0) M. W. N. 419; 43 M. 550; 2 U P. L. R. (P. C.) 118; 47 I. A. 33 **163**

Constructive possession—*Possession of part, whether possession of whole.*

Although possession of a part is constructive possession of the whole if the whole is otherwise vacant, this constructive possession is an incident of ownership and results from title The doctrine of constructive possession is not applicable to a case where the occupant defends himself on the ground of his possession only without proving any title. **Pat** KUMAR PREMATHA NATH MALIA *v* MEIK, (1920 PAT. 146; 5 P. L. J. 273; 1 P. L. T 360) **184**

Contract, *construction of—Condition, implied —Sale of goods to be supplied to vendor by third parties—Goods not supplied to vendor—Liability of vendor to purchaser.*

Defendants undertook to supply a certain number of bales of Dhoties manufactured by the Bradbury Mills to the plaintiffs. The agreement after setting out the details proceeded to say: "The goods under manufacture are sold. The same are to be taken delivery of as and when the same may be received from the mills. Delivery is to be caused to be given in full by the 3 st of December in the year 918." The mills failed to supply the full number of bales to the defendants, who consequently could not supply them to the plaintiffs. The latter sued the defendants to recover damages for breach of contract:

Held, that the basis or foundation of the contract was the anticipation, common to both parties, that the mills would supply the goods to the vendors and that the goods not having been supplied by the mills, the foundation of the contract disappeared and neither party had any claim against the other for damages **B** HURNANDRAI FULCHAND *v.* PRAGDAS BUDHSEN, 24 BOM. L. R. 343 **632**

Contract—concld.

be late and that it would be taken as a case of "Force majeure." The plaintiffs were also informed that the defendants were entitled to tender delivery at any time until arrival of the last steamer of July shipment, which was yet to come. In October, that is, before the last steamer arrived, plaintiffs institutes the present suit claiming damages for breach of contract owing to defendants' failure to tender the sugar of the July shipment by 12th September 1917, the latest date by which such shipment sugar could be tendered for delivery under the contracts. The defendants contended that the contracts were made on the usual terms of office contracts, by virtue of which in case of delay in shipment due to unavoidable circumstances they were exempt from liability. In other words, the benefit of what is known in the contract forms of importing firms as the "Force majeure" clause was claimed:

Held, (1) that the contracts between the parties were on the terms of the office contracts with the buyers, meaning thereby that the parties were bound by the terms of those contracts as to whether the goods tendered were such as could be tendered as July shipment goods;

(2) that the defendants were entitled to wait till the arrival of the last steamer, and could take advantage of the "Force majeure" clause;

(3) that the plaintiffs' suit, having been intsituted before the arrival of the last steamer, was premature and must be dismissed. **S** GOBINDRAM *v.* KHUSHALDAS, 13 S. L R. 100 **885**

———, *construction of—Contract for delivery of sugar Contract on "usual terms"—Late shipment—Office contracts, meaning of - Shortage of steamers*—Force majeure *clause, when can be taken, advantage of.*

Plaintiffs entered into four contracts with the defendants at Karachi on the "usual terms" for the purchase of 60 tons of Java sugar, July-September 19 7 shipment. Owing to the war and the Government requisitioning tonnage, part of the July 1917 shipment was shut out at Java and July shipment goods arrived in Karachi, some in August 1917 and the remainder in February 1918. Plaintiffs demanded delivery of the goods in August 1917 and were informed that July shipment goods were still to come. In September they again demanded delivery and were informed that the defendants were entitled to perform at any time up to the arrival of the steamer. In response to a further demand for delivery the defendants intimated that they had been advised that on account of Government requisitioning steamers August and subsequent shipments would

———, *formation of—Documents constituting contract—Breach of contract—Damages, measure of.*

A., a dealer in a certain class of goods, used to obtain his supplies from firm *B*. On July 21st he wrote to *B*. stating his requirements and asking the firm to write *sowda* or contract. On July 24th the firm wrote giving their selling rates from July to November. On July 24th *A*. wrote to the firm "Please write *sowda* for one wagon for the month of July in respect of flour," etc., he then set out the rates and concluded thus, "Please write *sowda* for four wagons On arrival of the goods ordered I shall send for one wagon of July *sowda*. Further I shall make the *sowda* for the months of October and November *pucca* hereafter. Please send a reply to this letter." He also on the 1st and 5th August made remittances to *B* which the latter accepted. On July 29th *B*. despatched a letter, dated July 28th, to *A* repeating the rates quoted in his letter of July 24th, and on the same day sent him a telegram quoting different rates, to which *A*. objected:

Held, that there was a completed contract between the parties, that after the firm *B*. had sent in its quotation, and *A* had made the remittance and given the order, there was an acceptance of the offer which constituted a complete contract, and that the rate of damages was the difference between the price prevailing in *A*'s city on the day of delivery and the contract rate *plus* the cost of freight and bags. **C** MADHUSUDAN KOER *v.* BADRIDAS, 31 C. L. J. 93 **693**

Contract Act (IX of 1872), s. 16—*Mortgage—Interest, high rate of—Court, power of, to reduce rate of interest—Undue influence—Hard and unconscionable bargain.*

In the absence of any thing to show that undue advantage was taken of a mortgagor, or that his will was dominated or that the terms of the mortgage were extorted from him in any way, the mortgagee is entitled to interest at the contract rate, and the Court ought not to come to the conclusion that the stipulation in the mortgage-deed as to interest is hard and unconscionable. C BEJOY KUMAR ADDYA *v.* SATISH CHANDRA GHOSE, 24 C. W. N. 444 **1007**

——— **s. 16**—*Undue influence—Burden of proof—Unconscionable bargain—Test—Compound interest, agreement to pay, effect of.*

An agreement to pay interest at a stipulated rate does not become unconscionable merely because there is a stipulation to pay compound interest at the same rate in the event of there being a default in the payment of the simple interest agreed upon.

There is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt or the interest accruing due upon it which he has contracted to pay. It is the state of affairs at the time when the bargain was struck that has to be considered, and not the ultimate claim made L RAM DAS *v.* ABBAS **74**

——— **s. 23**—*Auction sale—Agreement not to bid against each other, whether unlawful—Bidding curtailed—Fraud on vendor.*

It is not unlawful for two or more persons to agree not to bid against each other at an auction sale. The fact that owing to such an agreement the bidding is curtailed is not a fraud upon the vendor. L B NAGAPPA CHETTY *v.* AH FOKE, 12 Bur. L. T. 241 **963**

——— **s. 23**—*Champertous agreement, validity of—Agreement to share property obtained by litigation in consideration of promisee providing funds, whether can be enforced.*

The English Law of champerty is not in force in India and fair agreements made by claimants of property in litigation to share it with others on their obtaining decrees, in consideration of funds being supplied by the latter for carrying on their suits, are not in themselves opposed to public policy, nor are they necessarily void, but such agreements, when extortionate, are inequitable and in that case should not receive effect.

In order to determine whether such an agreement is extortionate or inequitable, what has to be looked at is the actual value of the land in dispute at the time when the agreement was made. L INDAR SINGH *v.* MUNSHI BHAGWAN SINGH, 1 L. 124 **272**

——— **s. 23**—*Surety-bond, forfeiture of—Agreement to indemnify surety, enforceability of Public policy.*

A contract to indemnify a surety against loss in the event of the surety-bond being forfeited is illegal and cannot be enforced. C BHUPATI CHARAN NANDI *v.* GOLAM EHIHAR CHOUDHURY, 24 C. W. N. 368 **539**

——— **ss. 79, 83, 86, 112**—*C. I. F. contract—Sale of goods—Property in goods, when passes—Buyer, right of, to reject goods—Remedy in case of shortage or deterioration.*

Contract Act—contd.

Under a *C. I. F.* contract property in the goods sold passes at the time of shipment, but such passing is subject to the buyer's right to reject the goods if after inspection they are found to be not goods in accordance with the contract; this, however, refers to the goods at the time of shipment and not to any shortage or deterioration caused on the voyage for which the buyer's remedy lies in the policy of insurance.

Section 86 of the Contract Act does not preclude a buyer from agreeing to take the risk of loss or damage before the property in the goods passes to him. On tender of the effective shipping documents the property in the goods passes to the buyer, but even if this were not so, a contract, the terms of which imply that the goods are at the buyer's risk from the time of the shipment, is not invalid. L B AH CHOY *v.* TRADING COMPANY **978**

——— **s. 107**, *applicability of—Contract to sell goods not ascertained—Sale, whether complete—Delivery, failure to accept—Re-sale—Damages, measure of.*

On 18th August 1919 *D.* entered into an agreement with *S.*, the owner of an oil mill, for the purchase of 101 maunds of castor oil at Rs. 31-12-0 per maund to be delivered at Cawnpore in 8 days, *S.* despatched a portion of the oil on the 21st August and the remainder on the 23rd August to a firm at Cawnpore, and called upon *D.* to take delivery after having the oil weighed at the shop of that firm. *D.* failed to take delivery, and further refused a telegram from *S*, warning him that if he did not take delivery in 2 days the oil would be sold at the prevailing rate, and that he would be liable for damages caused by re-sale. On 13th September *S.* sold the oil for Rs 26 a maund and brought the present suit to recover as damages the difference between the contract rate and the price realised by re-sale:

Held, that the plaintiff was not entitled to the damages claimed, as the transaction did not amount to a complete sale, but was merely a contract to sell, that the sale could not have become complete until the quantity of the oil sold was separated and taken to Cawnpore and was weighed or was otherwise ready for delivery within the knowledge and with the consent of *D.* and that *S.* was merely entitled to the difference between the rate agreed and the market rate prevailing on the date of the breach.

Held, further, that to such a case the provisions of section 07 of the Contract Act did not apply. O SHAMBHU DAYAL *v.* DURGA PRASAD, 23 O. C. 67 **647**

——— **ss. 151, 152, 161**—*Railways Act (IX of 1890), ss. 72, 80—Bailee, laibility of, extent of—Burden of proof—Goods consigned to two Railways—One Railway responsible for loss—Damages, whether can be recovered from both Railways.*

The duty of a Railway Administration to which goods are delivered for carriage is that of a bailee as defined in sections 151, 152 and 161 of the Contract Act, and when a thing is injured or lost while in the charge of a Railway the question of the burden of proof must be dealt with on the footing that the Railway is a bailee and not an insurer, and the burden of proving that the Railway

Contract Act—concld.

has exercised ordinary care must generally in the first instance be upon the Railway and it is for them to establish positively that they had discharged the statutory duty which is defined in section 72 of the Railways Act, read with sections 151 and 152 of the Contract Act.

Although section 80 of the Railways Act gives a plaintiff an option to sue one of two Railway Administrations in cases where goods have been booked through, yet where the plaintiff sues both of them he is not entitled to a decree against that one of them which has satisfied the Court that it has taken all the care of his goods that was required of it by law. **O** SECRETARY OF STATE FOR INDIA *v.* AFZUL HUSAIN, 7 O. L. J. 250; 23 O. C. 96; 2 U. P. L. R. (J. C.) 109 **714**

Co-sharer—*Co-sharer, one of several, paying off rent decree—Contribution, suit for, maintainability of—Court, duty of, performance of—Presumption—Contract Act (IX of 1872), s. 69—Appropriation, doctrine of, applicability of, to contribution.*

Where a co-sharer is not bound by law to pay a rent decree in favour of the superior landlord, he is not liable to contribution where the decree is paid off by the other co-sharer.

Where a statutory duty is imposed on a Court, it must be presumed that that duty has been performed.

No question of appropriation arises in a suit for contribution under section 69 of the Contract Act. **Pat** KAMALESWARI PROSAD SINGH *v.* JAGAR NATH SAHAI **949**

Costs—*Discretion of Court, how to be exercised—Appeal, when competent.*

Courts have full discretion in the matter of award of costs, but that discretion is not an arbitrary one and must be exercised in accordance with general principles

In a pre-emption case the plaintiff's right of pre-emption was admitted, the only point in controversy being the price payable. The District Judge, dissenting from the Court of first instance, held that the whole of the price was paid before the Sub-Registrar and that there was no proof of the return of any part of the price. He accordingly accepted the vendee's appeal as to the price, but did not set aside the first Court's decree awarding costs against him. The vendee filed a second appeal in the High Court:

Held, (1) that in the circumstances of the case the Court of Second Appeal was entitled to entertain an appeal on the question of costs;

(2) that the vendee, having defeated his adversary on the only point in controversy between them, was entitled to recover his costs. **L** GOBIND SAHAI *v.* RAM CHAND **971**

Court-fee, *deficiency in, on plaint and appeal—Procedure—Suit for declaratory decree and consequential relief—Court-fee payable.*

Where upon the proper valuation of a suit an Appellate Court finds that there is a deficit in the amount of Court-fees paid by the plaintiff on his plaint and memorandum of appeal, the correct procedure for the Court to adopt is to call upon the plaintiff to make good the deficiency and on his failing to do so, to enforce its order by the dismissal of his suit. In such a case the rejection of the plaint is inappropriate, because section 10 of the Court Fees Act enjoins a dismissal without option.

Court-fee—concld.

Where a plaintiff asks for a declaration and consequential relief, he should pay *ad valorem* fees in proportion to the loss from which he seeks to be relieved. **Pat** BRIJ KRISHNA DAS *v.* MURLI RAI, 4 P. L. J. 703 **316**

Court Fees Act (VII of 1870), s. 7 (iv) (c)—*Suits Valuation Act (VII of 1887), s. 8—Suit for declaration and injunction—Valuation for purposes of Court-fees and jurisdiction.*

A plaintiff in a suit for a declaration and for an injunction by way of consequential relief has the right to put his own valuation on the claim for purposes of Court-fees under section 7, clause (*iv*) (*c*) of the Court Fees Act, and under section 8 of the Suits Valuation Act, the same value must determine the value for the purpose of jurisdiction.

In a suit for a declaration and for an injunction by way of consequential relief the plaintiff valued the claim at Rs. 135 for purposes of Court-fees and at Rs 16,000 for purposes of jurisdiction. The suit was heard by a First Class Subordinate Judge under his special jurisdiction and was dismissed. Plaintiff filed an appeal in the High Court. On the appeal coming on for hearing, the plaintiff-appellant raised a preliminary point that the value of the claim for purposes of jurisdiction must be taken to be Rs. 135 in accordance with the provision of section 8 of the Suits Valuation Act and that the appeal accordingly lay to the District Judge and not to the High Court:

Held, that under the circumstances of this case, it must be held that the valuation was incorrectly stated for Court-fees and correctly stated for purposes of jurisdiction and that the appeal, therefore, lay to the High Court. **B** BALKRISHNA NARAYAN SAWANT *v.* JANKIBAI SITARAM SANZGIRI, 22 Bom. L. R. 289; 44 B. 331 **340**

——— s. 7 (iv) (c)—*Suit for declaration that decree is void, nature of—Prayer for setting aside decree—Court-fee payable.*

A suit for a declaration that a decree is null and void and for setting it aside is one both for a declaration and for consequential relief and is governed by clause (*iv*) (*c*) of section 7 of the Court Fees Act. **N** GOVIND *v.* DHEKLU **550**

——— s. 7 (IV) (c), (v)—*Suit for declaration of title and possession—Court-fee payable.*

Where a challenge is directly thrown on the plaintiff's title as the adopted son of a certain person and the plaintiff comes into Court in order to meet that challenge and claims a declaration of his title as an adopted son and also seeks to recover possession of his adoptive father's property, the suit falls within section 7 (*iv*) (*c*), of the Court Fees Act and not within clause (*v*) of the section. **Pat** UGRA MOHAN *v.* LACHHMI PRASAD CHAUDHURI, 5 P. L. J. 339 **422**

——— s. 7 (v), Sch. II, Art. 17 (vi)—*Suit for partition—Property in possession of defendant—Court-fee payable.*

Plaints in all suits for partition should be carefully examined. Where it is patent that the

defendants are in possession of any part of the property to be partitioned and have denied the plaintiff's title thereto, the suit is obviously a suit to recover possession of that part of the property at least, and a Court-fee *ad valorem* on the share claimed in that part must be levied. **Pat** DIP CHAND RAI *v.* CHHETRU LAL, 1 P. L. T. 529 **570**

——— s. 7 (iv) (c), Sch. II, Art. 17 (3) *—Suit to set aside decree on ground of fraud, nature of—Court-fee payable.*

A suit to set aside a decree on the ground of fraud falls under sub-clause (*c*) of clause (*iv*) of section 7 of the Court Fees Act and *ad valorem* Court-fees must be paid on the value set on the claim for purposes of jurisdiction. **N** BALDEOPRASAD *v.* GHASIRAM, 16 N. L. R 84 **360**

Criminal Procedure Code (Act V of 1898), s. 44—*Omission to give information of commission of offence to Police, manner of proving.*

Under section 44 of the Criminal Procedure Code it is the duty of a person who witnesses the commission of an offence to give information thereof to the nearest Magistrate or Police Officer, and, if he fails to do so, he renders himself liable to prosecution under section 202 of the Penal Code. **N** AJODHI *v.* EMPEROR, 16 N. L R. 30; 21 CR. L. J. 486 **532**

——— s. 107—*Information, necessity of, before initiation of proceedings—Magistrate, whether can issue process on his own knowledge—Procedure.*

Prior to the initiation of proceedings under section 107, Criminal Procedure Code, information must be given against a person from whom it is sought to take security.

Where the petitioner made an application under section 107, Criminal Procedure Code, against one *A.* and the Magistrate, on taking his statement, recorded an order that the petitioner was a quarrelsome fellow and called upon him to show cause why he should not be bound down, and eventually did place him on security under section 107:

Held, (1) that it was quite illegal for the Magistrate to issue notice to the petitioner merely because he considered from his own statement that he was a quarrelsome person;

(2) that no information such as is required by section 107 having been given to the Magistrate, the initiation of the proceedings was *ultra vires*. **L** ABDUL KARIM *v.* EMPEROR, 10 P. L. R. 1920; 21 CR. L. J. 511 **671**

——— s. 107, *proceedings under—Hearsay evidence.*

Proceedings under section 107, Criminal Procedure Code, cannot be based upon hearsay evidence. **N** MOHAN *v.* EMPEROR, 21 CR. L. J. 560 **864**

——— s. 107—*Security for breach of peace—Jurisdiction of Magistrate, essential condition of—"Wrongful act," meaning of—Penal Code (Act XLV of 1860,) s. 295—Killing of dedicated bull—Offence.*

An essential condition of the jurisdiction of a Magistrate to act under section 107, riminal Procedure Code, is that he should have some tangible evidence that some definite wrongful act is contemplated, which act, if committed, is likely to cause a breach of the peace.

The words "wrongful act" in section 107 mean an act forbidden by the Penal Statutes of India, or declared to be penal or wrongful by such Statutes.

The killing of a dedicated bull for the sake of the meat and the value of the skin is not an offence under section 295 of the Penal Code. **Pat** PIR ALI *v.* EMPEROR, 21 CR. L. J. 453 **437**

——— ss. 107, 350 (1), *proviso* (a)*—Proceedings under s. 107—Right of person proceeded against to re-call witnesses.*

A person proceeded against under section 107 of the Criminal Procedure Code has the same right, under section 350 (1), proviso (*a*), as an accused person in a summons or warrant case, to have the witnesses re-called and re-heard **M** YELUCHURI VENKATACHENNAYA *v.* EMPEROR, 11 L. W. 435; (1920, M. W. N. 280; 38 M. L. J. 370; 21 CR. L. J. 402; 43 M. 511 **50**

——— s. 133—*Absence of one of the Jurors at the time of making investigation, effect of—Report of other Jurors, whether should be acted upon—Procedure.*

Where in a proceeding under section 133 of the Code of Criminal Procedure only four out of the five Jurors were present at the time of the investigation:

Held, that the Magistrate should not act upon their report but should allow the proceedings to go on after appointing a fresh Jury. **C** DASSYA *v.* NIBARAN CHANDRA GHOSE, 31 C. L. J. 371; 21 CR. L. J. 448; 24 C. W. N. 928 **240**

——— s. 133, *scope of—Lawful trade, whether can be prohibited—Manner of carrying on trade, whether can be restricted—Order proceeding on grounds not covered by notice, legality of.*

Section 133 of the Criminal Procedure Code relates to an existing state of affairs and not to the possibility of future results.

Clause (3) of section 133 deals only with occupations or trades which are in themselves injurious to health or physical comfort and has nothing to do with trades which in themselves are innocuous, but in the course of which the manager, or plier, of them commits a public nuisance.

The provisions of Chapter X of the Criminal Procedure Code should be worked so as not to become themselves a nuisance to the community at large, and although every man is bound so to use his own property that it may not work legal damage or harm to his neighbour, yet no one has a right to interfere with a free and full enjoyment by another of his property except on clear and absolute proof that such use is producing such legal damage or harm and, therefore, a lawful and necessary trade such as the manufacture of bricks should not be interfered with unless it is proved that it is injurious to the health, or physical comfort, of the community.

An order under section 133 of the Criminal Procedure Code which proceeds on grounds not covered by the notice issued to the accused is illegal **L** GOKAL HAND *v.* EMPEROR, [illegible] L. 16; 21 CR. L. J 462 **446**

——— s. 162—*Statement to Police, manner of proving*

Although section 162 of the Criminal Procedure Code forbids the obtaining of signatures to a statement taken down in writing by the Police, there is

Criminal Procedure Code—contd.

no prohibition to evidence being given of a statement recorded in writing by the Police, provided it is otherwise relevant, nor can the provisions of the section be evaded by the Police recording as the first information report a statement obtained after the commencement of the investigation **N** AJODHI *v.* EMPEROR, 16 N. L. R 30; 21 CR. L J. 486 **582**

——— **s. 164**—*Statement recorded in presence of Police Officer, value of—Witness withholding information about offence, reliability of.*

A statement cannot be said to be properly recorded under section 164, Criminal Procedure Code, if a Police Officer is present at the time and is allowed to put questions to the witness.

Statements of witnesses who do not say anything about the commission of an offence which they have witnessed to anybody till the time of their examination by the Police and who on being questioned previously stated that they knew nothing, cannot be relied on. **L** INDAR SAIN *v.* EMPEROR, 21 CR. L. J. 418 **210**

——— **ss. 179, 181 (2), 202**—*Penal Code (Act XLV of 1860), s. 403—Criminal misappropriation—Place of trial—Preliminary inquiry, when necessary.*

Accused was charged by his master with having misappropriated a sum of money. He received the money on behalf of his master at Raniganj, and deposited it in his master's name with a firm at Barh; he withdrew it from this firm and failed to account for it, the complaint was filed in the Court of the City Magistrate of Patna, who dismissed it on the ground that the case was of a civil nature for the adjustment of accounts:

Held, (1) that the facts alleged did not necessarily involve an adjustment of accounts, and the complaint should not have been dismissed on that ground alone;

(2) that as the offence was complete the moment the accused received or retained the money with the dishonest motive of appropriating it or converting it to his own use, and as he received the money at Barh, the City Magistrate of Patna had no jurisdiction to entertain the complaint

Where upon a complaint it is doubtful whether an offence has been committed, the Magistrate should hold an inquiry under section [illegible] of the Criminal Procedure Code before summoning the accused to ascertain whether a *prima facie* case has been made out and the accused should be summoned or not. **Pat** GOWKARAN LAL *v.* SARJU SAW, 1 P. L. T. 200; 21 CR. L. J. 519 **775**

——— **s. 195**—*Penal Code Act XLV of 1860), s. 193—Evidence Act (I of 187 , s. 80—Perjury, trial for—Prosecution, duty of—Recital in judgment, whether can take the place of deposition—Admissibility of recital—Sanction to prosecute, refusal to grant by trial Court—Sessions Judge, interference by, when justified.*

In a prosecution under section 193, Penal Code, it is the duty of the prosecution to prove conclusively that the statement made by the accused was necessarily a false statement.

The recital in a judgment of a statement made by a witness cannot take the place of a record of the deposition of the witness, nor can such recital be accepted as evidence under section 80 of the Evidence Act, and it, therefore, cannot form the basis of a prosecution under section 93 of the Penal Code.

Where a trial Court which has the advantage of seeing a witness in the box, and is cognisant of the full facts in connection with the case, refuses to sanction the prosecution of the witness, the Sessions Judge should not, unless a clear case is made out against the witness, too readily adopt a different view and grant sanction. **Pat** NIRGHIN MAHTON *v.* EMPEROR, 21 CR L. J. 500 **660**

——— **ss. 195, 476**—*Order under s. 476—Judicial proceeding, existence of, whether necessary—Court sanctioning prosecution under s. 195—Sanction subsequently altered to order under s. 476, legality of—Time limit for passing such order.*

For the purposes of section 476 of the riminal Procedure Code it is not necessary that judicial proceedings should be in existence before an order under that section is made; all that is required is that the order should be passed with respect to an offence which may have been committed before the Court or brought to its notice in the course of a judicial proceeding.

Where a Court sanctions a prosecution under section 195, Criminal Procedure Code, and is subsequently directed by the Appellate Court to which it is subordinate to draw up a proceeding under section 476 as being more appropriate, a compliance with such a direction is not fatal to the proceedings, as the granting of sanction to prosecute at an earlier stage of the proceedings was present in the mind of the Court.

Although there is no time limit fixed for the making of an order under section 476, Criminal Procedure Code, yet where there has been undue delay, the High Court is entitled to set aside the order and arrest further proceedings. **Pat** BIRAN RAI *v.* EMPEROR, (920 PAT. 205; 1 P. L. T. 331; 21 CR. . . J 649 **853**

——— **s. 195 (6)**—*Appellate Court, power of, to remand case for further inquiry—Inherent power of Court to make inquiry.*

Although a Court, before which an application comes under section 195 (6) of the Criminal Procedure Code for re-consideration of orders passed by a Subordinate Court has no power to remand the case for further inquiry, it, nevertheless, has inherent power to make an inquiry itself and to proceed in accordance with law. **Pat** BALDEO KOERI *v.* LAKSHMI NARAYAN KUER, 1 P. L. T. 627; 21 CR. L. J. 479 **511**

——— **s. 195 (6) (7)**—*Sanction given by Munsif—Appeal, forum of—Munsif's Court, whether subordinate to that of Senior Subordinate Judge.*

A Munsif granted sanction for the prosecution of one *S* for an offence under section 210, Indian Penal Code. On appeal the Senior Subordinate Judge maintained the order. *S.* filed an application for revision in the High Court:

Held, that as appeals from the order or decree of a Munsif ordinarily lie to the District Courtand only in special cases to the Senior Subordinate Judge, the Munsif is subordinate to the District Court within the meaning of section 195 (6), Criminal Procedure Code;

(2) that consequently the Senior Subordinate Judge

had no power to hear the appeal. L SUNDAR SINGH *v.* PHUMAN SINGH, 21 CR. L. J. 4 5; 122 P. L R. 1920 **591**

——— **s. 202**—*Criminal misappropriation—Place of trial—Preliminary inquiry, when necessary.*

Where upon a complaint it is doubtful whether an offence has been committed, the Magistrate should hold an inquiry under section 202 of the Criminal Procedure Code before summoning the accused to ascertain whether a *prima facie* case has been made out and the accused should be summoned or not. Pat GOWKARAN LAL *v.* SARJU SAW, 1 P. L. T. 200; 21 CR. L. J. 519 **775**

——— **ss. 202, 203, 476**—*Penal Code (Act XLV of 1860), s. 211—Complaint against Police Officer—Investigation by another Police Officer, propriety of—Complaint dismissed without complainant's evidence—Complainant, order for prosecution of, whether justified.*

Where a complaint is made against an Officer of Police, it is improper to direct another Police Officer to conduct the investigation, the investigation should be conducted by the Magistrate receiving the complaint or by some other Magistrate.

When a complaint is dismissed upon the report of the Investigating Officer without taking the complainant's evidence, it is improper to direct the prosecution of the complainant under section 211, Penal Code. A MEWA LAL *v.* EMPEROR, 18 A. L. J. 620; 21 CR. L. J. 416; 2 U. P. L R. A 213 **64**

——— **ss. 236, 271, 537**—*Sessions case—Charge, absence of, from record, explanation of—Irregularity.*

On the record of a trial by a Court of Session there should be the charge, which under section 271 of the Criminal Procedure Code has been read over and explained to the accused, and where this is not so, the record should contain an explanation of its absence The fact that this is an omission covered by section 537 of the Code is not a sufficient answer. A JAGDEO PRASHAD *v.* EMPEROR, 18 A L. J. 442; 21 CR. L. J. 410 **58**

——— **s. 260**—*Summary trial—Non-appealable sentence—Judgment, contents of.*

In a summary trial, where a non-appealable sentence is passed, the Magistrate need only record a finding and his reasons therefor. A BHOLA NATH *v.* EMPEROR, 21 CR L. J. 442 **234**

——— **s. 288**—*Witness not produced in Court of Session, effect of—Statement.*

Section 288 of the Criminal Procedure Code has no application to the evidence of a witness not produced ad examine d in a Court of Session. N AJODHI *v.* EMPEROR, 16 N. L. R. 30; 21 CR. L. J. 486 **582**

——— **ss. 297, 439**—*Trial by Jury—Previous proceedings against accused—Failure to warn Jury to disregard result of such proceedings—Misdirection—Joint trial of two accused—Appeal by one—High Court, power of, to deal with non-appealing accused*

Where in his summing up to a Jury the Judge considers it necessary to refer to previous proceedings against the accused, he ought to deal with them in such a manner as to avoid, if possible, the minds of the Jury being affected by the result of the proceedings It is his duty to warn the Jury to pay no attention to the result of those proceedings, and his omission to so warn the Jury amounts to a misdirection sufficient to vitiate the whole of the proceedings.

The High Court in the exercise of the powers vested in it under section 439 of the Code of Criminal Procedure can, in a proper case, while setting aside the conviction and sentence of an accused appellant, also release his co-accused who has not appealed. C MIR MOUZE ALI *v.* EMPEROR, 31 C. L. J. 305; 21 CR.L. J 554 **858**

——— **ss. 303, 307**—*Verdict of Jury—Perverse verdict—Jury, when may be questioned for reasons of verdict—Penal Code (Act XLV of 1860), s. 380—Accused caught with stolen property—Explanation, absence of—Offence.*

Accused was tried by a Jury upon a charge of theft. He produced no witnesses in defence The prosecution evidence showed that immediately after the theft he was pursued and was caught red-handed with the stolen property in his possession. The Jury returned a verdict of not guilty:

Held, that the verdict was perverse, and that the accused should be convicted under section 380 of the Penal Code.

Per *Sadasiva Aiyar, J*—Although a Sessions Judge has no power under section 303 or section 307 of the Criminal Procedure Code to question a Jury as to the reasons for their verdict, it nevertheless is not improper to put them questions for the purpose of coming to a satisfactory conclusion whether the case is a fit one for reference to the High Court M SUBBIAH THEVAN, *In re*, 11 L. W. 56; 1920 M W. N 347; 39 M. L. J. 65; 43 M. 744 21 CR L J. 466 **498**

——— **ss. 338, 339**—*Pardon tendered to accused—Order directing trial—Jurisdiction—Procedure.*

At the conclusion of a Sessions trial the Sessions Judge directed the commitment for trial of two of the accused to whom a pardon had been tendered by the District Magistrate:

Held, (1) that the Sessions Judge had jurisdiction to make the order;

(2) that on being placed on trial the accused would first plead their pardons and it would be for the trial Court to decide whether or not the pardons had been forfeited. L CHANAN SINGH *v.* EMPEROR, 1 L. 218; 108 P. L. R. 1920; 21 CR. L. J. 518 **774**

——— **s. 345**—*Composition of offence with one of several accused persons, effect of.*

The composition of an offence under section 345 of the Criminal Procedure Code with one of several accused persons has not the effect of an acquittal of all the accused persons. L RAM KISHEN *v.* EMPEROR, 1 L 169; 21 CR L. J. 437; 121 P. L. R. 1920 **229**

——— **ss. 345, 439**—*Composition of offence—Revision—High Court or Sessions Judge, power of, to allow composition.*

Neither the High Court nor the Judge of a Court of Session, when sitting as a Court of Revision, has the power, in view of section 345 of the Criminal Procedure Code, to allow an offence to be compounded A RAM BARAN SINGH *v.* EMPEROR, 2 U. P. L R. A 40; 8 A. L. J. 574; 21 CR L. J. 447; 42 A 474 **239**

——— **ss. 412, 429, 439**—*Petroleum Act*

Criminal Procedure Code—contd.

(VIII of 1899), s. 15 (a)——Guilty, plea of—Written statement by accused, value and effect of—Procedure.

Accused was charged with having in his possession a quantity of kerosine oil without a license or pass: he pleaded guilty and filed a written statement in which he raised the defence that he did not trade in kerosine oil, that the oil belonged to a firm which had a transport license, and that under that license he had been employed to convey the oil from the Railway station to the firm's godown:

Held, that the plea of guilty must be taken in connection with the written statement, that the plea was really not a plea of guilty and was of no value, and that it was incumbent on the Magistrate to try the case on the merits.

Per *Newbould, J.*—The principle of section 412 of the Code of Criminal Procedure should ordinarily be applied in cases in which the High Court is asked to exercise its revisional powers.

Where a Court of revision holds the conviction of an accused person to be bad on the ground that a plea of guilty should not have been recorded, it should order a retrial of the accused. **C** EMPEROR *v* AKUB ALI, 31 C. L. J. 122; 21 CR. L. J. 547 **851**

——— **s. 423**—*Appellate Court, power of, to alter conviction.*

Where a person is tried and convicted of a particular offence, it is illegal for a Court of Appeal to alter the conviction to one for an altogether different offence. **Pat** RAGHU SINGH *v.* EMPEROR, 1 P. L. T. 221; 21 CR. L. J 496 **592**

——— **s. 437**—*Further inquiry, order for, when to be made—Notice to accused, whether necessary.*

Before an order for further enquiry is passed to the prejudice of an accused person who has been discharged, it is proper that he should be called upon to show cause why such order should not be passed.

An order directing further enquiry should not be passed where on the face of the order of discharge it does not appear that the order is perfunctory or foolish. **L** NABI BAKHSH *v.* EMPEROR, 1 L. 216; 109 P. L. R. 1920; 21 CR L. J. 521 **777**

——— **s. 439**—*Revision—High Court, power of interference of.*

In dealing with an application under section 439, Criminal Procedure Code, the High Court has to see not merely whether it disagrees with the findings but whether there is something in the way in whics the trial Court has looked at the law or in the method by which it has dealt with the evidence which makes it so doubtful whether the conviction is right that it would amount to a miscarriage of justice to allow it to stand. **A** MAHBOOB *v.* EMPEROR, 2 U. P. L. R. (A) 113; 21 CR L J. 552 **856**

——— **s. 439 (3)**—*Enhancement of sentence—High Court, power of, extent of.*

In revision the High Court can enhance a sentence and inflict any punishment for the offence which in the opinion of the Court has been committed which might have been inflicted for such offence by a Magistrate of the first class, even although the trial Magistrate was invested only with second or third class powers.

The accused were convicted by a Magistrate of the second class of an offence under section 325, Indian Penal Code, and sentenced to three months' rigorous imprisonment and a fine of Rs. 25 each. Their appeal was rejected by the Sub-Divisional Magistrate, who sent the record to the District Magistrate with a recommendation that the High Court should be moved to enhance the sentences which in his opinion were inadequate. The District Magistrate reported the case to the High Court:

Held, that the Court had power to enhance the sentences to the limit of the sentence which could have been passed by a Magistrate of the first class, inspite of the fact that the trying Magistrate could only have awarded six months **L** EMPEROR *v.* JAGAT SINGH, 21 CR. L. J. 57; 1 L 453 **861**

——— **s. 476**—*Order under s. 476—Judicial proceeding, existence of, whether necessary—Time limit for passing such order.*

For the purposes of section 476 of the Criminal Procedure Code it is not necessary that judicial proceedings should be in existence before an order under that section is made, all that is required is that the order should be passed with respect to an offence which may have been committed before the Court or brought to its notice in the course of a judicial proceeding.

Although there is no time limit fixed for the making of an order under section 476, Criminal Procedure Code, yet where there has been undue delay, the High Court is entitled to set aside the order and arrest further proceedings. **Pat** BIRAN RAI *v.* EMPEROR, (1920) PAT. 205; 1 P. L. T. 331: 21 CR. L J. 549 **853**

——— **s. 488**—*Muhammadan Law—Maintenance, order for—Divorce, effect of—Period for which order effective*

A Muhammadan wife obtained an order for maintenance, and applied to the Court for the recovery of arrears due thereunder. The husband pleaded that he had divorced her, and was, therefore, no longer bound by the order. The wife denied knowledge of the divorce, which she alleged was pronounced in her absence and which come to her knowledge only when her husband raised the plea:

Held, that the order of maintenance would become inoperative on the expiration of the divorced wife's *iddat*, and that, in this case, that period should not be deemed to have expired until the expiry of three months from the date on which she was made cognisant of the divorce. **L B** MAHOMED HUSAIN *v.* MA PWA HNIT, 10 L. B R. 104; 13 Bur. L. T. 43: 21 CR. L J. 503 **663**

——— **s. 517**—*Property produced before Court—Power of Court to dispose of property.*

Under section 517 of the Criminal Procedure Code it is not necessary that the property to be disposed of should have been used for the commission of an offence or that some offence should appear to have been committed regarding it: the Court has power to make an order for the disposal of any property "produced before it or in its custody." **N** GANPAT *v.* BAI, 21 CR. L J 414 **62**

——— **s. 524**—*Property seized on suspicion of being stolen—Order for forfeiture and sale, legality of—Suit to recover possession, maintainability of—Limitation*

An order under section 524, Criminal Procedure

Code, directing property seized on suspicion of its being stolen to be forfeited and ordering the sale-proceeds thereof to be credited to Government, is illegal and without jurisdiction, as all that that section authorises is that the Government shall be free to sell the property or to hold it as a trustee for the true owner. A suit, therefore, for the recovery of possession of such property is maintainable, and the fact that such suit is brought more than a year after the order of confiscation is no bar, as it is not necessary to set that order aside. **Pat** SECRETARY OF STATE FOR INDIA IN COUNCIL *v* LOWN KARAN MARWARI, 5 P. L. J. 321; (1920) PAT 254; 1 P. L. T. 451; 21 CR. L. J. 475 **507**

——— **s. 526**—*Transfer of case—Apprehension against fair and impartial trial—Delay in examining complainant—Disregard of preliminaries prescribed by Code, effect of.*

In dealing with applications for the transfer of cases each case must be decided upon its own circumstances.

It is not every kind of apprehension that will entitle an accused person to a transfer of the case against him; there must, upon the record, be reasonable grounds for apprehending that the trial would not be fair and impartial. Inordinate delay in examining the complainant, or a disregard of the preliminaries prescribed by the Code of Criminal Procedure for dealing with complaints, and awaiting the consideration of the evidence in another case with which the accused has no concern, in order to decide whether any action should be taken upon the complaint, are matters which afford reason to the accused to apprehend that he will not have a fair and impartial trial, and such a case is a proper one in which to direct a transfer. **Pat** REKHA AHIR *v.* EMPEROR, 1 P. L. T. 434; 2 CR. L. J. 504 **664**

——— **s. 562,** *applicability of—Penal Code (Act XLV of 1860), s 420.*

The provisions of section 562 of the Criminal Procedure Code are inapplicable to an offence under section 420 of the Penal Code. **Pat** EMPEROR *v.* DEVA KANTA JHA, 5 P L J 257; 1 P. L. T. 197; (1920) PAT. 224; 21 CR. L. J. 468 **500**

Criminal proceedings, *postponement of, to civil proceedings.*

Though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until the determination of civil proceedings in which the same issues are involved. Criminal proceedings lend themselves to the unscrupulous application of improper pressure with a view to influencing the course of the civil proceedings, and beyond that there is the mischief of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a Civil Court. **C** LUCAS *v.* OFFICIAL ASSIGNEE OF BENGAL, 24 C. W. N 418; 21 CR. L. J 431 **577**

Criminal Tribes Act (III of 1911), s. 22 (2) (b)—*Failure to report change of residence—Previous conviction, form of.*

The failure by a member of a criminal tribe notified under section 10 of the Criminal Tribes Act to report himself and to give information of his residence or intended change of residence renders him liable to conviction under section 22 (2) of the Act; if he has been previously convicted, he is liable to conviction under section 22 (2) (*b*) of the Act. **A** EMPEROR *v.* BHAGELU DOM, 21 CR. L. J. 434 **226**

Cross-objections against co-respondent, when can be entertained. *See* CIVIL PROCEDURE CODE, O. XLI, R 22 **262**

Custom—Abadi *Mortgage of house by non-proprietor—Presumption—Suit for possession, whether maintainable.*

The initial presumption is against a non-proprietor being able to alienate the site of, and his right of residence in, his house without the consent of the proprietary body.

In the case of such an alienation the proprietors are entitled to a decree for possession. **L** AHMAD YAR *v.* SAADULLAH **11**

——— *Adoption*—Dhusars *of Gurgaon settled in Central Provinces, whether governed by Punjab Customary Law—Orphan, adoption of, whether valid.*

In matters of adoption Dhusars of Gurgaon, a non-agriculturist tribe, who settled in the Central Provinces are governed by the Customary Law of the Punjab and there is nothing to prevent the adoption of an orphan among them. **N** JAINARAIN DHUSAR *v.* RAM KISHORE **822**

——— *Alienation by widow—Consent of reversioner—Acquiescence—Mutation, failure to object to, effect of—Alienee making improvements—Silence—Estoppel.*

A widow permitted an occupancy tenant to exchange one of his occupancy fields with a non-occupancy one. Plaintiff, one of the collaterals of the last male holder and a *lambardar*, not only did not object to the exchange but was present when mutation was sanctioned and affixed his seal to the *patwari's* report. Subsequently the occupancy tenant sank a well in the field obtained by him under the exchange and even then the plaintiff raised no objection. Six years after the exchange had been effected, he brought a suit for a declaration that the exchange would not affect his reversionary rights;

Held, that the plaintiff, having acquiesced in the exchange and having failed to object to the sinking of the well by the defendant, was equitably estopped from now objecting to the exchange **L** ILA-UD-DIN *v* AMIR ULLAH, 2 U P. L R (L.) 105 **874**

——— *Family custom set up—Tribal custom, evidence as to, whether relevant.*

Where only a family custom is set up, evidence as to a tribal custom may in certain circumstances be relevant as showing that a family belonging to that tribe observed it. **O** CHAURAS KUNWAR *v* JAGANNATH SINGH, 7 O. L. J. 147; 2 U. P. L. R. J. C. 89 **287**

——— General rule, whether abrogated by special custom *See* PUNJAB COURTS ACT, 1914, s 41 **651**

——— Gift—Donee, failure of direct line of—Reversion of gifted property—Trespasser, possession of, whether adverse to nearest reversioner or all reversioners—Trees planted by donee, whether revert with the land—Compensation. *See* LIMITATION ACT, SCH. I, ART 144 **733**

——— *Inheritance*—Jadubansi Ahirs *of village Dharam Khera, District Kheri—Collaterals pre-*

Custom—contd.

ferred to daughters—Wajib-ul-arz, *entry in, construction of.*

By virtue of a tribal and family custom among the Jadubansi Ahirs of village Dharam Khera, in the District of Kheri, collaterals are, in matters of inheritance, entitled to preference over daughters and their issue.

Where a *wajib-ul-arz*, purporting to have been dictated or agreed to by the ancestor of the family under consideration, recorded that the custom observed by the family relating to inheritance was that, if a person died without leaving a son, his widow was entitled to remain in possession of his estate for life without any power of transfer, and that, if there was no widow the collaterals would succeed and in their default daughters and their sons would succeed to the inheritance:

Held, that the *wajib-ul-arz* established that there was a custom in the family by virtue of which daughters and their issue were postponed in favour of collaterals where they existed. **O** TIKA *v.* RAM KUAR, 7 O L. J. 234; 23 O. C. 106 **696**

——— *—Pre-emption—Preferential right—Relationship—Burden of proof*—Wajib-ul-arz, *entry in, construction of*—Hissadar qaribi, *whether denotes blood relation.*

If a person claims a preferential right of pre-emption over another co-sharer by reason of relationship, it is for him to prove that fact.

The expression "*hissadar qaribi*" in a *wajib-ul-arz* does not necessarily indicate a blood relation. **A** BHAGWANDAS *v* TEJ RAM **148**

——— *Pre-emption—Village confiscated by Government and held for 21 years—Grant to other persons*—Wajib-ul-arz, *entry in, not stating facts, value of.*

In 1857, at the time of the Mutiny, a village was confiscated by Government, who held it for twenty-one years and then gave it in grant to persons other than the original proprietors. one year after this, a *wajib-ul-arz* was prepared but it did not state the actual facts In a suit for pre-emption an entry in the *wajib-ul-arz* was relied on to prove the existence of a custom of pre-emption:

Held, that inasmuch as the *wajib-ul-arz* did not state the actual facts, the entry was no proof of the existence of the custom of pre-emption, but that it was merely a record of the wishes of the Zemindars **A** RADHA KISHEN *v.* GULZARI LAL, 2 U. P. L. R (A) 156; 18 A L J. 569 **73**

——— *Pre-emption*—Wajib-ul-arz, *interpretation of*—Bhai bhatija, *meaning of.*

Where in recording a custom of pre-emption in a *wajib-ul-arz*, the first right is given to "*bhai bhatija sharik hakiyat*," this does not mean that an own brother has a preference over a cousin.

Plaintiff claimed a preferential right of pre-emption against the vendee on the ground of being the own brother of the vendor, and it was found that the vendee and the two brothers were descended from the same common great-grandfather:

Held, that the plaintiff had not a preferential right under the terms of the *wajib-ul-arz*. **A** SAMHAR SINGH *v* SHER SINGH, 18 A. L. J. 454; 2 U P. L. R A) 158 **183**

———, *proof of—Burden of proof—Gift to*

Custom—concld.

khanadamad—*Reversion of gifted property, when takes place—Succession—Daughter entitled to succeed, whether can pass succession to sons.*

Any person, who relies on an alleged custom, has to prove that the custom exists and applies to the circumstances of the case.

Gifted land reverts to the donor or his collaterals only when the line of descendants of the donee, both male and female, has entirely died out.

The same rule applies where property is gifted to a *khanadamad*

Except in the case of a daughter who succeeds to her father's property only as an unmarried daughter entitled to hold it until her marriage, there is no custom whereby a daughter who is entitled to succeed is not also entitled to pass succession on to her sons **L** SHAH MUHAMMAD *v* FAZAL ILAHI, 2 U. P. L. R. (L) 103 **913**

——— *Village common land, building on, by co-sharer—Suit for demolition—Special damage, proof of, whether necessary—Delay in suing—Acquiescence.*

A suit by some of the proprietors of a village for the demolition of a house built by another co-proprietor on the village common land is not maintainable without proof of special damage to the plaintiffs.

Where it appeared that the plaintiffs did not raise any objection to the building of the house at the time and instituted their suit after 5 or 6 years:

Held, that the plaintiffs by their conduct had shown that they had acquiesced in the building and that they were, therefore, not entitled to the relief they sought. **L** SHEO RAM *v* DHAPAN **454**

——— Widow, childless—Estate taken by widow, nature of. *See* WAJIB-UL-ARZ **699**

Custom or Hindu Law—Kapur Khatris *of Jhelum District—Presumption—Burden of proof—Mere inaction, whether enough—Hindu Law—Widow, right of, to share on partition—Widow in possession of family house—Declaratory suit, whether competent.*

Where the parties are high caste Hindus and do not depend upon agriculture for their livelihood, the ordinary presumption is that they are governed by the provisions of the Hindu law, and the onus rests heavily on the party denying this to establish the existence of a custom at variance with that law.

Kapur Khatris of Jhelum District are governed by Hindu Law in matters of partition

In order to establish a custom wherein the interests of a female are in conflict with those of a male, it must be shown by clear and cogent evidence that there was actually an assertion of her claim by the female and a denial by the male.

Mere inaction, which may be due to various causes, *e. g.* mutual good will or ignorance of the law, affords no indication of the fact that the rule of Hindu Law has been abrogated and a custom at variance with it has taken its place

The rule of the Mitakshara Law is firmly established that a mother is entitled only to maintenance until partition, and that she can never herself demand a partition. But if a partition takes place by the act of others, not being strangers, she will be entitled to receive a share, if the effect of that

Custom or Hindu Law—concld.

partition is to break up or diminish the estate out of which she would otherwise be maintained.

Where, therefore, one of the co-sharers in a joint estate having applied for partition, the widow of the last male owner sued for a declaration of her title to a share in the estate:

Held, (1) that she had a right to claim a share equal to that of the other co-sharers;

(2) that as the widow was residing in the family house, the declaratory suit was maintainable. **L** GANESH DEVI *v.* DARSHAN SINGH, 2 U. P. L. R. (L) 100 **478**

Declaration, *suit for, value of—Appeal, second—Valuation, objection to.*

Where an objection to valuation is taken in the pleadings, and again before issues are framed, and again in the Appellate Court, section 11 of the Suits Valuation Act is no bar to the objection being taken and entertained in second appeal. **Pat** MOHINI MOHAN MISSER *v.* GOUR CHANDRA KAI, 5 P. L. J. 397; 1 P. L. T. 39; 2 U. P. L. R. (PAT) 123 **762**

Decree, ex parte—*Suit to set aside decree, maintainability of—Decree obtained by perjured evidence.*

The mere fact that the claim in a suit in which an *ex parte* decree was passed was supported by perjured evidence, would not by itself be a ground for setting aside the decree.

The principle underlying this rule is that the whole case was before the Court which decided it on the pleadings and on the evidence, and whether the case was a false one or not, and whether the evidence adduced was perjured evidence or not, the Court must be held to have adjudicated on both these points and once having adjudicated on them it cannot be asked to adjudicate on them again. **Pat** KRIPASINDHU *v.* NANDU CHARAN, 1 P. L. T. 206 **606**

——— obtained by perjured evidence—Suit to set aside decree, maintainability of—Case, whether fit one for appeal to Privy Council. *See* CIVIL PROCEDURE CODE, s. 09 (c) **615**

Definitions:—

Agrahar. *See* HINDU LAW—GIFT **361**

As such. *See* COMPANIES ACT, s. 68 **163**

Ayakzoung. *See* BUDDHIST ECCLESIASTICAL LAW **939**

Bhai Bhatija. *See* CUSTOM—PRE-EMPTION **183**

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Decree passed on admission. *See* O. P. TENANCY ACT, s. 81 **845**

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Hisadar Qaribi. *See* WAJIB-UL-ARZ **148**

Holding. *See* OUDH RENT ACT, s. 37 **966**

Jodi. *See* MADRAS ESTATES LAND ACT, s. 3 (1) **552**

Merchant. *See* ARBITRATION ACT, s. 19 **76**

Offence. *See* PENAL CODE, s. 149 **210**

Plaint. *See* CIVIL PROCEDURE CODE, O. LXIII, R. 1 **865**

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Trespass. *See* PENAL CODE, s. 143 **235**

Within. *See* BENGAL MUNICIPAL ACT, s. 85 **821**

Wrongful Act. *See* CRIMINAL PROCEDURE CODE, s. 07 **437**

Yajman Vriti. *See* HINDU LAW **683**

Document lost, contents of, proof of—Oral evidence, admissibility of. *See* STAMP ACT, s. 35 **249**

——— on which plaintiff relies—Defendant, right of, to inspect documents. *See* CIVIL PROCEDURE CODE, O. VII, R. 14 **457**

———, *subsequent addition to, whether binding—Burden of proof.*

Where a party has shown it probable that there is a subsequent addition to a document, he cannot be held bound by the addition merely because it is proved or admitted that the rest of the document is genuine. **N** SONIBAI *v.* DHANRAJ **620**

Easement—Right of way—Open user for 20 years Presumption. *See* LIMITATION ACT, s. 26 **728**

———, *suit based upon—Easement not established—Natural right, decree, whether can be based on—Natural right not specifically pleaded—Appellate Court whether can make new case not set out in plaint.*

Where a plaintiff claims a right based upon easement and fails to establish the exercise of the right for the statutory period, he cannot succeed upon his natural right, and it is not open to the Court to make out a case not set up in the plaint and grant relief.

Plaintiff sued for a declaration of right by easement to two *mochas* for draining off rain water from his lands, but he failed to establish the exercise of the right for the statutory period. The Appellate Court, however, gave him a decree, holding that he was entitled to the natural flow of the water through the *mochas*. In second appeal:

Held, that the decree could not be maintained; that the plaintiff having failed to establish the easement asserted by him, it was not open to the Appellate Court to change the claim into one for the flow of natural water; that the plaintiff could not succeed upon his natural right to drain off water from higher to lower lands in the absence of evidence that the water flowed in the usual course of nature and in undefined channels, and that to succeed upon his natural right, the plaintiff must have specifically pleaded such right. **Pat** BADHE MANDER *v.* FAKIR MANDER **970**

——— Tenant, whether can obtain prescriptive right against landlord—Easement, extinguishment of, by natural forces—Suit to enforce easement, maintainability of. *See* LANDLORD AND TENANT **598**

Ejectment, *suit for—Lease, expiry of—Plaintiff not relying on lease—Cause of action, change of.*

A suit for ejectment was contested on the ground that the defendant had acquired occupancy rights. To rebut this the plaintiff produced a lease to cover

Ejectment—concld.

a period of eight years. Defendant objected in appeal that the lease should have been made the basis of the suit and that the suit ought to have been under section 58 of the Agra Tenancy Act. The objection was allowed and the suit dismissed on the ground that plaintiff ought not to have been allowed to change his cause of action. In second appeal:

Held, that the plaintiff had not changed his cause of action and that he was not bound to base his claim on the lease. **U P B R** GAURI SHANKAR *v.* MEWA, 2 U. P. L. R. (B. R.) 69 **977**

Estate, *separate, what constitutes—Cess, direct payment of, effect of.*

Direct payment of cess in respect of rent free lands is by no means conclusive that the lands constitute a separate estate. **Pat** KUMAR PREMATHA NATH MALIA *v.* MEIK, (1920) PAT 146; 5 P. L. J. 273; 1 P. L. T. 360 **184**

Estoppel—*Person taking active part in bringing about sale, whether estopped from challenging it—Purchase in good faith*

There is no estoppel against a person challenging a sale merely because he took an active part in bringing about the sale, was present at the execution of the document, and who, at the time, represented that no claims of his would affect the vendee's title. **S** SHAHAB-UD-DIN *v.* VOHIDBUX, 14 S L. R. 12 **492**

Evidence Act (I of 1872), s. 25—*Confession to Police, admsisibility of, to prove ownership of property.*

A confession made to the Police by an accused person is admissible to prove the ownership of property in respect of which he is accused. **N** GANPAT *v.* BANI, 21 CR. L. J. 414 **62**

——— **s. 32 (2)**—*Statement made in course of gossip, admissibility of.*

A statement made by a person in the ordinary course of gossip and not in the ordinary course of business is not a statement to which the provisions of section 32 (2) of the Evidence Act would apply. **N** AJODHI *v.* EMPEROR, 16 N. L. R. 30; 21 CR. L. J. 486 **582**

——— **ss. 32 (2), 34**—Talab baki *papers, evidentiary, value of.*

Under section 34 of the Evidence Act *talab baki* papers are not sufficient evidence to charge any person with liability. The *talab baki* papers prepared by the agent of a landlord may be evidence under section 32, clause (2) of the Evidence Act, if the landlord shows that the person making the statement is dead and that the entries were made by him in the ordinary course of business. **C** UMED ALI *v.* HABIBULLAH, 51 C. L. J. 61; 47 C. 266 **38**

——— **ss. 33, 165**—*Evidence taken in judicial proceeding, admissibility of, in subsequent proceeding between same parties, by consent of parties.*

Evidence given by a witness in a judicial proceeding is admissible in a later proceeding between the same parties where they agree upon that course, irrespective of the conditions prescribed by section 33 of the Evidence Act. **M** JAINAB BIBI *v.* HYDERALLY SAHEB, 38 M. L. J. 532; 28 M. L. T. 23; (1920) M. W. N. 360; 12 L. W. 64; 43 M. 609 **957**

——— **s. 35**—Confidential inquiry as to possession, whether admissible. *See* PROCEDURE **807**

Evidence Act—concld.

——— **s. 67**—*Document not required by law to be attested—Execution, proof of.*

In the case of a document not required by law to be attested, it is absolutely necessary under section 67 of the Evidence Act that some evidence should be given to show that the executant executed the document, *i. e.*, that he signed it or put his mark on it. **O** BANKE LAL *v* SWAMI DAYAL, 7 O. L. J. 207; 2 U. P. L. R. (J. C.) 82; 23 O. C. 72 **328**

——— **s. 68**—*Transfer of Property Act (IV of 1882), s. 59—Attestation of mortgage-deed—Execution by* pardanashin *lady—Proof.*

In the case of a *pardanashin* lady executing a mortgage-deed it is not essential that the attesting witnesses should actually see the executant sign or make a mark. The attestation would be sufficiently proved if there is evidence that the lady admitted that she was the executant and the deed was taken behind the *pardah* for her signature and after it was signed by her, the signatures of attesting witnesses who were present there were then made. **N** KASIDANBI *v.* GANGU LAL **247**

——— **s. 80**—Perjury, trial for—Recital in judgment, whether can take the place of deposition—Admissibility of recital *See* CRIMINAL PROCEDURE CODE, s 195 **660**

——— **s. 92**—*Evidence to show that consideration for pro-note was advanced by person other than payee, admissibility of.*

Under section 92 of the Evidence Act, evidence is inadmissible to prove that the consideration for a promissory-note was advanced by some person other than the payee of the note. **U B** MAUNG SAW *v.* INGRASWAMY, 3 U. B. R. (1919) 200 **259**

——— **s. 92**—*Oral evidence to vary or contradict terms of document, admissibility of.*

Evidence of acts and conduct of parties is not admissible in order to contradict or vary the written terms of an agreement. **Pat** SUKHAN RAI *v.* CHAKOWRI SINGH, 2 U. P. L. R. (PAT.) 119 **752**

——— **s. 92, proviso (2)**—*Construction of document—Ambiguity—Intention of parties—Oral evidence, admissibility of.*

Where effect can be given to every word used in a document, it is not open to the parties to adduce evidence as regards their intention, but where certain words, the use of which is superfluous, render the document ambiguous and it is clear that the parties intended something different from what has been actually written, then under section 92, proviso (2) of the Evidence Act, oral evidence is admissible to show what the parties really intended.

The provision regarding interest in a document ran as follows: "I shall pay for the aforesaid sum every year calculating interest at ten *kalams* of paddy per year":

Held, that the word 'calculating' would be meaningless unless there was a basis on which the calculation was to be made and the document being silent as to the basis, oral evidence was admissible to show what the basis was. **M** MUTHUSAMI IYER *v.* VARADA VYROYAN, 11 L. W. 352; (1920) M. W. N. 239 **476**

Evidence for defence, *method of recording.*

A Magistrate should record the evidence for the defence with the same amount of care and precision as that for the prosecution, as otherwise his opinion that the evidence is false is not easy to test. **A** MAHBOOB *v.* EMPEROR, 2 U. P. L. R. (A) 113; 21 CR. L. J. 552 **856**

Excess Profits Duty Act (X of 1919), s. 2—*'Business', meaning of—Company owning house property and carrying on business of letting tenements and stalls—Company, whether liable to taxation.*

The term 'business' in section 2 of the Excess Profits Duty Act has the same meaning which is assigned to it in the Income Tax Act, and the former Act does not contemplate an extension of that meaning or justify the introduction of anything which, according to the scheme of the Income Tax Act, is wholly dissimilar.

A person who has invested his capital in house property and who keeps a rent office, and a staff of rent collectors, clerks, etc., for the purpose of letting out his houses and collecting the rents, is not carrying on a 'business' within the meaning of the Excess Profits Duty Act. Similarly, a Company which holds house property, and distributes the rents therefrom in the form of dividends to share-holders, is not carrying on a 'business' within the meaning of that Act, as, although it is an association for acquiring gain, yet the method of acquiring gain is passive by owning property and not by the active carrying on of business. **L B** KALADAN SURATTEE BAZAAR CO. LTD., *In re* **914**

Execution of decree Appellate decree, ambiguity in—Decree of first Court and pleadings, whether can be looked into—Executing Court, powers of *See* CONSTRUCTION OF DECREE **283**

——— *Order made without notice to party—Party whether bound by order—Civil Procedure Code (Act V of 1908), O XXXIV, r. 6—Mortgage decree—Balance remaining unpaid on sale—Judgment debtor, liability of, decision of—Notice to judgment-debtor, whether necessary.*

A party to an execution proceeding who has had no opportunity to take exception to a proposed order of the Court is not bound in the same way as if an adverse order were made in his presence.

Where the only matter before an execution Court is whether execution can proceed without a supplemental decree under Order XXXIV, rule 6, of the Civil Procedure Code, an order made without notice to the judgment-debtor directing execution to issue against him in respect of costs cannot be supported. **C** ILLIMMOLLA *v.* MANINDRA MOHAN PODDAR, 31 C. L. J. 382 **801**

——— *Sale—Application to set aside sale, dismissal of—Application to set aside dismissal—Appeal, whether lies.*

An order rejecting an application to set aside an order dismissing for default an application to set aside an auction sale, is not appealable. **C** AMBICA CHARN KHASKEL *v* ESMAIL **981**

——— Sale of properties belonging to stranger—Application to set aside sale—Limitation *See* LIMITATION ACT, SCH. I, ART. 166 **260**

Ex parte decree, application to set aside, dismissed for default—Application for restoration, whether entertainable. *See* CIVIL PROCEDURE CODE, O. IX, r. 13 **25**

——— obtained by fraud, suit to set aside—Burden of proof. *See* FRAUD **270**

——— Suit to set aside decree, whether competent—Remedy, proper. *See* CIVIL PROCEDURE CODE, (ACT V OF 1908), O. IX, R 13 **878**

Expert *evidence as to age, value of.*

The effect of medical testimony as to the age of a person is to render the other evidence adduced in the case as to his age medically probable or improbable. **O** SRIPAL SINGH *v.* JAGDISH NARAYAN, 7 O L J. 219; 2 U P. L. R. (J. C.) 77 **313**

Fraud—Ex parte *decree obtained by fraud, suit to set aside—Burden of proof.*

In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the Court. The dishonesty of a claim on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit Therefore, if the plaintiff cannot prove that the decree was fraudulently obtained, he cannot succeed whether the original claim against him was true or false. **Pat** KRISHNA DAYAL GIR *v.* LAKSHMI NARAIN, 1 P. L. T. 486 **270**

Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 167—*High Court, power of superintendence of, extent of—Procedure—Duty of Court.*

It is the privilege and prerogative of a High Court, once a record is before it which is erroneous and so erroneous as manifestly to amount to an injustice, to exercise its powers of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require.

If the record is not before the High Court, but sufficient materials are before it to induce it to send for the record to correct a gross error apparent on the face of the record, it should accede to the application in exercise of the powers conferred upon it, not under section 115 of the Civil Procedure Code, but under the wider and larger powers conferred upon it under section 107 of the Government of India Act. **Pat** BRINDABAN CHANDER CHOUBEY *v* GOUR CHANDRA RAY, (1920) Pat 66; 1 P L. T 467 **155**

Government of India (Amendment) Act, 1916 (6 & 7 Geo. V. C. 37), s. 2 (2) **440**

Grant, *construction of—Minerals, whether pass by grant—Adverse possession of minerals, what constitutes—Leases of sub-soil rights, grant of, effect of—Constructive possession—Possession of part, whether possession of whole—Trespasser, position of—Surface working, whether gives title to sub-soil rights—Estate, separate, what constitutes—Cess, direct payment of, effect of.*

Where a *zemindar* grants a tenure in lands within his *zemindari* and it does not clearly appear by the terms of the grant that a right to the minerals is included, the minerals do not pass to the grantee.

The mere grant of leases by the tenure-holder which purport to grant sub-soil rights will not in

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itself give to the tenure-holder a title to the sub-soil rights by adverse possession. What must be considered, in order to decide the question of adverse possession, is the evidence of actual working.

Although possession of a part is constructive possession of the whole if the whole is otherwise vacant, this constructive possession is an incident of ownership and results from title. The doctrine of constructive possession is not applicable to a case where the o cupant defends himself on the ground of his possession only without proving any title.

A wrong doer's rights by adverse possession must be confined to the land of which he is in actual possession.

Where an owner of land sells it reserving to himself the minerals, he retains possession of the minerals in the same way as if he had not sold the surface. Non-user is not an abandonment of possession. Consequently, no matter how long mines remain unworked by the owner, his right is not barred so long as they are not worked by some one else.

There may be cases in which a title by adverse possession can be made out in respect to minerals, but it does not follow that by working a part of the minerals or opening up particular quarries possession over a continuous field of minerals or of quarries of which the portion worked forms part can be obtained.

A mere surface working cannot give any claim by adverse possession to the whole of the coal seam or to any portion of it beyond that which is actually extracted

Direct payment of cess in respect of rent free lands is by no means conclusive that the lands constitute a separate estate. **Pat** KUMAR METHA PREMTHA MALIA v MEIK, (1920) Pat. 146; 5 P. L. J. 273; 1 P. L. T. 360 **184**

——— – Sanad—*Proprietary interest—Grantee, dispossession of—Suit for re-possession, maintainability of.*

A person holding a full proprietary interest under a grant of a *sanad* from the Government who is dispossessed of that property is entitled to maintain a suit for re-possession into that property. **P C** GANPAT v. LALAMIYA, 16 N. L. R. 59; 1 L. W 574 **242**

Guardian ad litem, appointment of, provisions as to, object of Court, duty of—Notices to minor and his guardian, whether necessary preliminaries to appointment of guardian *ad litem* Failure to issue required notices, effect of Guardian *ad litem*, appointment of, effect of - Irregularity or defect in procedure—Minor, whether bound by decree passed in suit - Decree, when can be avoided by minor—Guardian *ad litem*, powers of, extent of. *See* CIVIL PROCEDURE CODE, O. XXXII, r. 3 **313**

Guardians and Wards Act (VIII of 1890), ss. 7, 47 (a) –*Order appointing guardian subject to furnishing security - Nature of order—Final order—Appeal, maintainablility of.*

An order appointing a guardian for a minor subject to the person appointed furnishing security is a preliminary and conditional order, and is no bar to ar appeal against the final order made under section 7 of the Guardians and Wards Act after the security is furnished. **M** SANGAYYA TEVAN v. PETHAMMAL, 11 L W. 377 **513**

Guardians and Wards Act—concld.

——— **ss. 27, 31 (2)**—*Admission by guardian of time-barred debt, whether act of prudence—Order sanctioning transfer by guardian, contents of—Necessity for and advantage of transfer not recited in order, effect of.*

The provisions of section 31 (2) of the Guardians and Wards Act are mandatory and not merely directory, and an order made by a District Judge granting sanction to the guardian to transfer his ward's property, which fails to recite the necessity for or the advantage of the transfer, is not a legal order which can be pleaded as sufficient sanction for the transfer by the guardian.

It is not an act of ordinary prudence on the part of a guardian, within the meaning of section 27 of the Guardians and Wards Act, to admit that his ward is liable for a debt which cannot be legally recovered owing to the lapse of time. **O** BANKE LAL v. SWAMI DAYAL, 7 O. L. J. 207; 2 U. P. L. R. (J. C.) 62; 23 O. C. 72 **328**

——— **ss. 47, 48**—*Order refusing to remove guardian—Appeal, whether lies.*

An order refusing to remove a guardian is final and is not open to appeal under sections 47 and 48 of the Guardians and Wards Act. **A** MUHAMMAD ANWAR ALI KHAN v. DARA SHAH KHAN, 18 A. L. J. 624; 2 U P. L. R. (A) 217; 42 A. 514 **208**

Guardianship—*Mother—Natural right of mother to have custody of her child, whether can be given up for good by agreement—Child made over by mother to another to be brought up as the latter's own—Mother, whether precluded from claiming it back—Circumstances depriving mother of her natural right—Expectations or associations.*

A mother cannot be deprived of her natural right of absolute control over her own child by any agreement. Therefore, the mere fact that the child was made over by its mother to another to be brought up by the latter as her own, or even a definite agreement never to claim it back, would not preclude her from having the custody of her own child. But there may be circumstances in a particular case which would render it undesirable in the interests of the infant that the mother should resume her rights over it when she has once made over the child to another, and associations or expectations have been created on the part of the infant When there are no such associations or expectations which it would be undesirable in the interests of the infant to disturb or disappoint, the Court exercising the jurisdiction of the Crown over infants would not deprive the mother of her natural right of guardianship over her child. **C** PETERSON v. SHAVE, 24 C. W. N. 711 **673**

Guilty, *plea of—Written statement by accused, value and effect of—Procedure*

Where a Court of revision holds the conviction of an accused person to be bad on the ground that a plea of guilty should not have been recorded, it should order a retrial of the accused **C** EMPEROR v. AKUB ALI, 31 C. L. J. 122; 21 CR. L. J. 517 **851**

Highway—*Dedication to the public—Intention to dedicate—Permissive use by tenants or their visitors, effect of—Dedication to a section of the public, whether sufficient—Punjab Municipal Act (III of 1911), ss. 3, 171—Public street, what is.*

In cases where the existence of a public highway is in issue, it is of crucial importance to distinguish between the grant to the public as such of a right of way and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it.

A public right of way can be acquired by user of, or by dedication to, the public in general. But in order to constitute a valid dedication to the public of a highway by the owner of the soil there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more, and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment. The *onus* of establishing such an intention lies heavily upon the person asserting the dedication.

A person in dedicating land to public use may place such limits as he wishes upon the dedication. There may be a dedication to the public for a limited purpose as for instance an access to a particular building, or a footway, horse-way or drift-way, but there can be no such thing in law as a public right of way constituted by dedication to only a section of the public.

A plot of ground left open in a market owned by a citizen, and by its nature accessory to shop property and let by him as such to his shop tenants, and neither drained, lighted, nor cleaned by a Municipality would not form a public street, and if the Municipality enters upon it and builds a road across it in spite of the objection of the owner and without taking any steps under the Statute to acquire it, such action amounts to a trespass and the ground still remains the private property of the owner. **P C** MUHAMMAD RUSTAM ALI KHAN *v.* MUNICIPAL COMMITTEE OF KARNAL CITY, 1 P. W. R 1920; 13 P. L R. 1920; 38 M. L. 455; 1 L. 117; 11 L. W. 579; 18 A. L. J. 466; 22 Bom. L. R. 563; 2 U. P. L. R. (P. C.) 87; 28 M. L. T. 1 **1**

Hindu Joint family, holding let to member of—Ejectment—Holding let to other members of family—Tenancy, whether continuous. *See* AGRA TENANCY ACT (II OF 1901), s. 4 **764**

Hindu Law—Adoption—Factum valet, *doctrine of, applicability of.*

The doctrine of *factum valet* in Hindu Law only applies to adoptions where matters which do not affect the essence of the adoption have been disregarded. It cannot be applied to validate the adoption of an orphan. **N** SONIBAI *v.* DHANRAJ **620**

——— *Jains—Adoption of married man, validity of—Religious ceremony, whether necessary—Giving and taking, whether essential.*

Among Jains a married man can lawfully be adopted, adoption amongst Jains being a purely secular matter.

No religious ceremonies are essential to the validity of an adoption among Jains, inasmuch as they do not believe in the Hindu doctrine of the spiritual efficacy of sons. But the secular ceremony

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of giving and taking cannot] be dispensed with. **N** JAMUNABAI *v.* JUHARMAL **81**

——— **Adoption**—Jains—*Possession of child, delivery of, when complete—Grown up man, delivery of, mode of*—Jain *widow, adoption by—Consent of husband, whether necessary.*

In matters of adoption the Jains are governed by Hindu Law to the extent that giving and taking are sufficient to constitute a valid adoption.

In the case of Jains all that is necessary under the law to effect an adoption is that the possession of the child to be given in adoption must be made over to the adoptive parent.

In the case of a grown up man who is adopted, his being placed near his adoptive parent would be sufficient in point of law to constitute a valid delivery of possession. The ceremony of actually placing him in the lap of his adoptive parent is not essential.

The permission of the husband is not necessary in the case of a Jain widow adopting a son. **N** JIWRAJ *v* SHEOKUWARBAI **65**

——— ——— *Sister's son's son, adoption of, validity of—Adopted son, whether can succeed to occupancy rights.*

Although the adoption of a sister's son's son may amount to a breach of caste custom, it nevertheless, is not illegal or void.

An adopted son can succeed to an occupancy right, and is not liable to ejectment as a non-occupancy tenant **U P B R** SHEOPUJAN RAI *v* MANOG GIR, 2 U. P L R. (B R.) 12 **652**

——— **Alienation** *by co-parcener in undivided family, validity of.*

An alienation by a co-parcener in an undivided Hindu family in the Central Provinces is valid to the extent of the alienor's own interest in the property. **N** KISANLAL *v.* NATHU, 16 N. L. R. 131 **44**

——— **Daybhaga**—Person interested, right of, to oppose application by stranger for Probate. *See* WILL **122**

——— **Debt** *incurred by father on suretyship—Son, liability of.*

A Hindu son or grandson governed by the Mitakshara Law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money and which comes within the meaning of *vyavarika*, which has been translated as lawful, useful or customary, unless the transaction is either illegal or immoral. **Pat** BALKRISHNA SAHAI *v.* SHAM SUNDAR SAHAY **962**

——— *Female, grant in favour of—Presumption—Absolute estate, grant of—Succession Act (X of 1865), s. 82, applicability of.*

Where a grant is made by a person governed by the Hindu Law in favour of a female, there is no necessary presumption that an absolute estate is intended to be granted, and section 82 of the Succession Act has no application to such a case. **O** CHAURAS KUNWAR *v.* JAGANNATH SINGH, 7 O L J. 1[illegible]; 2 U. P. L. R. J. C.) 89 **287**

——— *Parbhus in Central Provinces, law applicable to—Daughters, estate taken by*

The Parbhus of the Central Provinces, who originally immigrated from the Bombay Presidency, are governed by the Bombay School of

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Hindu Law as now known and judicially ascertained, and not by that law as it existed at the date of their immigration.

In those parts of the Bombay Presidency where the Mayukha Law is paramount authority, as well as in those parts governed by the Mitakshara Law, daughters succeed to an absolute estate. **N** MADHORAO *v.* KESHEORAO **175**

——— *Property given to two widows for maintenance —Tenancy-in-common—Property acquired under grant from Government, whether self-acquired.*

Where property is given to two widows for their maintenance, they enjoy it as tenants-in-common and not as joint tenants.

Property acquired under a grant from Government is self-acquired, unless it is merely restoration of a confiscated grant intended for the benefit of the family. **Pat** SASIBALA DASI *v* CHANDRA MOHAN DUTTA **937**

——— Separation, proof of. *See* HINDU LAW—JOINT FAMILY **306**

——— Yajman vriti, *nature of—Co-owner of* vriti *performing ceremonies and appropriating fees—Trespass—Damages, suit for, by other co-owners, whether maintainable—Priest, whether can be dismissed by* yajman.

A *yajman vriti* is a religious office to which fees are attached.

Where one co-owner of a *vriti* performs the religious ceremonies of a *yajman* and appropriates the fees, the otheir co-owners of the *vriti* can sue him to recover their share of the fees.

Where the act of the co-owner performing the ceremonies amounts to an ouster of the other co-owners, the latter can sue the former for damages as a tortfeasor.

A *yajman* has no right to dismiss a priest except for serious misconduct or upon the latter being outcasted.

The law allows a co-owner to sue another co-owner for trespass, if the latter has ousted him and such ouster covers an act inconsistent with the enjoyment of the property by both. **S** MANGHIRMAL *v.* JETHANAND. 13 S. L. R. 56 **683**

——— **Gift**—Agrahar *gift, nature of—Condition restricting residence, whether enforceable—Public policy.*

A religious gift (*agrahar*) to a Brahmin for his maintenance is a private and an absolute gift according to law, and is entirely distinguishable from a religious endowment in favour of a deity of a public character, and where such a gift imposes a condition restricting the residence of the donee, and there is no rule of Hindu Law necessitating the enforcement of such condition, the condition is opposed to public policy and has no legal effect **B** RUKMINIBAI KRISHNARAO *v.* LAXMIBAI NARAYAN, 22 Bom. L. R. 254; 44 B 304 **361**

——— **Inheritance**—*Illegitimate daughter, right of, to inherit, her mother's property—Hindu female entitled to maintenance—Possession—Mutation—No indication that possession is in lieu of maintenance—Adverse possession—Daughter, right of, to inherit*

According to Hindu Law an illegitimate daughter, even among twice born classes, inherits the property of her mother in preference to trespassers.

Where a share in the property of a Hindu was held by his mistress, and mutation was effected in her favour some 40 years ago, and although she was entilted to maintenance, there was nothing to show that her possession was in lieu of maintenance, it was held that she had acquired title by adverse possession and that upon her death her share devolved on her daughter. **N** KASTURI *v* LOTE MAJOR **952**

——— **Inheritance**—*Mental effection, whether disqualification.*

According to Hindu Law mental affection, to disqualify a person from inheriting, must be of such a nature that a man is thereby debarred or incapable of performing the funeral rites and offering the proper funeral oblations. **C** PADMABATI DASSI *v.* BONOMALI SEAL, 24 C. W. N. 378 **566**

——— **Joint family**—*Alienation—Necessity, proof of—Enquiry by alienee—Presumption.*

If an alienee from the father of a joint Hindu family makes enquiries as to the necessities of the loan and if he satisfies himself that the necessities represented exist, he is sufficiently protected.

If the necessity for the loan cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain that such circumstances existed and that the transferee acted in good faith **O** JAI NARAIN *v* BAJRANG BAHADUR SINGH, 7 O L J. 330; 2 U. P. L. R. (J. C.) 115 **826**

——— ——— *Ancestral property, nature of—Property inherited from collaterals, whether ancestral—Alienation—Father, power of, to alienate family property—Antecedent debt, meaning of.*

Under the Hindu Law property acquired by inheritance from a collateral relation is not ancestral property.

Joint family property may be sold or charged by the father in order to discharge an antecedent debt, that is to say, a debt incurred not only prior to the date of the sale or charge but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be afforded by it Where joint family property is thus sold or mortgaged, no question arises as to whether the antecedent debt was incurred for legal necessity or for other purposes binding upon the sons or as to whether the transaction entered into by the father is enforceable against the sons during his lifetime. **O** PUDAI RAM *v* BAIJNATH LAL, 7 O. L. J. 273; 23 O. C. 264 **745**

——— ——— *Business carried on by co-parcener, whether family business—Presumption—Minor, liability of—Burden of proof—Ancestral trade —Manager, acts of, whether binding on minor—Minor, when can be partner—Evidence—Account books, witholding of—Presumption.*

There is no presumption that a Hindu family has any joint property or that a business carried on by a co-parcener is a family business

If a plaintiff seeks to impose upon a minor in a joint family any liability as a member of a family partnership, it is for him to show how the minor's liability arises.

A minor member of a joint family upon whom an ancestral trade has descended is bound by all acts of

the manager, or the adult members acting as managers, which are necessarily incidental to and flowing out of the carrying on of that trade. But where a business is not ancestral, a minor member is not necessarily interested in a business carried on by the major members of the joint family to which he belongs.

A minor member of a joint family cannot become a partner in an ancestral business unless on attaining full age he takes active steps to be recognised as such.

A minor member of a joint family firm can only be liable to the extent of the assets of the business *i e.*, the property which has been used by the family for the purpose or which has been acquired therefrom. **N** PADAMRAJ v GOPIKISAN **129**

——— **Joint family**—Execution of decree—Sale of share of co-parcener in joint Hindu family—Purchaser, position of—Suit for partition and allotment of share, maintainability of. *See* CIVIL PROCEDURE CODE, 1882, s. 244 **254**

——— ——— —*Manager, power of, to alienate family property, extent of—Test to be applied.*

In order to determine whether a mortgage by the manager of a joint family is binding on the family, the real test is the benefit to the family and not a justifying legal necessity for the transaction. The manager of a joint family has implied authority to do whatever is best for all concerned and the test in each case is, was it a transaction into which a prudent owner would enter in order to benefit the estate. **Pat** SHEOTAHAL SINGH *v.* ARJUN DASS, 1 P. L. T 136; (1920) Pat 155 **879**

——— ——— —*Member joining firm—Presumption—Burden of proof,*

There is no presumption that a business carried on by a member of a joint Hindu family is a joint family business.

The burden of proving that a certain member of a joint Hindu family joined a firm not in his individual capacity, but as a representative of the whole family, is on the party who alleges it. **L** SANT RAM *v.* KIDAR NATH **469**

——— ——— —*Mortgage by father—Decree against father—Sale of mortgaged property—Redemption, suit for, by sons, maintainability of.*

A Hindu father executed a mortgage which was binding on his sons. The mortgagees obtained a decree on the basis of that mortgage against the father alone, without making the sons parties to the suit, and themselves purchased the mortgaged property in execution of their decree. Subsequently the sons sued the mortgagees-purchasers, seeking *inter alia* redemption of the property:

Held, that the suit was maintainable for redemption of the mortgaged property.

Hard cases must not be allowed to make bad law. **O** DRIGPAL SINGH *v.* SUKHNANDAN LAL, 7 O. L. J. 164; 2 U. P. L. R. (J. C.) 96 **299**

——— —*Mortgage by father—Necessity—Immorality—Burden of proof.*

Where in a suit to enforce a mortgage, by the father of a Hindu joint family, the sons advance the defence that the father was of immoral life and there was no necessity for the loan, the burden of proving not only that there was necessity to borrow but that it was not unreasonable to borrow at the rate of interest stipulated lies upon the plaintiff, while it is for the defendants to prove that the money was borrowed for expenses incident to an immoral life. **P C** MANNA SINGH *v.* KARU SINGH, 1 P. L. T. 6 **766**

——— **Joint family**—*Presumption of jointness—Separation, proof of—Settlement records, value of, as evidence of title or possession - Settlement of Oudh after Mutiny, entries in, whether recognised existing rights or constituted a fresh root of title.*

Given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father.

It is not any part of the law of India that settlement records are by themselves conclusive evidence of the facts which they purport to record. They have merely to be considered with other evidence. The broad question of partition of rights or separation of interests is not dealt with in such records, and the inference of such a transaction from entries therein may be weak or strong according to circumstances. A definition of shares in revenue and village papers is by itself very slight evidence of an actual separation in a Hindu family and generally quite insufficient to overcome the presumption against partition.

Lord Canning's Proclamation after the Mutiny swept away all prior titles in Oudh. But the Government officers conducting the settlements did not proceed upon the notion that prior rights were to go for nothing, and in most cases their proceedings were rather a recognition of those rights than a fresh root of title. **P C** NAGESHAR BAKHSH SINGH *v.* GANESHA, 7 O. L. J. 49; 2 U. P. L. R. (P. C.) 37; 34 M. L J. 521; 23 O C 1; 18 A. L. J. 532; 22 Bom. L. R. 596, 28 M. L. T. 5; 42 A 368 **306**

——— ——— —*Purchase in name of one member*—Benami *transaction—Real owner, whether bound by result of litigation to which* benamidar *is party—Limitation Act (IX of 1908), s 22—Party already represented, joinder of, after expiry of limitation, effect of—Trusts Act (II of 1882), s. 82—Resulting trust—Purchase in name of one person with money supplied by several, effect of—Person interested in litigation but not party to suit, whether bound by result.*

A purchase in the name of one member of a joint Hindu family is a *benami* transaction, especially when that member is not the managing member or a representative of the family.

A *benamidar* is allowed to represent the real owner in suits both as plaintiff as well as defendant, and a decree obtained by a *benamidar* or against a *benamidar* is binding upon the real owner.

If a person is already represented in a suit by a party to the suit, his joinder is not the joinder of a new plaintiff or a new defendant, within the meaning of section 22 of the Limitation Act

A resulting trust takes place where several persons jointly furnish the purchase-money and the purchase is made in the name of one of them

A person interested in a litigation is not bound to apply to have himself made a party and in default to be bound by the result of that litigation. **N** NARHAR *v.* NARAIN **386**

Hindu Law—contd.

——— Joint family—*Sister, unmarried—Residence, right of—Family dwelling house, sale of—Purchaser, position of.*

Under the Hindu Law the right of an unmarried sister to reside in the family dwelling house till her marriage is unaffected by the sale of the house in execution of a decree against the last male owner for a debt contracted without family necessity, and she is entitled to resist delivery to the auction-purchaser till suitable arrangements are made for her accommodation. **M** SURYANARAYANA RAO NAIDU *v.* BALASUBRAMANIA MUDALI, 11 L. W. 409; 38 M. L. J. 433; (1920) M. W N 267; 43 M. 635 **524**

——— Mitakshara—Dravada School—*Adoption by widow—Consent of nearest* sapindas, *whether necessary—Consent of more distant relatives, whether sufficient.*

Under the Mitakshara Law as administered in the Dravada country, a Hindu widow, although not authorised by her husband to adopt a son to him, may nevertheless make such an adoption with the consent of his nearest *sapindas*

The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter.

Save in exceptional cases, *e. g*, minority, lunacy or absence in a distant country, the consent of the nearest *sapindas* must be asked and if it is not asked, it is no excuse to say that they would certainly have refused; but where a *sapinda* is clearly proved to have withheld his consent from corrupt or malicious motives, his dissent may be disregarded.

The absence of consent on the part of the nearest *sapindas* cannot be made good by the authorisation of more distant relatives. **P C** ADUSUMILLI KRISTNAYYA *v.* ADUSUMILLI LAKSHMIPATHI, 18 A. L J. 601; (1920) M. W N. 385 24 C. W. N. 905; 39 M. L. J 70; 28 M. L. T. 70; 43 M. 650; 12 L. W. 625 **39**

——— —*Father's sister's sons, whether heirs—Presumption of continuance of life—Burden of proving death—Evidence Act (I of 1872), s. 108*

In places where the Mitakshara system of Hindu Law prevails, the father's sister's sons of the last male owner are heirs.

The presumption is in favour of the continuance of life and the onus of proving the death of a person lies on the party who asserts it.

Plaintiffs sued for possession of certain land of which their maternal uncle's son *S.* was the last male owner. Upon the death of *S.* the land was held by his mother *A*, on whose death the village proprietors took possession. *A.* was said to have died in May 1902 and the present suit was instituted on the 5th May 914:

Held, (1) that according to Hindu Law the plaintiffs were entitled to succeed to their maternal uncle's son as *bandhus*;

(2) that there was no presumption that *A* died before the 5th May 1902;

(3) that the onus of proving that *A* died before the 5th May 1902 lay upon the defendants

(4) that in the absence of any proof of the exact date of death the suit was within time. **L** TANI *v.* BIKHI RAM, 114 P. L. R. 1920 **742**

Hindu Law—contd.

——— Mitakshara—*Partition, requisites of—Division of interest—Intention to separate, whether sufficient—Burden of proof.*

In a Hindu joint family a disruption of the status of jointness may take place by agreement, without division of the estate by metes and bounds. Even an unambiguous expression of an intention by one member of the joint family to separate and hold his share separately will suffice. But the question is one of fact, and the onus is on the party alleging separation of interest or the intention to separate to affirmatively establish it. **P C** GIRDHAR DAS *v* SRI KRISHNA DATT, 18 A L J. 545; 39 M. L. J. 18; 22 BOM. L. R. 1348 **233**

——— Succession—Munditchela, *right of, to succeed—Adoption*—Mundit chela, *whether adopted son—Joint family Father or manager, power of, to make Will—Son, birth of, effect of*—Girhast Bairagis—*Son, position of.*

There is no custom which authorises the succession of a *mundit chela* to the estate of the person making him a *chela*.

The fact that a person is made a *mundit chela* does not constitute that person an adopted son, and the mere fact that his father was present at the ceremony of his initiation as a *chela* does not convert the ceremony into one of adoption

Where the head of a Hindu family governed by the Mitakshara Law makes a Will, the subsequent birth of a son, who thereupon becomes a co-parcener in the family estate, has the effect of rendering the Will inoperative and absolutely void and not merely voidable.

Among Girhast Bairagis a son acquires an interest by birth in the ancestral property of the father. **N** GULABDAS *v* DHARMIN BAI **996**

——— Temple—*Manager, whether entitled to remove image to new temple—Ruinous condition of temple, effect of.*

The fact that a public temple is in a ruinous condition would not entitle the manager of the temple to remove the image from the temple and instal it permanently in a new building, especially where the removal is objected to by a majority of the worshippers. **B** HARI RAGHUNATH *v.* ANTAJI BHIKAJI, 22 Bom. L. R. 334: 44 B 466 **459**

——— ——— Pala *or turn of worship, transfer of, validity of—Custom, requisites of—Right of management and right of service in connection with temples, distinction between—Compulsory and private alienation—Private alienation, when permissible*—Shebait, *duties and power of—Sale of priestly office for benefit of* shebait, *legality of*—Pala, *sub-division of, legality of—Question of law—Appeal, second—Separation of* pala *from immoveable property of endowment, whether permissible.*

Custom, if established, may render private alienation of a *pala* valid, but in determining the question, the benefit to the idol must be taken into consideration as a matter of primary importance. Property dedicated to a deity is *extra commercium*, and is entitled to special protection of the sovereign whose duty it is to intervene to prevent fraud and waste. Persons having the management and possession of the property of an idol must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property. The manager of the endow-

ment is by virtue of his office the administrator of the property attached to it. As regards the property he is in the position of a trustee. Sale of the trusteeship for pecuniary gain is not permissible. The sale of a priestly office for the benefit of the *shebait* is illegal. Right of worship is property, but has not all the incidents of property. A distinction has been made between transfers *inter vivos* and transfers by Will. The *shebait* is manager or *quas* trustee for the benefit of the idol and as the office endures only for his life, he has no right of devise by Will, as his Will only comes into operation on his death when there is nothing for him to alienate.

The requisites of custom are that it should be ancient, and invariable, uniform, reasonable, not immoral, certain and consistent. About its being ancient it must have existed "so long as the memory of man runneth not to the contrary."

There is a distinction between the right of management and the right of service in connection with temples, private and public, and between compulsory and private alienations. Private alienations are not absolutely prohibited but alienations to strangers are not favoured. In the case of private alienations the prohibition is not of general application and custom and usage govern and prevail over the text law which prohibits both partition and alienation.

The question as to whether a *pala* is divisible or not is a point of law and can be raised for the first time in second appeal.

Division of a *pala* by inheritance is on a different basis from division by transactions *inter vivos* or by devise.

Separation of a *pala* from the immoveable property of an endowment is not a reasonable method of management of the property or of conducting the *sheba*. Where there is no custom of separation of the *pala* and the endowed property, sub-division *inter vivos* of the *pala* alone should not be allowed, as it cannot be for the benefit of the deity. **C** NITYA GOPAL *v* PROVAS CHANDRA, 31 C. L. J. 37; 24 C. W. N. 309 **19**

——— **Widow**—*After-born son, whether divests his mother's estate from date of birth or from date of father's death—Alienation by* enceinte *widow, legality of.*

The rights of a son under Hindu Law in the estate left by his father commence at birth and not before. Therefore, an after-born son divests his mother's estate as a widow from the moment of his birth and not from the moment of his father's death. Between the date of the death of her husband and that of the birth of her son, the widow is competent to alienate her husband's property for necessity. **L** HIRA *v.* BUTA, 1 L 128; 49 P. W. R 1920; 133 P. L. R. 1920 **256**

———, *alienation by—Cesses, payment of, whether legal necessity—Interest, high rate of, necessity for, proof of—Burden of proof.*

The reversionary heirs of a Hindu widow are not bound by a debt incurred by her for the payment of cesses.

Where a mortgagee from a Hindu widow sues to enforce his mortgage against the reversioners of the widow, and the principal is found to have been advanced for necessity, the question as to the necessity for the rate of interest does not arise and ought not to be gone into, unless the defendants by their written statement specifically raise that question. **Pat** JAG SAHU *v* RADHA KISHUN, 1 P. L T. 209; 5 P. L. J. 287; (1920) Pat. 211; 2 U. P. L. R. (Pat) 127 **867**

——— **Widow,** *alienation by—Consent of reversioner, effect of—Necessity, proof of.*

The consent of the immediate reversioner to an alienation made by a Hindu widow is presumptive proof of legal necessity and bars further enquiry into legal necessity. The consenting reversioner cannot subsequently say that there was no legal necessity **Pat** ADHIKARI KUER *v.* LOKENATH RAI, 2 U. P. L. R. (Pat) 93; 1 P. L. T 335 **426**

———, *alienation by—Necessity, proof of—Consideration, small portion of, not shown for necessity, effect of.*

Where in the case of a sale effected by a Hindu widow, the entire consideration with the exception of a small portion is shown to have been taken for legal necessity, the vendee cannot be deprived of the benefit of his purchase.

In the case of a mortgage no such question arises, because it is open to the reversioners to sue for redemption on payment of the amount for which they may be held liable. **O** BHARATH SINGH *v.* MUNNU SINGH, 7 O L.J. 151; 2 U P. L. R. (J. C.) 93 **291**

——— ——— —*Maintenance—Right of residence —Widow, whether bound to liquidate husband's debts.*

Ordinarily, a Hindu widow has a right of residence in the family house and she may not be ousted except to satisfy claims which are paramount to her right of residence, which is a part of her right to maintenance.

The widow of an undivided member of a Hindu family can set up her right of residence against a purchaser for value, unless the alienation was for a family purpose, but the widow of a divided member is bound to liquidate any debt which was binding on her husband unless it was incurred in fraud of her right.

Where, however, the husband loses the property in his lifetime, there is nothing to which his widow can succeed as his heir or from which she can derive maintenance. **L** ASA DEBI *v.* BASHI RAM, 2 U. P. L. R. (L) 93 **198**

———, *right of, to share on partition—Widow in possession of family house—Declaratory suit, whether competent.*

The rule of the Mitakshara Law is firmly established that a mother is entitled only to maintenance until partition and that she can never herself demand a partition. But if a partition takes place by the act of others, not being strangers, she will be entitled to receive a share, if the effect of that partition is to break up or diminish the estate out of which she would otherwise be maintained.

Where therefore, one of the co-sharers in a joint estate having applied for partition, the widow of the last male owner sued for a declaration of her title to a share in the estate:

Held (1) that she had a right to claim a share equal to that of the other co-sharers.

(2) that as the widow was residing in the family house, the declaratory suit was maintainable.

Hindu Law—concld.

GANESH DEVI v. DARSHAN SINGH, 2 U. P. L. R. (L) 100 **478**

——— **Will,** *construction of—Bequest to wife for life with remainder to sons—Accumulation, direction for, validity of.*

A direction in the Will of a Hindu testator to accumulate the surplus income of devised property with a gift of the accumulations is not fundamentally bad: it only fails if it offends some independent rule of Hindu l aw.

A testator by his Will appointed his wife his executrix and trustee and "gave devised and bequeathed unto her the rest and residue" of his moveable and immoveable properties for her life and after her death to his five sons in equal shares, with directions to incur certain expenses and to accumulate the surplus income for the benefit of the sons:

Held, that the provision for accumulation of the surplus income was not bad. **C** RAM LAL SEN *v.* BIDHUMUKHI DASI, 47 C 76 **373**

Indian Soldiers (Litigation) Ordinance (II of 1915), ss. 2, 9—*"Serving under war conditions," meaning of—Duty of Court in cases of doubt.*

"Serving under war conditions" does not necessarily mean serving abroad.

When the Court is in doubt as to whether a party can be said to be serving under war conditions or not, it ought to refer the matter to the prescribed authority and act on the certificate given by such authority. **L** GURBACHAN SINGH *v.* RALLA RAM **947**

Improvements by purchaser—*Compensation, purchaser, whether entitled to.*

Where a purchaser of immoveable property, under the honest belief that he is the absolute owner thereof, undertakes permanent improvements on the property, he is in equity entitled to compensation for the improvements made by him, on the sale being annulled on the ground that the vendor had only a limited interest in the property and could not convey an absolute title, but he is liable for mesne profits from the date his possession became wrongful, *i. e.*, from the date of the death of the vendor **S** SHAHAB-UD-DIN *v.* VOHIDBUX, 14 S. L. R. 12 **492**

Interest *by way of damages, award of.*

In a proper case interest may be awarded by way of damages, even though it is not claimable under the Interest Act. Mere non-payment on the due date, however, is not sufficient to justify such an award. **M** SINGARAJU VENKATASUBRAMANIAM *v.* RAJAH OF VENKATAGIRI, 11 L. W. 523 **552**

Interlocutory order deciding preliminary issues—Revision, whether entertainable. *See* CIVIL PROCEDURE CODE, s. 115 **248**

Interpretation of Statutes—*Legal term, meaning of.*

In interpreting a Statute, the settled rule of construction is that where the Legislature uses a legal term which has a known significance, it must be assumed that the term has been used in that sense and in no other. **Pat** JHARI SINGHA *v.* EMPEROR, 21 Cr. L. J 443 **235**

Jagirdar, *agreement by, with zemindars for commutation of customary dues—Agreement, whether can be avoided—Jagirs in Sind—Grant, nature of.*

A *jagirdar* entered into an agreement with certain *zemindars* holding permanent rights in the *jagir* land, whereby he bound himself to accept certain rates in cash and kind in consideration of the customary dues he was entitled as *jagirdar* to receive. On the death of the *jagirdar* his son brought the present suit to avoid this agreement on the grounds that by the terms of the grant conferring the *jagir* a limited estate only was conveyed, the grantee's rights to alienate being restricted, that the agreement did not create permanent rights, and that he was not bound thereby:

Held, upon a consideration of the history of alienations in Sind and the terms of the *sanad* conferring the *jagir*, that the intention of the grantors was to confer a hereditary estate in perpetuity without imposing any condition restricting alienation; that upon a proper construction of the agreement the intention was to make a permanent settlement, and that the plaintiff was bound thereby. **S** MIR SHER MAHOMED *v.* ETHOMAL, 14 S. L. R. 1 **484**

Jail identification—*Magistrate superintending, evidence of, whether necessary—Court, duty of.*

Where a jail identification is held in the presence of a Magistrate, the Magistrate should be produced at the trial as a witness, and it is the duty of the Court to call him before the conclusion of the trial. **A** EMPEROR *v.* SUNDAR, 2 U. P. L. R (A) 116; 21 Cr. L. J. 515 **771**

Jurisdiction—*Connected suits—Appeal in one—Appellate Court, whether can arrive at conflicting findings.*

Where in a case the plaintiff instituted a suit for rent as also atitle suit, but an appeal was preferred against the decision in the rent suit only and the Judge came to certain findings different from those arrived at by the Munsif in the title suit:

Held, (1) that the fact that no appeal was preferred from the decision in the title suit did not preclude the Judge from dealing with the appeal before him and going into such matters as were necessary for the decision of the appeal;

(2) that in doing so the Judge had not decided anything that was outside the scope of the suit or appeal. **C** NALINAKSHYA DUTTA *v.* DHUN KRISHNA MONDAL **282**

Jurisdiction of Civil and Revenue Courts—*Pleadings—Suit by owner for declaration of rightful possession, whether cognizable by Civil Court—Defendant obtaining possession pending suit—Amendment of plaint, whether should be allowed.*

The question of jurisdiction has to be decided entirely on the allegations in the plaint

Plaintiffs sued for a declaration that they were in rightful possession of the land in suit, alleging that the land belonged to them and that the defendant had made a claim on the ground that he was the heir of a deceased occupancy tenant, while as a matter of fact he had no title to the land. The first Court decreed their claim, holding that the occupancy rights were extinct and that the defendant had no rights therein On appeal the District Judge, finding that the defendant had since obtained a decree from a Revenue Court restoring him to possession as an occupancy tenant, held that the

Jurisdiction of Civil and Revenue Courts—concld.

defendant was in legal possession and that the declaratory suit could not proceed Plaintiffs filed a second appeal to the High Court:

Held, (1) that on the allegations in the plaint the suit was cognizable by a Civil Court;

(2) that the *locus standi* of the plaintiff to ask for relief from a Civil Court had in no way been affected by the subsequent decree obtained by the defendant in a Revenue Court;

(3) that as the plaintiffs had lost possession during the pendency of the suit, they ought to have been allowed to amend their plaint and ask for possession. **L** KARAM DAD *v* HUSSAIN BAKHSH **458**

Kotwar—*Village service tenant*—Kotwar *losing office, but continuing in possession of portion of village service holding*—*Settlement, new, effect of, on arrangement*—*C. P. Tenancy Act (XI of 1893), s. 56 (2), applicability of.*

J. and *N.* were Kotwars in a village and each held one of two fields which constituted the village service holding It was subsequently decided that one Kotwar would suffice, and the question was which of the two should be dismissed; this was decided by the parties drawing lots, it being understood that the loser would continue for his lifetime in possession of the field he was cultivating *J* lost and was thus deprived of the office of Kotwar, but he continued in possession of the field he was cultivating, and the *wajib-ul-arz* was corrected accordingly. In the new settlement some years later the village service holding was recorded in the sole name of *N*'s son *D.*, who consequently ejected *J J.* brought the present suit for re-instatement in possession and correction of the *wajib-ul-arz.* The suit was resisted on the ground that the arrangement by which *J.* was displaced as Kotwar but was allowed to continue in possession did not bind the successors-in-office of *N* and that under section 56 (2) of the C. P. Tenancy Act, *J.*'s sub-lease exceeding one year at a time was void:

Held, that section 56 (2) of the C. P. Tenancy Act did not apply that as the sub-tenancy created in favour of *J* was part of the arrangement whereby *N.* became the village service tenant, it would be inequitable to permit the ejectment of *J* merely because a new settlement had been made or because *N.* had ceased to be Kotwar **N** CHIBLIA *v.* DAWLATYA **749**

Kudima and adima tenures—Denial to render service—Resumption, liability to. *See* MALABAR LAW **13**

Land Acquisition Act (I of 1894), s. 13—*Reference by Collector after money awarded withdrawn, legality of.*

The fact that the compensation awarded under the Land Acquisition Act is withdrawn by the party to whom it was awarded does not affect the right of the party who is entitled to receive it to have a reference made to the Court under section 8 of the Act. **Pat** RAHIT SAHU *v.* MAHADEO CHAUDHURI, 1 P. L. T. 44; 2 U. P. L. R. (Pat) 43; (1920) PAT 129 **126**

——— **s. 23**—*Land acquisition*—*Vacant land*—*Assessment, method of.*

In a land acquisition case the amount of compensation cannot be enhanced upon the basis of conveyances of lands which have no similarity] to the lands acquired.

Land Acquisition Act—concld.

In awarding compensation for land acquired under the Land Acquisition Act it is unsound to assert that the value of a *raiyat's* interest is so much without specification of the conditions of the tenancy. How much is recoverable by a landlord from a hypothetical tenant may be determined with some approach to accuracy from the rent receivable by him But the exact value of the *raiyat's* interest is dependent on a number of unknown factors.

In awarding compensation for a vacant piece of land the existence of a hypothetical tenant on each plot was assumed and calculation was made of the respective values of what was designated as landlord's interest and *raiyat's* interest. The total of the sums which represented the values of these interests was taken as the value of the land:

Held, that the award was based on unsound principles. **C** HEM CHANDRA *v* SECRETARY OF STATE FOR INDIA, 31 C. L. J. 214 **758**

Landlord and tenant—*Additional rent for additional area, suit for*—*Standard of measurement*—*Presumption.*

Where in a suit for additional rent for additional area the standard of measurement set up on behalf of the plaintiff is inconsistent with the *kabuliyat* upon which the suit is based, it cannot be presumed that the present standard of measurement was the standard in use at the time when the lands comprised within the tenancy were originally measured **C** MADHABI SUNDARI DASYA *v.* SYAMA CHARAN BISWAS, 31 C. L. J. 202 **748**

——— Agraharamdars, *liability of, to pay* jodi *to* zemindar—*Madras Estates Land Act (I of 1908), ss.* 3 (11), 61—Jodi, *whether rent*—*Interest by way of damages, award of*—*Pleadings*—*Defence setting up new case, whether can be advanced in appeal.*

Where a village is held by *agraharamdars*, they are jointly and severally liable to the *zemindar* for the whole of the *jodi* due on the entire village; the fact that they have split up the village into separate holdings will not relieve them of this liability, because any arrangement among themselves to enjoy the land in shares and pay the *jodi* proportionately is not binding on the landlord, unless he consents to it.

A defence not raised in the lower Court and which sets up a new case, cannot be advanced in a Court of Appeal

Jodi is not rent as defined in section 3 (11) of the Madras Estates Land and interest thereon cannot be claimed under section 61 of the Act.

In a proper case interest may be awarded by way of damages, even though it is not claimable under the Interest Act Mere non-payment on the due date, however, is not sufficient to justify such an award **M** SINGARAJU VENKATASUBBARAMANIAM *v.* RAJAH OF VENKATAGIRI, I. L. R. 3 [illegible] **552**

——— Denial of title—Forfeiture—Denial, what amounts to. *See* MALABAR LAW **13**

——— *Easement*—*Tenant, whether can obtain prescriptive right against landlord*—*Easement, extinguishment of, by natural forces*—*Suit to enforce easement, maintainability of.*

A tenant cannot, by mere enjoyment, obtain a

Landlord and tenant—contd.

prescriptive easement against his landlord, but there is nothing to prevent his having a customary right, or a right by implied contract with his landlord.

A servient owner cannot by his own wrongful act destroy the utility of the servient tenement actively and thus claim to have put an end to the easement. But if by the forces of nature the easement or right ceases to exist, an action for relief based on the easement is not maintainable. **M** BAYYA SAHU v. KRISHNACHANDRA GAJAPATHY, 11 L. W. 600 **598**

——— *Enhancement of rent, effect of—Agreement to vacate within one month of receipt of notice—Notice to quit not expiring with end of month, validity of—Transfer of Property Act (IV of 1882), s. 106.*

Mere enhancement of rent does not put an end to an existing tenancy.

Defendant executed a lease in plaintiffs' favour on the 30th August 1916, under which rent was fixed at Rs. 16 per mensem payable on the 2nd day of each Hindi month. The lease also contained an agreement to the effect that the defendant would within one month of receipt of notice pay the rent and vacate without objection. On the 27th May 1917 the parties agreed to raise the rent to Rs. 40 per mensem, but there was no other change in the terms of the tenancy. On the expiry of the lease on the 30th August 1917 no new lease was executed. On the 8th August 1918 plaintiffs sent defendant a notice to vacate within one month from receipt of notice This notice was received by the defendant on the 10th August, which was the 3rd day of a Hindi month. The defendant having failed to vacate, the plaintiffs sued for ejectment and for recovery of rent:

Held, (1) that the raising of the rent to Rs. 40 per mensem did not create any fresh tenancy and after the expiry of the lease the old terms still continued to apply as no fresh ones were agreed upon;

(2) that as there was a clear contract in the lease to vacate at one month's notice, section 106 of the Transfer of Property Act did not apply and the notice was perfectly valid, even though it was not received on the 2nd day of the Hindi month. **L** RADHA KISHEN v. RATAN LAL **7**

——— *Merger, doctrine of, applicability of—Rent, right to recover.*

The doctrine of merger can only be applied when the interest in the superior right definitely covers the subordinate right

Where the plaintiff has the right to collect the entire rent of a fixed-rate holding while the defendant has only a mortgagee interest in the holding and an entirely separate interest in the proprietary right the doctrine of merger does not apply and the plaintiff is entitled to collect the entire rent. **U P B R** MAHABIR PRASAD SINGH v. MANKI, 2 U. P. L. R. (B. R.) 14 **677**

——— *Occupancy holding—Joint tenants—Surrender by one tenant of his share, validity of.*

A surrender by one of several joint tenants of an occupancy holding of his share in the holding is valid. **Pat** RAGHUNATH CHATTERJEE v. JUTHU CHATTAR, 2 U P. L. R. (PAT.) 97 **466**

——— *Occupancy holding, non-transferable, transfer of—Khas possession, suit for, by landlord—Limitation, commencement of—Adverse possession of transferee, requisites of—Abandonment—Bengal Tenancy Act (VIII of 1885), s. 87—Limitation Act (IX of 1908), s. 18.*

Where there is a transfer of a non-transferable occupancy holding, it is only on the theory of abandonment within the meaning of section 87 of the Bengal Tenancy Act that the landlord can re-enter and where such abandonment took place 12 years before the landlord's suit to recover *khas* possession, the only way of overcoming the bar of limitation to the suit would be by establishing a case within section 18 of the Limitation Act

To establish a case of adverse possession against the landlord by the transferee of a non-transferable occupancy holding it must be shown that the possession was adequate in continuity, publicity and extent The element of publicity would be wanting if the landlord was not aware of the transfer, and where the element of publicity is wanting the element of extent would also be wanting **C** MANULLA KOLU v. PRASANNA KUMAR SARKAR **811**

——— *Occupancy tenant, whether entitled to cut and appropriate trees—Custom—Burden of proof—Record of Rights, entry in—Presumption of correctness—Evidence before Court—Duty of Court.*

The general rule is that an occupancy tenant has the right to cut the trees standing on his holding but the landlord has the right to appropriate them If the tenant claims any right to appropriate the trees, he must prove a custom or usage to that effect.

An entry in a Record of Rights is entitled to the benefit of the presumption attached to it, but where the Court has before it the evidence upon which the record was prepared and where the plaintiff denies the correctness of the record, the Court is bound to come to a finding whether that evidence is sufficient to justify the entry **Pat** JANKI KUER v. SUDAGAR RAM, 1 P. L. T. 221; (1920) PAT. 177 **417**

——— Ryotwari *holding, suit for possession of—Permanent tenancy, claim of, by defendant.*

Where in a suit for the recovery of possession of agricultural land in a *ryotwari* tract the defendant claims a right of permanent tenancy, it is for him to establish permanency, and this may be done by proving a custom, a contract or a title, or by other means; and where in such a case custom is out of the question, and contract is negatived by the trial Court, but that Court leaves the question of title untouched, it is open to the High Court, in appeal, to make a pronouncement on that question **P** (SETURATNAM AIYAR v. VENKATACHALA GOUNDEN, (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578, 18 A. L. J. 707; 43 M. 567 **117**

——— *Suit for possession by landlord - Defendent setting up tenancy—Land, whether comprised in tenancy—Burden of proof*

A landlord brought a suit for declaration of title to, and recovery of possession of, some land from his tenant on the ground that the land in suit was not included in the tenancy. The defendant alleged a tenancy under the plaintiff in respect of the land claimed. It was found that the land claimed was not an encroachment, nor was it contiguous to the land forming the tenancy of the defendant:

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Held, that the onus of proving that the land was included in the tenancy of the defendant lay on the defendant. **C** NABIN CHANDRA NATH *v.* TIRTHABASI BHOWMIK **1 O**

——— *Under-raiyat, status of—Lands held as* korfa chasi *or* korfa raiyati*—Appeal, second—Point involving question of fact not raised at trial, whether can be taken in second appeal.*

Where in a *kabuliyat* the holdings are described as *korfa chasi* and *korfa raiyati* and the predecessors-in-interest of the holders under the *kabuliyat* had portions at least of the lands comprised in *khas* cultivation, the status of the holders is that of under-*raiyats*.

A point which ought to be, but is not, taken in the trial Court and in respect of which no direct evidence is given cannot be taken in second appeal, especially if it involves a question of fact. **C** ANWAR BEWA *v* SURENDRA NATH **844**

Lease, *construction of*—Istimrari *lease, duration of.*

A lease, described as *istimrari*, which contains no specific clauses referring to succession and transfer, is good only for the lifetime of the lessee, and, by itself, is no defence to a notice of ejectment against the successors of the lessee. **U P B R** HARDUTT SINGH *v.* JAIKARAN SINGH, 2 U. P. L. R. (B. R.) 13 **656**

——— *Sub-lease by lessee—Breach of covenant—Lessor, right of, to recover damages or rent from sub-lessee.*

Where a lessee in contravention of the terms of his lease grants a sub-lease, the lessor has no cause of action against the sub-lessee either for rent or for damages, his right to recover damages for breach of covenant being restricted to the lessee. **N** SITARAM MAHARAJ *v.* NARAYAN **268**

———*Leases of sub-soil rights, grant of, effect of.*

The mere grant of leases by the teunre-holder which purport to grant sub-soil rights will not in itself give to the tenure-holder a title to the sub-soil rights by adverse possession What must be considered, in order to decide the question of adverse possession, is the evidence of actual working. **Pat** KUMAR PREMATHA NATA MALIA *v.* MEIK, (1920) PAT. 146; 5 P. L. J. 273; 1 P. L. T. 360 **184**

Legal Practitioners Act (XVIII of 1879), ss. 36, 39—*Proceedings under Legal Practitioners Act—Revision.*

The enquiry under section 39 of the Legal Practitioners Act is of the nature of a departmental enquiry, and it is enough if it is conducted in such a way that the officer enquiring acts with substantial justice and gives the person against whom proceedings are being taken an opportunity to show cause. **S** MULCHAND, *In re*, 13 S. L. R. 212; 21 CR L. J. 449 **433**

Letters of Administration, application for, by two presons—Status of one admitted and of other disputed—Procedure. *See* PROBATE AND ADMINISTRATION ACT (V OF 1881), s 23 **764**

Letters Patent (All.), cl. 8—*Vakil preparing and presenting petition without authority from his clients—Misconduct.*

A Vakil prepared and presented to a Sessions Judge in the course of a criminal trial a statement which purported to be a petition issuing from his clients and drafted on their instructions, whereas

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in truth and in fact it was a petition which originated with him and in respect of which he had received no instructions, and he put therein allegations which were made recklessly and without any reasonable grounds for belief:

Held, that he was guilty of professional misconduct. **A** A VAKIL, *In the matter of*, 18 A. L. J. 429; 2 U. P. L. R. (A) 150; 21 CR L. J. 409; 42 A. 450 **501**

——— **(Cal.), cl. 12**—*Properties situate partly within and partly without ordinary original civil jurisdiction of High Court—Leave to sue, competency of—Jurisdiction, want of*—Res judicata—*Mortgage—Sub-mortgagee, remedies of—Suit against mortgagor—Court, proper.*

The Calcutta High Court is not competent to grant leave, under clause 12 of its Letters Patent, to enforce a cause of action in respect of properties situated partly within, and partly without, the local limits of its ordinary original civil jurisdiction, and a decree so far as it affects properties without those limits must be deemed to have been made without jurisdiction.

Where a Court has no jurisdiction over the subject-matter of an action in which an order is made, such order is wholly void and cannot operate as *res judicata*.

A sub-mortgagee is entitled to bring a suit against his mortgagor and to realise the dues on his mortgage by sale or foreclosure. It is also open to a sub-mortgagee, but by no means obligatory on him, to frame his suit in such a way as not only to enforce his rights under his own mortgage but to enforce the original mortgage against the mortgagor of his mortgagor A sub-mortgagee may thus be content to cut off the equity of redemption of his mortgagor or he may at his choice, by a suit properly framed, cut off the equity of redemption not merely of his mortgagor but also of the mortgagor of his mortgagor.

Where the properties comprised in an original mortgage are situated in the Mufassil, the mortgagee by the grant of a sub-mortgage along with a mortgage of property in the town of Calcutta is not entitled to have the forum altered in relation to the enforcement of the original mortgage As between the mortgagee and the sub-mortgagee, a suit to enforce the security may fittingly be instituted on the Original Side of the High Court at Calcutta. But as the original mortgagor could have been sued by his mortgagee in respect of liabilities arising out of the mortgage transaction only in the Mufassil Court, the mortgagee, by granting a mortgage to a third person of his interest as mortgagee and by including in that document a property in Calcutta, cannot be permitted to prejudice the position of his mortgagor and to render him liable to be sued in a Court other than the Mufassil Court. **C** KRISHNA KISHORE DE *v.* AMAR NATH KHETTRY 31 C. L. J. 472; 21 C. W. N. 633 **532**

Limitation—*Adoption, right to challenge, barred by limitation—Gift to adopted son, whether can be impeached by reversioners.*

Where an adoption remains unchallenged, and the right to impeach it is barred by limitation, a gift made subsequently in favour of the adopted son does not give the reversioners a fresh cause of

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action, in that it does not involve any further denial their rights than was involved in the adoption. KHUSHAL SINGH *v.* HANDA, 2 U. P. L. R. (L) 110 **931**

Limitation Act (IX of 1908), s. 4, *applicability of, to private agreements between parties —Agreement by decree-holder to set aside sale on payment of decretal money by judgment-debtor within certain time—Payment beyond time fixed but on re-opening of Court, effect of.*

Section 4 of the Limitation Act does not apply to a case where a certain date has been fixed for the payment of money by agreement of the parties.

A decree-holder agreed to set aside the sale of the properties of the judgment-debtor if the latter paid up the decretal amount within two months of the date of the sale. The Courts were closed on the last day allowed for payment and the decretal amount was deposited on the day that the Courts re-opened:

Held, that payment not having been made within the time agreed upon, the sale could not be set aside. **Pat** ADYA SINGH *v.* NASIB SINGH, 1 P. L. T. 227 **495**

——— s. 4—*Civil Procedure Code (Act V of 1908), O. VII, r. 6—Plaint filed on day Court re-opened after vacation—Limitation, expiry of, during vacation—Plaint omitting to state cause of delay—Plaint, whether liable to be rejected—Evidence Act (1 of 1872), s. 57 (9)—Judicial notice —Holidays notified—Duty of Court.*

Although under rule 6, Order VII, of the Civil Procedure Code the plaint in a suit filed after expiry of the period of limitation should show on what ground exemption is claimed, yet an omission to do so in respect of a suit filed on the day the Court re-opened after its summer vacation, the period of limitation for bringing which had expired during the vacation, would not entail dismissal of the suit, because under section 57 (9) of the Evidence Act the Court is bound to take judicial notice of any public holidays notified in the Official Gazette, and the plaintiff is entitled to presume that the Court would take such judicial notice. The proper course for the Court in such a case is not to dismiss the suit but to require the plaint to be amended. **N** TEKCHAND *v.* PATTO **926**

——— s. 12—*Time requisite for obtaining copy —Application for copy, dismissed for default—Copy of decree obtained by party other than appellant—Appellant, whether entitled to deduction of time for obtaining copy.*

Inasmuch as the law does not require that the copy of a decree accompanying a memorandum of appeal should have been obtained by the appellant himself, the provisions of section 12 of the Limitation Act would apply where a copy of the decree appealed against was obtained by another person.

Where, therefore, an appellant applied for a copy of a decree, but his application was dismissed in default of paying the necessary fees, and he presented an appeal accompanied by a copy of the decree obtained by another person:

Held, that, under section 12 of the Limitation Act, he was entitled to an exclusion of the time occupied in obtaining the copy in computing the

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period prescribed for the appeal. **M** AMINUDEEN SAHIB *v.* PYARI BI, 11 L. W. 370; 38 M. L. J. 340; (1920) M. W. N. 246; 43 M. 633 **73**

——— s. 12—*Time requisite for obtaining copy— Judgment pronounced on first day of vacation—Copy applied for several days after re-opening of Court—Period of vacation, whether can be excluded from time for appealing.*

Where a judgment is pronounced on the first day of the Court's vacation, and an application for a copy is not made till several days after the re-opening of the Court, the applicant is not entitled to deduct the period of the vacation, as time requisite for obtaining a copy under section 12 of the Limitation Act, from the period prescribed for presenting an appeal. **M** DONOPUDY SUBRAMANYAM *v.* NUNE NARASIMHAM, 11 L. W. 483; (1920) M. W. N. 295; 38 M. L. J. 465; 43 M. 640 **67**

——— s. 19—*Mortgage Redemption—Acknowledgment by mortgagee—Limitation—Burden of proof.*

Where in a suit for the redemption of a mortgage the plaintiff relies upon an acknowledgment by the mortgagee to establish the subsistence of the mortgage, it is for him to prove that the acknowledgment was made before the expiry of the period of limitation and that he had a subsisting title at the date of the suit **A** ANUP SINGH *v.* FATEH CHAND, 2 U. P. L. R. (A) 187 & 258; 18 A. L. J. 789; 42 A. 575 **586**

——— s. 20—*Part-payment of principal— Writing, what must contain—Extension of limitation.*

If the fact that a payment is made by a debtor to a creditor appears in the handwriting of the person making the payment, and if it appears on the evidence in the case that the payment was in part satisfaction of the principal of a debt, the requirements of section 20 of the Limitation Act would be satisfied. **B** SAKHARAM MANCHAND GUJAR *v.* KEVAL PADAMASI GUJAR, 22 Bom. L. R. 313; 44 B. 392 **429**

——— s. 22—*Party already represented, joinder of, after expiry of limitation, effect of.*

If a person is already represented in a suit by a party to the suit, his joinder is not the joinder of a new plaintiff or a new defendant, within the meaning of section 22 of the Limitation Act. **N** NARHAR *v.* NARAIN **386**

——— s. 23, Sch. I, Art. 120—*Injunction, suit for—Continuing wrong—Limitation—Terminus a quo.*

Article 120 of the Limitation Act, being the residuary Article, prescribes the period of limitation for a suit for injunction, but the *terminus a quo* is the date when the right to sue accrues.

Plaintiffs sued for the issue of a perpetual injunction restraining defendant from discharging rain water on to the roof of the plaintiffs' shop through a *parnala*:

Held, that the plaintiffs had a fresh cause of action on each occasion when the defendant discharged water through the *parnala* on the plaintiffs' roof and that they were entitled to rely upon the last occasion when this was done as the starting point of limitation. **L** NUR MOHAMMAD *v.* GAURI SHANKAR, 2 U. P. L. R. (L) 116 **1003**

——— s. 26—*Easement— Right of way—Open user for 20 years—Presumption - Appeal, second—Failure to make presumption allowed by law—Error of law.*

An open user of a right of way continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of section 26 of the Indian Limitation Act.

The failure by a Court to make a presumption allowed by law amounts to an error of law. **L** DIWAN *v.* JAGTA, 1 L 206; 113 P L. R. 1920 **728**

——— s. 28, Sch. I, Art. 47—*Scope of Art. 47—Criminal Procedure Code (Act V of 1898), s. 146—Possession proceedings—Attachment of property and appointment of Receiver - Suit challenging Magistrate's order by party aggrieved Limitation—Failure to sue within time - Extinguishment of remedy.*

The suit contemplated in Article 47 of Schedule I to the Limitation Act is one for possession by a party against whom an oder is passed by a Magistrate The principle underlying Article 47 is that as possession is outstanding, the party who is out of it should sue within three years to recover it. If he fails to sue within that period then under section 28 of the Limitation At his right to possession is extinguished. **M** SOLAI AMMAL *v* JOGI CHETTY, 10 L. W. 647: 27 M. L. T. 53 **675**

——— Sch I, Art. 67—*Book entry, whether bond—Suit for recovery of money due on book entry—Limitation*

A book entry containing a promise to pay at a certain rate of interest and attested by witnesses is a bond, and a suit for recovery of the money due thereon is governed by Article 67 of Schedule I to the Limitation Act **L** HARI SINGH *v* FAZAL **117**

——— ——— Art. 68, *applicability of—Probate and Administration Act (V of 1881), s 78—Administration security bond, suit on—Limitation applicable.*

An administration security bond is not a bond subject to a condition as contemplated in Article 68 of Schedule I to the Limitation Act, consequently the period of limitation prescribed by that article does not apply to a suit brought upon a breach of the terms of the bond Article 68 applies to a bond which is to become enforceable only when a specified condition is broken. The obligation to sue under an administration surety bond is liable to be enforced at once, and can only be avoided by the sureties showing that the conditions laid down in the bond have been fully carried out, or carried out as far as possible up to the time of the suit. The right to sue on such a bond accrues on failure of the administrator to comply with any of the conditions, or on the administrator putting it out of his power to comply with them. **L B** KO PU MA THEIN YIN, 2 Bur. L. T. 225 **968**

——— ——— Arts. 115, 120—*Suit for return of goods delivered with interest in kind—Limitation applicable.*

Plaintiff sued for 4 ¾ *manis* of wheat, alleging that the defendant had signed a balance in his favour of 5¼ *manis* with interest payable in kind at the rate of 50 per cent. per annum;

Held, that the suit was governed either by Article 115 of Schedule I to the Limitation Act, in which case limitation began to run when payment was demanded and refused, or by Article 120, and that in either case the suit was in time. **L** SOHAN SINGH *v.* MUHAMMAD DIN **162**

——— Sch. I, Art. 116—*Suit to recover arrears of rent under registered* kanom *deed—Limitation.*

The period of limitation applicable to a suit recover arrears of rent from the assignee of a person holding under a registered *kanom* deed is contained in Article 116 of Schedule I to the Limitation Act. **M** KANNAN NARAYANAN *v.* MUTHALPUREDATH RAMUNNI, 11 L. W. 328 **241**

——— ——— Art. 118, *applicability of—Suit for possession questioning validity of adoption—Limitation.*

A suit for possession of property where the plaintiff questions the validity of an adoption is not governed by Article 118 of Schedule I to the Limitation Act **N** SONIBAI *v* DHANRAJ **620**

——— ——— Art. 132—*Mortgage—Charge, nature of—Suit to recover mortgage money wrongfully received by defendant—Limitation.*

Plaintiffs, two out of the three daughters of one *G.*, who died 11 years before suit, sued for possession of 2/3rds of certain immoveable property and mortgage money realised by the defendants after *G.'s* death:

Held, (1) that the money realised by the defendants represented the security which the plaintiffs had under the mortgage and did not cease to represent that security by reason of the defendants having wrongfully received payment thereof from the mortgagors;

(2) that the suit was governed by Article 132 of Schedule I to the Limitation Act and was within time. **L** ASO *v.* HARNAMI, 2 U. P. L R. (1) 114 **944**

——— ——— Arts. 140, 144—*Devised property, suit for possession of—Devisee in possession—Limitation applicable.*

Where the purchaser of the rights of a devisee sues to obtain possession of the devised property, the period of limitation applicable, if the devisee or his transferee has once obtained possession, is prescribed by Article 144 of Schedule I to the Limitation Act. If the devisee has not obtained possession, the suit must be brought within the period prescribed by Article 140 of that Schedule. **N** GAJIBAI *v.* NILKANTH **929**

——— ——— Art. 142, *applicability of—Possession and dispossession—Burden of proof*

In order to avail himself of the period of limitation prescribed by Article 14 of Schedule I to the Limitation Act, the plaintiff in a suit for possession of immoveable property must prove the dispossession which he alleges, and that he was in possession within twelve years of the suit. **L B** MUTHIA CHETTY *v.* THEVAR, 12 Bur L. T, 234 **951**

——— ——— Art. 142—*Possession and dispossession—Suit for possession—Burden of proof.*

When a plaintiff brings a suit for possession on the allegation that while in possession he was dispossessed by the defendant, he must show when exactly he was dispossessed and he must bring his suit within 2 years of the date of dispossession. **Pat** BHIKHAN *v.* MARDAN ALI **40**

Limitation Act—contd.

Sch. I, Art. 144—*Custom—Gift—Donee, failure of direct line of—Reversion of gifted property—Trespasser, possession of, whether adverse to nearest reversioner or all reversioners—Trees planted by donee, whether revert with the land—Compensation.*

Where on the failure of a donee's line of descendants the gifted property is taken possession of by a trespasser his possession is adverse, within the meaning of Article 144 of Schedule I to the Limitation Act, to the nearest reversioner who is entitled to claim immediate possession of the property and not to the more distant collaterals who cannot at once claim possession.

A donee has a precarious tenure of the gifted land and any permanent fixtures, *e g*, trees which he attaches to it and any permanent structures which he erects upon it would, in the event of the failure of his direct line, go to the reversionary owner of the land, and not to the collateral heirs of the donee The latter are not in such a case entitled to any compensation. **L** HARNAMAN *v.* DASONDHI, 1. L. R. 210; 112 P L. R. 1920 **733**

Arts. 166, 181—*Execution of decree—Sale of properties belonging to stranger—Application to set aside sale—Limitation.*

Where the property of a stranger to execution proceedings, *i. e*, a person who was not a party to the decree, is attached and sold, the sale is void for want of jurisdiction, and an application to set aside such a sale would not be barred if made within the period prescribed by Article 181, of Schedule I to the Limitation Act Article 166 has no application to such a case **M** SHESHAGIRI RAO *v.* SREENIVASA RAO, 38 M. L J. 62; (1920, M. W. N. 127; 43 M. 313 **260**

Art. 131—Application for restoration of application to set aside *ex parte* decree dismissed for default—Limitation applicable *See* CIVIL PROCEDURE CODE, O. IX, R. 325

Art. 181—*Execution of decree—Interposition of bar to execution—Fresh application, when to be made—Limtiation*

Where a bar is interposed which prevents the holder of a decree from carrying on execution, as for instance, where execution is restrained by injunction, he must, to save execution being barred by limitation, come into Court within three years of the removal of the bar under Article 181 of Schedule I to the Limitation Act. **A** BALWANT SINGH *v.* BUDH SINGH, 18 A. L J. 642; 42 A 564 **1005**

Art. 181—*Execution of decree—Sale set aside—Fresh application for execution—Limitation—Appeal, pendency of, whether bar to applying for execution.*

Where a sale held in execution of a decree is set aside, the decree-holder has a period of three years from the date of the order setting aside the sale to again apply for execution. The fact that the order forms the subject of an appeal is no bar to the making of an application for execution during the pendency of the appeal within the aforesaid period of three years. **Pat** AMJAD HUSSAIN *v.* SHYAM LAL **1004**

Arts. 181, 182—*Mortgage-decree—Application for order absolute—Repeal of ss. 88, 89, Transfer of Property Act, before expiry of time fixed for payment—Prior application within three years, dismissal of—Final decree, application for, whether necessary—Limitation.*

A mortgage decree having been passed on 10th December 1908, the decree-holder applied on 2nd December 1911 for an order absolute for sale. That application having been dismissed for default, the decree-holder again applied for an order absolute on 28th April 1914:

Held, that the decree-holder had a right to make the application for order absolute on 28th April 1914 and that the right was not barred by Article 182 of Schedule I to the Limitation Act or by section 48, Civil Procedure Code.

Per *Sadasiva Aiyar, J*.—A decree passed under section 88 of the Transfer of Property Act gave a vested right to the decree-holder to apply in execution for an order absolute and the repeal of the said section by Order XXXIV, Civil Procedure Code, could not take away this right.

Per *Spencer, J*.—The application of 2nd December 1911 was a step-in-aid of execution but if it were deemed necessary, owing to the introduction of Act V of 908 while the suit was pending, that the decree-holder should apply for a final decree, the applications of 1911 and 1914 might be treated as applications under Article 181 of the Limitation Act for a final decree, the second application being treated as a continuation or revival of the first. **M** GANAPATHIYA PILLAI *v.* GOPALA AIYER **563**

Lunacy Act (XXXIV of 1858), *proceedings under—Order of Judge and deposition of lunatic, whether admissible in subsequent suit against lunatic Hindu Law—Inheritance—Mental affection, whether disqualification.*

Although the order and the report made by a Judge in a proceeding in lunacy under Act XXXIV of 1858 do not fall within either sections 40, 41 or 42 of the Evidence Act, yet in a subsequent suit against the lunatic they are admissible in evidence under other provisions of the Act. But the deposition of the lunatic taken in the lunacy proceeding would not be admissible in evidence unless he is examined in the subsequent suit, for it is admissible only to contradict any evidence which he gives in the subsequent suit.

According to Hindu Law mental affection, to disqualify a person from inheriting, must be of such a nature that a man is thereby debarred or incapable of performing the funeral rites and offering the proper funeral oblations. **C** PADMABUTTI DASI *v.* BONOMALI SEAL, 24 C. W. N. 378 **566**

Madras Estates Land Act (I of 1908), s. 3 (2), (5), (11)—*Minor inamdar—Grantee of lands in permanently settled estate, whether 'land-holder'—'Rents,' in cl. (5), meaning of.*

Per *Wallis, C. J.*—An *inamdar* to whom lands were granted by the *zemindar* after the settlement out of the lands included in the permanently settled estate is not a 'land-holder' within the definition of clause 5 of section 3 of the Madras Estates Land Act.

There is no sufficient reason for refusing to apply the definition of 'rent' in clause (11) to the word 'rents' in clause (5) of section 3 of the Madras Estates Land Act, and full effect can be given to that definition by reading the latter part of it as

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intended to include, as it says, persons entitled to collect the rents due to the owner of the estate, such as farmers or assignees of such rents by way of mortgage, etc *Inams* and under-tenures in larger estates which do not consist of one or more villages but are of lesser extent are not within the operation of the Act.

Per *Sadasiva Aiyar, J*—(dissenting).—An *inamdar* to whom lands were granted by the *zemindar* after the settlement out of lands included in the permanently settled estate is not a 'land-holder' within the definition of clause (5) of section 3 of the Madras Estates Land Act. **M** GADADHARADOSS *v.* SURYANARAYANA PATNAIK, 38 M. L. J. 342; (1920) M. W. N. 503; 12 L. W. 77 **92**

——— **ss. 3 (11), 61**—Jodi, *whether rent.*

Jodi is not rent as defined in section 3 (11) of the Madras Estates Land and interest thereon cannot be claimed under section 61 of the Act. **M** SINGARAJU VENKATASUBBARAMANIAM *v.* RAJAH OF VENKATAGIRI, 11 L. W. 523 **552**

Maintenance grant—Mashahara bandegi patra, *construction of*—"Douhitransha," *meaning of*—*Succession Act (X of 1865), s. 160, applicability of.*

A *mashahara bandegi patra* (maintenance grant) executed in favour of his daughter by a *zemindar* of considerable means having no son, recited that the daughter had been receiving a certain sum of money from his *zemindari* for her maintenance and other expenses, and that unless some deed was executed objection might be raised in future to her getting the "settled amount of maintenance" which was, therefore, made "*kaim*" permanent by the deed and it was, further, provided by the deed that the daughter would get the same in "*douhitransha*":

Held, (1) that the grant was intended to be perpetual and was not limited to the life of the daughter's sons:

(2) that the word "*douhitransha*" was intended to mean "in the line of the daughter's sons"

The principle enunciated in section 160 of the Succession Act cannot apply when a contrary intention appears in the document. **C** RAJLAKHI DEBYA *v.* SAROLA SUNDARI DEBYA **803**

Malabar Law—*Landlord and tenant—Denial of title—Forfeiture - Denial, what amounts to*—Kudima *and* adima tenures—*Denial to render service—Resumption, liability to*

In order that a denial of the landlord's title by a tenant may operate as a forfeiture of the tenancy, such denial must be brought home to the knowledge of the landlord, and it must be unequivocal and clear. The mere acceptance and retention by a tenant of a document in which he is spoken of as the *jenmi* would not operate as a denial of the landlord's title, but the setting up of a prescriptive title would.

In the case of *kudima* and *adima* tenures in Malabar, a grant made for past services cannot be resumed, but a grant made for future services, can be resumed for failure to perform the services and a denial of title is tantamount to a denial to render services. **M** KOLANGERETH RAMMAN NAIR *v.* KOLLAMATAMULLATHIL MARIYOMMA, 11 L. W. 613; (1920) M. W. N. 332; 43 M. 480 **13**

Malabar Law—concld.

——— Tarwad—*Agreement by* karnavan *for benefit of* tarwad—*Junior member not consulted—Agreement, whether valid*

Where an agreement is entered into by the *karnavan* of a Malabar *tarwad* for the benefit of the *tarwad*, the fact that a junior member was not consulted about it is not a legal ground for invalidating the agreement. **M** VENGANATH RAJA VASUDEVA *v.* NAITHILATH MATATHIL, 27 M. L. T. 54 **199**

Malicious prosecution—*Damages, suit to recover—Reasonable and probable cause, absence of—Burden of proof.*

In order to succeed in a suit to recover damages for malicious prosecution, the plaintiff must prove, among other things, (*a*) that he was acquitted in the criminal proceedings, (*b*) that the defendant was actuated by malice in instituting the proceedings, (*c*) that damage was caused to him as a result of the prosecution, and (*d*) that there was absence of reasonable and probable cause on the part of the defendant. **A** NAZIR HASAN *v.* BAKHTAWAR, 2 U. P. L. R. (A. J.) 7 **161**

Maliciously procuring order of Court—*Damages, suit for—Malice, absence of, effect of.*

In the absence of proof of malice or its equivalent, a suit for damages for having wrongfully procured an order of Court appointing a Receiver will not lie. **LB** M. M. L. P. K. CHETTY *v.* SUPAYA MAISTRY, 12 BUR. L. T. 239 **960**

Martial Law Ordinance (IV of 1919), *applicability of—Ordinance, whether confined to persons taken in the act of committing an offence specified in Regulation X of 1804—Government of India Act, 1915 (5 and 6 Geo V, c. 61), ss 65 (2), 73, 72—Government of India (Amendment) Act, 1916, (6 and 7 Geo. V, c. 37) s. 2 (2)—Restrictions on powers of Indian Legislature—Right to be tried by ordinary Courts, whether can be taken away—Laws affecting allegiance—"Repugnancy" between Indian Statutes and Acts of Parliament, how far invalidates Indian Statutes.*

The Martial Law (Further Extension) Ordinance, 1919 Ordinance No. (IV of 1919) is not confined in its application to persons taken in the act of committing one of the offences specified in Regulation X of 1804, or to the persons and offences described in Martial Law Ordinance I of 1919, but extends to all offences committed on or after March 30th, 1919.

Section 65, sub-section (2) of the Government of India Act, 1915, does not prevent the Indian Government from passing a law which may modify or affect a rule of the constitution or of the common law upon the observance of which some person may conceive or allege that his allegiance depends: it refers only to laws which directly affect the allegiance of the subject, as by a transfer or qualification of the allegiance or a modification of the obligation thereby imposed.

Observations of Phear, J., in *Ameer Khan, In the matter of*, 6 B. L. R. 394 and 459 at p. 477, approved

It was argued that Ordinance IV of 1919 contravenes section 65 (3) of the Government of India Act, 1915, which prevents the Indian Government from empowering any Court other than a High

Martial Law Ordinance—concld.

Court to sentence to death any of His Majesty's subjects born in Europe, the Ordinance containing no exception in favour of such subjects :

Held, that the Ordinance may properly be described as repugnant to the Act so far as British-born subjects are concerned, but that it is void only to the extent of that repugnancy, *i. e*, in the case of His Majesty's subjects born in Europe **P C** BUGGA *v.* EMEEROR, (1920) M. W. N. 326; 2 U. P. L. R. (P. C) 50; 24 C. W. N. 650; 18 A L. J. 455; 22 Bom. L. R. 609; 39 M. L. J. 1; 12 L. W. 293; 1 L. 326; 21 CR. L. J. 458 **440**

Material Irregularity, what amounts to. *See* AGRA TENANCY ACT, S. 185 **287**

Minor—*Contract by guardian, when binding on minor's estate—Creditor, rights of—Subrogation.*

Where a contract is entered into by a guardian on behalf of a minor in a case in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor is subject, a decree might be passed against the estate of the minor.

Where a guardian borrows money for the necessities of a minor in such circumstances as to give him a right to be reimbursed from the minor's estate, his creditor may in a proper case be subrogated to the guardian's rights. **N** CHHOGALAL MEGHRAJ *v.* KANHAYALAL TARACHAND **740**

——— *Guardian* ad litem, *appointment of—Disqualified person appointed guardian—Minor, whether represented.*

If the law absolutely disqualifies certain persons from being appointed guardians *ad litem*, the appointment of any such person in that capacity is a nullity, and the minor is not at all represented in the litigation. **O** DRIGPAL SINGH *v* SUKHNANDAN LAL, 7 O. L. J. 164; 2 U. P. L. R. (J. C) 96 **299**

Misjoinder *of causes of action against separate defendants—Objection to use of irrelevant evidence not taken in trial Court, effect of.*

Where a plaintiff in disregard of the provisions of the Civil Procedure Code unites in the same suit, not merely several causes of action, but several causes of action or suits against separate defendants, with the result that in effect the litigation is conducted and treated throughout as though the defendants are a community with common interests, he cannot be heard to object to the use of evidence against him as irrelevant, but to which the irregularity of his procedure has given relevance and to which he took no exception when it was tendered at the trial. **P C** SETURATNAM AIYAR *v* VENKATACHALA GOUNDUN, (1910, M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 43 M. 567 **117**

Mortgage—*Co-mortgagees, position of—Payment to one co-mortgagee, whether discharges mortgage.*

Co-mortgagees must, unless the contrary is shown, be regarded as having a separate interest in the money advanced, although they take a joint security, and must be treated as in the position of tenants-in-common and not joint tenants. Therefore, a payment of the mortgage-debt to one of two mortgagees would not amount to a discharge of the mortgagor's liability to the other mortgagee. **Pat** ABBAS *v.* MISRI LAL, 1 P. L. T. 339; 5 P. L. J. 376 **403**

Mortgage—contd.

——— *Construction of document—Deed stipulating for redemption on payment of mortgage-money and charging property with liability for principal and interest—Redemption, sum payable on.*

Where a mortgage-deed stipulates for redemption of the mortgaged property on payment by the mortgagor of the mortgage-money, and states that the property is mortgaged for the principal and interest, the mortgagor can only redeem on payment of the principal sum and the interest due thereon. **L** GHANISHAM DAS *v* MUBARIK **576**

——— *Hypothecation of future crops, when becomes complete—Suit against transferee without notice, whether maintainable Revision—Misapprehension of nature of contract, whether material irregularity.*

A hypothecation of future crop becomes complete when the crop is grown and the produce realized, and is enforcible against a transferee of such produce with notice of the obligee's equitable interest but not against a transferee without notice.

On the 4th January 1918 *G.* hypothecated the coming *rabi* crop by an unregistered deed to the plaintiff, and on the 10th February 1918 *G.* and his son *N.* hypothecated the same crop by an unregistered deed to *S.*, who had no notice of the prior hypothecation *S* having taken the crop, plaintiff sued *N.* (*G* having died and *S* for the amount due to him:

Held, (1) that the hypothecation to the plaintiff and *S* became complete at the same time, *i.e.*, when the crop was grown and the plaintiff could not, therefore, have any preference over *S* who moreover had no notice of the former hypothecation;

(2) that, therefore, *S.* was not liable at all;

(3) that the lower Appellate Court's misapprehension of the nature of the contract entered into by *G.* was a material irregularity justifying interference in revision. **L** SAWAYA RAM *v.* FATTU RAM **489**

——— *Interest, rate of, fixed and certain—Mortgagee, right of, to receive profits in excess—Construction of document.*

Where under a mortgege-deed the rate of interest which the mortgagee is to receive is fixed and certain he is not entitled to any portion of the usufruct which might be in excess of that rate, and the mortgagor is entitled to maintain a suit for accounts to be taken of the profits realized by the mortgagee from the mortgaged property.

It would require very clear words to induce a Court to put upon a mortgage-deed such a construction as would entitle the mortgagee to claim interest and such portion of the usufruct as might be in excess of it.

Where a mortgage-deed provided that the net profits of the mortgaged property, which were estimated at a certain fixed amount, would go towards the payment of interest at the stipulated rate due to the mortgagee, that if the gross rental then fetched by the mortgaged property became deficient afterwards the mortgagor would pay the deficit, that if the revenue assessed on the propertry was enhanced the mortgagor would pay the extra revenue, that if by any efforts of the mortgagee the profits derived from the mortgaged property increased the advantage of that increase would go to the mortgagee, that the mortgagor would have no right to claim surplus profits on that account and

that the mortgagor would be entitled to redeem the property after the lapse of the fixed period on payment of the principal money secured by the mortgage and such deficient profits or extra revenue as might be recoverable under the above conditions:

Held, that in a suit for redemption of the above mortgage the mortgagor was entitled to claim an account of the profits, derived by the mortgagee from the mortgaged property although no provision was made in the deed to cover a case where the profits might increase without any special efforts on the part of the mortgagee. **O** NARAIN DAS *v.* BAIJ NATH SAHAI, 7 O. L. J. 231 **692**

——— *Mortgagee, right of, to take possession on default—Waiver—Penal clauses—Suit by mortgagee to recover possession—Consideration, payment of, whether can be gone into—Redemption, whether can be permitted.*

A mortgage-deed was to the following effect. The principal and interest was to be paid within a fixed period. If default was made in payment of any portion of the interest, the balance was to be converted from simple interest to compound interest at the same rate. If the total amount due on the deed was not paid by the time fixed, the mortgagee was at liberty either to bring the mortgaged property to sale and recover the amount due from the sale-proceeds or, in the alternative, to enter into possession of the property and remain in possession until such time as the mortgage was redeemed or in perpetuity if the mortgage was not redeemed. Default was made in the payment of principal and interest and it was found that the mortgagee had accepted certain deeds of further charge in respect of some of the unpaid arrears of interest:

Held, (1) that the acceptance of the deeds of further charge by the mortgagee did not amount to a waiver of his remedy as to taking possession of the mortgaged property;

(2) that the mortgage-deed contained no penal clause and that the condition permitting possession was a good condition.

The question as to whether the full consideration for a mortgage was paid can be gone into only when a suit for its redemption is filed and not in a suit by the mortgagee for possession of the mortgaged property. Nor can the mortgagor be allowed to redeem the mortgage in such a suit. **O** GOKUL PRASAD *v.* SITLA PRASAD, 7 O. L. J. 184 **348**

——— *Mortgagor in possession—Rent settled by mortgagor, whether binding on mortgagee - Burden of proof.*

Where a person gets a contractual benefit from a mortgagor in possession after the date of the mortgage, the onus is upon such person to prove that it was a benefit which he might derive and retain in the usual course of the management of the property.

Where a mortgagor in possession made a collusive settlement of rent with the tenants:

Held, that the settlement was not binding on the mortgagee. **Pat** MATHURA RAI *v.* MANDIL DAS, 1 P. L. T. 392 **805**

——— *of grove land—Mortgagee, right of, to let for cultivation—Lease, whether binding upon mortgagor*

It is within the rights of a mortgagee of grove land to let the land for agricultural purposes, and such letting is binding on the mortgagor. Where grove land is so let, the mortgagor cannot set up the fiction that it was not held for these purposes. **U P B R** GAJADHAR *v.* BENI PRASAD, 2 U. P. L. R. (B. R) 44 **819**

——— *Redemption*—Benamidar, *whether can maintain suit for redemption.*

A *benamidar* can maintain a suit for redemption in his own name, and the beneficial owner is bound by the decision of the suit, whether he is a party to it or not. **Pat** BISUDHANAND *v.* ISRI SINGH **599**

——— *Redemption, suit for—Mortgage converted into sale—Sale, validity of, whether can be questioned by mortgagor.*

Plaintiff sued to redeem a mortgage effected by himself. The defence was that the plaintiff had converted the mortgage into a sale, and this was established Plaintiff objected to the validity of the sale on the ground that he had no power to effect it:

Held, that plaintiff had no *locus standi* to impugn the validity of the sale. **U B** MA YE BAW *v.* MAUNG SHWE HMAN, 3 U. B. R. (1919) 192 **253**

——— *Suit for sale—Failure to implead necessary parties—Sale in execution of mortgage decree—Suit to redeem by persons who should have been joined as parties, maintainability of.*

In a suit for sale under a mortgage the mortgagee failed effectively to implead certain persons interested in the mortgaged property. A decree was passed and the mortgaged property was sold under it and was purchased by the mortgagee. The persons who should have been impleaded subsequently sued for a declaration that their right to redeem was not extinguished, but, to save Court-fees, abandoned the prayer to set aside the sale:

Held, that after the sale had taken place, the mortgagee held as purchaser and was entitled to raise all the defences that belonged to him as such, and that unless the claim to set aside the sale were made in a properly constituted action and properly raised in suitable pleadings in that action, the Court could not interfere with the possession which had been given him by the purchase. **P C** GIRNPAT LAL *v* BINDRASINI PRASHAD NARAYAN SINGH, 18 A L J. 555; (19 0) M. W. N. 382; 12 L. W. 59; 39 M. L. J. 108; 2 U. P. L. R (P. C.) 103; 24 C. W. N. 954 **274**

———, *suit on—Receiver, appointment and position of—Order for appointment of Receiver obtained by first mortgagee, effect of, on second mortgagee—Second mortgagee purchasing equity of redemption, position of—Mortgagee, when can ask for appointment of Receiver.*

Where there are two mortgages on the same property, it is open to the first mortgagee to obtain an order for the appointment of a Receiver and such order is binding on the mortgagor as also the second mortgagee, and a Receiver so appointed holds the property for the benefit of the first mortgagee and is bound to make over to him the entire income for the satisfaction of his dues The fact that the

Mortgage—concld.

second mortgagee has obtained a decree and in execution thereof has purchased the equity of redemption places him in no position of advantage. In his character of purchaser in execution of his own decree he is as much bound by the order appointing a Receiver as the mortgagor.

A mortgagee, whether he is or is not entitled to possession, may invite the Court to appoint a Receiver if the demands of justice require that the mortgagor should be deprived of possession. **C** RAMESHWAR SINGH *v.* CHUNI LAL SHAHA, 31 C. L. J. 385; 47 C. 418 **839**

——— , *usufructuary—Mortgagee to pay rent—Failure to pay—Redemption—Mortgagor, whether entitled to deduction of rent agreed to be paid.*

A usufructuary mortgage provided that the mortgagee should pay the annual rent to the landlord, but he failed to do so and the debt became time-barred. The mortgagor in suing for redemption claimed to be entitled to deduct from the principal mortgage money the sum which under the mortgage should have been paid by the mortgagee:

Held, that the mortgagor was not entitled to the deduction he claimed and that the mortgagee was entitled to the benefit of the non-payment. **Pat** TOKHAN PANDEY *v.* SIVAKANTA PROSAD SINGH **743**

Muhammadan Law—*Dower, claim for, nature of—Relinquishment of dower, valid, requisites of—Burden of proof.*

There is nothing in the Muhammadan Law to render valid the relinquishment of a claim for dower which was prompted when the lady was not a free agent or in a position to exercise free and deliberate judgment, and was under an influence which she was not in a position to overcome.

According to Muhammadan Law, the character of the obligation to pay the dower is a debt The moment the dower is settled it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may, therefore, deal with or dispose of it before taking possession of the same. The dower is the right of the woman solely; and hence it is that she is empowered to give it up or relinquish it in the continuance of the contract. As the debt is enforceable under the Contract Act, it can also be released under section 63 of that Act.

There is nothing in the Muhammadan Law which requires that a relinquishment of a claim for dower, to be valid, must take place immediately after the husband's death. The lady can relinquish it at any time. No consideration is needed for such relinquishment, but it must be shown that the lady had the opportunity of considering the matter when it is said she gave up her claim. **C** NURUNNESSA KHANUM *v.* MUHAMMAD SAKRU, 31 C. L. J. 14; 24 C. W. N. 385; 47 C. 537 **8**

——— *Endowment—Mutwalli, lease by—Sanction of Court—Suit, whether necessary—Civil Procedure Code (Act V of 1908), s. 92.*

To enable the Mutwalli of a Muhammadan endowment to grant a lease of a piece of land comprised in the endowment, it is sufficient to obtain the sanction of the District Judge. It is not necessary for such purpose to institute a suit under section 9 of the Code of Civil Procedure. **C** FAKHRANNESSA BEGAM *v.* DISTRICT JUDGE OF THE 24-PARGUNNAS, 24 C. W. N. 339; 47 C. 592 **475**

Muhammadan Law—concld.

——— Maintenance, order for—Divorce, effect of—Period for which order effective. *See* CRIMINAL PROCEDURE CODE, s. 488 **663**

——— *Pre-emption—Shafi-sharik—Imperfect partition—Complete separation of rights—Co-sharer—Pattidar, right of, to pre-empt.*

Where a plaintiff claims a right to pre-empt under the Muhammadan Law as a co-sharer, he must, in order to succeed, prove that he is one of the class of co-sharers within the meaning of that law.

In the case of an imperfect partition of a village, where there is a complete separation of all rights, the owner of a *patti* in that village cannot be regarded as a co-sharer and consequently he has no right to pre-empt. **A** MATHURA PRASAD *v.* HARDEO BAKHSH SINGH, 18 A. L. J. 58; 42 A. 477 **174**

——— *Succession—Co-heirs, position of—Suit by one heir to recover his share—Some co-heirs not made parties to suit—Non-joinder, effect of—Partition, suit for—Parties necessary.*

In a suit for partition it is necessary that all interested parties should be joined either as plaintiffs or as defendants.

On the death of a Muhammadan all his heirs become tenants-in-common of his estate.

A suit by one of several heirs of a deceased Muhammadan to recover his share in the estate left by the deceased is practically a suit for partition, and all the other heirs of the deceased must be impleaded as parties to the suit. If some of the heirs are not joined, the suit cannot proceed. Where their joinder becomes impossible, the suit must be dismissed. **O** MUHAMMAD AHMAD *v.* ANSAR MOHAMMAD, 7 O. L. J. 158; 23 O. C. 62 **304**

——— *Succession - Marriage—Slave girl—Acknowledgment that issue of slave girl entitled to succeed, effect of—Illegitimacy—Burden of proof.*

Although according to strict Muhammadan Law, no marriage is necessary between a slave girl and her master, yet an acknowledgment by the master that he has a son born by the slave girl, with whom he has gone through a ceremony of marriage, coupled with the assertion that on the failure of issue from his real wife the issue of the slave girl would be entitled to his succession, would invest the son with a legitimate status with all the consequences which that imports. In the absence of positive evidence that the marriage did not take place, the law will refuse to declare the son a bastard and so disentitled to inherit **L** IBRAHIM ALI KHAN *v.* MUBARAK BEGAM, 20 P. W. R. 1920; 1 L. 229; 82 P. L. R. 1920 **923**

Necessity—Immorality—Burden of proof. *See* HINDU LAW—JOINT FAMILY **766**

Negotiable Instruments Act (XXVI of 1881), s. 8—*Pro-note—Stranger, whether can sue on note*

Section 8 of the Negotiable Instruments Act prevents any person suing on a negotiable instrument, who is not named therein as the payee, or has not become entitled as endorsee or assignee. **U B** MAUNG SAW *v.* INGRASWAMY, 3 U. B. R. (1919) 200 **259**

——— **s. 80**—*Pro-note—Agreement to pay interest, proof of—Secondary evidence, admissibility of—Interest, rate of, allowable—Period for which interest payable.*

Negotiable Instruments Act—concld.

Secondary evidence of a written agreement to pay interest on a pro-note at a certain rate is inadmissible, and interest can only be awarded in accordance with section 80 of the Negotiable Instruments Act.

In the case of a promissory note payable on demand, the date of the demand and not of the making of the note must be taken as the point from which to calculate interest. **N** PENTAYA *v.* KESHEORAO, 16 N. L. R. 68 **249**

——— **s. 105**—*Presentation, time for—Reasonableness of time, whether question of law—Appeal, second.*

The question of the reasonableness of the time for presenting a bill of exchange for payment is a mixed question of law and fact. **L** FIRM, KATASI SINGH-KAHAN SINGH *v.* FIRM, DAULAT RAM-KIRPA RAM **936**

Non-Joinder of Parties—Suit by one heir to recover his share—Some co-heirs not made parties to suit—Non-joinder, effect of. *See* MUHAMMADAN LAW—SUCCESSION **304**

Opium Act (I of 1878), s. 9—*Sale of morphia to patients by approved medical practitioner without license—Offence.*

An approved medical practitioner is entitled under the Bengal Morphia Rules to possess a certain quantity of morphia drugs for use in his practice but not for sale. A medical practitioner who sells morphia, which he has prescribed to one of his patients, without a license is liable to conviction under section 9 of the Opium Act. **C** JOGESH CHANDRA *v.* EMPEROR, 24 C. W. N. 313; 21 CR. L. J. 497 **657**

Oral evidence, admissibility of, to vary or contradict terms of document. *See* EVIDENCE ACT, s. 92 **752**

Oudh Rent Act (XXII of 1886), s. 37, Exp. I—*Trespasser, land held by, nature of.*

Land held by a trespasser is not a "holding" or parcel of land held by a tenant and forming the subject of a separate engagement within the meaning of Explanation I to section 37 of the Oudh Rent Act. **U P B R** SANT PATHAK *v.* PARTAB RAHADUR 2 U. P. L. R. (B R.) 70 **966**

——— **s. 62 (1)**—*Land let for cultivating purposes, whether can be used for groves.*

Lands given to tenants for cultivating purposes must not be used for cultivating groves without the landlord's consent. **U P B R** DARSAN SINGH *v.* SHEORAJ SINGH, 2 U. P. L. R. (B R.) 22 **286**

Paper Currency Act (II of 1910), s. 26—*Promissory note—Endorsement in blank, effect of—Holder, right of, to recover.*

The endorsement in blank of a promissory note has the effect of making the note payable to bearer on demand. Such endorsement does not contravene the provisions of section 26 of the Paper Currency Act, as that section only prohibits the original making or issuing of promissory notes payable to bearer on demand, and the holder of a note so endorsed is not prevented from recovering on it. **L B** ISMAIL *v.* EZEKIEL, 12 BUR. L. T. 249 **930**

Pardanashin Lady—Execution of instrument by—Proof. *See* EVIDENCE ACT, s. 68 **247**

Part performance, *doctrine of, applicability of, to India—Conditions necessary for exercise of jurisdiction.*

There is nothing in the Law of India inconsistent with the doctrine of part performance on which Courts of Equity in England have acted for many years.

The jurisdiction to carry into execution transactions clothed imperfectly in legal forms being purely equitable, Courts of Equity have imposed on themselves certain limits for the exercise of the jurisdiction. Those limits must be clearly recognised and carefully guarded.

The first essential condition for the exercise of the jurisdiction is that there must be a final engagement between the parties. If the circumstances in the case suggest that the matter still rested in negotiation, there is no room to charge a person on the equities resulting from the acts done in execution of the contract.

The second essential condition is that there are such actings of the parties as must be unequivocally and in their own nature referable to the agreement alleged. If the alleged part performance cannot be connected with the alleged agreement, then there is nothing which the Court has to undo and consequently nothing which has been left undone and which ought to be carried into further execution. **Pat** DEB LAL JHA *v.* BALDEO JHA, 2 U. P. L. R. (PAT.) 100; 1 P. L. T. 354; (1920) PAT. 337 **277**

Partition proceedings—*Presumption—Co-sharers not parties to proceedings, whether bound—Mortgagees, whether necessary parties to, and whether bound by, proceedings.*

The presumption is that when a partition takes place, all the co-sharers in the village are made parties to the proceedings and, therefore, the proceedings must be taken to bind all the co-sharers and all persons who derive title under them.

Mortgagees are not necessary parties to partition proceedings, but they are bound by the decision of the partition Court in so far as it affects the interests of the co-sharers who are their mortgagors. **O** DRIGPAL SINGH *v.* NAKCHHED SINGH, 7 O. L. J. 171; 2 U. P. L. R. (J.C.) 99 **320**

———, suit for—Parties necessary. *See* MUHAMMADAN LAW—SUCCESSION **304**

———, *suit for*—Res judicata—*Previous suit, dismissal of, effect of.*

The right to sue for partition is a continuing right and incidental to the ownership of joint property. Therefore, so long as the propetry remains joint, one of the co-owners has a good cause of action for bringing a fresh suit for partition notwithstanding the dismissal of a previous suit for partition. **C** JAGAMOHINI DASI *v.* SHIBA GOPAL BANERJEE **610**

Party—*Person interested in litigation but not party to suit, whether bound by result.*

A person interested in a litigation is not bound to apply to have himself made a party and in default to be bound by the result of that litigation. **N** NARHAR *v.* NARAIN **386**

Penal Code (Act XLV of 1860), ss. 62, 302—*Murder—Forfeiture of property, order of, when appropriate.*

An order under section 62 of the Penal Code, directing the forfeiture of the property of a person sentenced to death for murder, is appropriate only

Penal Code—contd.

when theft forms part of the motive for the murder. **A** MANNA SINGH *v.* EMPEROR, 18 A. L. J. 375; 21 CR. L. J. 401 **49**

——— ss. 131, 135—*"Soldier," meaning of—Definition in Articles of War, scope of.*

The word "soldier" in section 135 of the Indian Penal Code must be interpreted as in the explanation to section 131 of the Code

The definition of the word "soldier" given in the Indian Articles of War is expressly confined to those Articles and is a very limited one. **L** SRI NAWAS *v.* EMPEROR, 102 P. L. R. 1920; 21 CR. L. J. 511 **671**

——— ss. 140, 149—*"Offence," meaning of.*

The word "offence" in section 149 of the Penal Code means only an offence under the Penal Code and does not include an offence under the Railways Act.

Consequently, a conviction under section 126 of the Railways Act, read with section 149 of the Penal Code, is illegal. **L** INDER SAIN *v.* EMPEROR, 21 CR. L. J. 418 **210**

——— ss. 143, 297—*Offence under s. 297, gist of—Trespass, meaning of—Interpretation of Statutes—Legal term, meaning of.*

The gist of an offence under section 297 of the Penal Code is trespass, and before a person can be convicted under that section it must be proved that there was a trespass by him with the intention and in the places mentioned in the section.

The term "trespass" means an unjustifiable intrusion upon property in possession of another person.

In interpreting a Statute, the settled rule of construction is that where the Legislature uses a legal term which has a known significance, it must be assumed that the term has been used in that sense and in no other. **Pat** JHARI SINGH *v.* EMPEROR, 21 CR. L. J 443 **235**

——— ss. 147, 379—*Unlawful assembly, common object of, to commit theft—No finding as to who removed property—Separate sentences, whether legal.*

Where it is found that the common object of an unlawful assembly was to commit theft, but there is no finding as to which of the persons composing the unlawful assembly removed the property stolen, it is illegal to convict them both under section 147 and under section 379 of the Penal Code and to pass separate sentences for each offence. **Pat** CHANDRA MOHAN SINGH *v* EMPEROR, 1 P. L. T 6[illegible]; 21 CR L. J. 480 **512**

——— ss. 149, 325—*Charge under s 325 read with s. 149—Conviction under s 325, legality of—Criminal Procedure Code (Act V of 1898), ss. 236, 237, 238.*

If an accused person is charged with grievous hurt under section 325 read with section 149 of the Penal Code, he cannot be convicted of the substantive offence under section 325, Indian Penal Code, such a course not being warranted by the provisions of sections 236, 237 and 238, Criminal Procedure Code. **Pat** PARTAP RAI *v.* EMPEROR, 21 CR. L. J. 439 **231**

——— ss. 395, 397—*Dacoity with torture—Sentence—Leniency, when should be shown*

A person found guilty of the offence of dacoity with torture ought not, in the matter of sentence, to be treated with any considerations of leniency. **A** EMPEROR *v.* SUNDAR, 2 U. P. L. R. (A) 115; 21 CR. L. J. 515 **771**

——— s. 406—*Criminal breach of trust by servant—Trust, nature of, to be established—Transaction involving adjustment of accounts—Retention of money, whether offence.*

Accused was employed as agent by the complainant to collect on his behalf the taxes of the Union Committee. He was to receive as remuneration 10 per cent of the collections, and was to hand over the collections, less his remuneration, to his master or to pay the money into the treasury, no period being fixed for the latter purpose. It was alleged that while in charge of the collections he failed to account for a certain sum of money collected by him. He was accordingly convicted of criminal breach of trust under section 406 of the Penal Code:

Held, that in such cases the nature of the trust should be established; that as the accused was entitled to deduct his remuneration from the collections, and as no period was fixed for payment into the treasury, a charge of criminal breach of trust could only be maintained after an adjustment of accounts, the mere fact that he retained the sums collected not being conclusive proof of criminal breach of trust, and that the conviction was, therefore, not maintainable. **Pat** NURUL HASSAN *v.* EMPEROR, 21 CR L. J 509 **669**

——— s. 411—*Receiving stolen property—Stolen property, value of—Evidence, nature of—Criminal trial—Procedure.*

In a case in which a person is charged with receiving or being in possession of property alleged to have been stolen, an important factor is the value of the property and as to this the Court should insist on having direct evidence, as the accused is entitled to have some sworn testimony of value which he can cross-examine. **A** MAHBOOB *v.* EMPEROR, 2 U P L R (A) 113; 21 CR. L J. 552 **856**

——— s. 411—*Receiving stolen property—Trial by Jury—Charge to Jury—Judge, duty of—Jury, functions of—Burden of proof*

Where a prisoner is charged with receiving stolen property, when the prosecution has proved the possession by the prisoner and that the goods had been recently stolen, the Jury may be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not, that is to say, if the Jury think that the explanation may reasonably be true though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the onus of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That onus never changes; it always rests on the prosecution.

In a prosecution under section 411 of the Penal Code it is the duty of the Judge in delivering his charge to the Jury to point out that the possession of the stolen goods must be possession *soon after the theft* or that the stolen goods must have been "*recently*" stolen. HATHIM MONDAL *v.* EMPEROR, 31 C. L. J. 10; 24 C W. N. 614; 21 CR. L J. 515 **843**

Penal Code—contd.

——— **ss. 415, 419**—*Cheating—Obtaining health certificate by giving false name—Health certificate, whether property within s.* 415.

A health certificate is property within the meaning of section 415 of the Penal Code and if a person by falsely personating another dishonestly or fraudulently induces a Health Officer to deliver to him a health certificate, he is guilty of an offence under section 419 of the Penal Code. **M** PACKIANATHAN, *In re*, 11 L. W. 368; 21 CR L. J. 478 **510**

——— **s. 426**—*Mischief—Intention to cause wrongful loss, finding as to, necessity of.*

In order to sustain a conviction under section 426 of the Penal Code, it is essentially necessary to find that the accused had the intention of causing wrongful loss to the complainant, or that he had knowledge that he was likely to cause such loss A mere finding that wrongful loss was caused is not sufficient. **M** PACKIRIYA PILLAI *v* MUTHUKRISHNA IYER, 21 CR. L. J. 450 **434**

——— **ss. 447, 448**—*House-trespass—Entry into house at invitation of wife of owner with intent to commit adultery—Offence.*

During the temporary absence of the complainant from his house his wife invited the accused to the house, who entered it with the intent to commit adultery:

Held, (1) that the complainant could not be said to have ceased to be in possession of his house because of his temporary absence;

(2) that the accused, having entered the house with the intent to commit an offence, was guilty of house-trespass. **U B** CHATTAR SINGH DAMAI *v.* EMPEROR, 3 U. B. R. 194; 21 CR. L.J. 435 **227**

——— **ss. 467, 471**—*Charge under s.* 467—*Conviction under s.* 471, *whether legal.*

Where an accused person was charged under section 467, Indian Penal Code, but it appeared in evidence that he had committed an offence under section 47 , Indian Penal Code, for which he might have been charged under section 236 of the Criminal Procedure Code:

Held, that although the accused was not charged with it, he could be convicted of an offence under section 471, Indian Penal Code. **A** JAGDEO PARSHAD *v.* EMPEROR, 18 A. L J. 442; 21 CR. L J. 410 **58**

——— **s. 498**—*Accused marrying woman represented to be a widow—Woman claimed as wife by another—Denial by her of marriage and staying preferably with accused—Accused, whether guilty of wrongful detention.*

Accused married a woman whom her relatives represented to be a widow. The complainant claimed the woman as his wife and demanded her from the accused. She denied that she had ever seen the complainant, or had had anything to do with him and deliberately walked into accused's house, Accused was convicted under section 498, Penal Code, for detaining the woman with unlawful intent knowing or having reason to believe that she was the wife of the complainant:

Held, that the conviction could not be sustained, as the woman's attitude showed that she was not being detained by the accused with or without justification, having determined to stay with him and not submit to the complainant, and that the accused did not have "reason to believe" that she was the wife of the complainant. **A** LACHMAN CHAMAR *v.* EMPEROR, 18 A. L J. 311; 21 CR. L. J. 417 **209**

Penal Code—concld.

——— **s. 504**—*Intentional insult—Offence, what constitutes—Discourtesy and bad manners, whether amount to insult.*

In order to constitute an offence under section 504 of the Penal Code, it is necessary that the insult should have been intentionally caused and thereby provocation given with the intention or knowledge that such provocation is likely to cause the person provoked to break the peace or to commit any other offence. Mere discourtesy and bad manners do not amount to a criminal offence for which a person can be criminally punished. **A** RAHIM BAKHSH *v* EMPEROR, 2 U. P. L. R. (A) 124; 18 A. L. J. 515; 21 CR L. J. 451 **435**

Petroleum Act (VIII of 1899), s. 15 (a) **851**

Place of suing—Goods, purchase of, at one place to be delivered at another—Cause of action, accrual of, at place of delivery. *See* CIVIL PROCEDURE CODE, s 20 (*c*) **182**

——— Sale of goods—Payment to be made where goods purchased—Cause of action, accrual of, place of. *See* CIVIL PROCEDURE CODE, s. 20 (*c*) **604**

Pleadings—Court, whether can set up new case *See* PRACTICE AND PROCEDURE **638**

——— *Defence setting up new case, whether can be advanced in appeal.*

A defence not raised in the lower Court and which sets up a new case, cannot be advanced in a Court of Appeal. **M** SINGARAJU VENKATASUBBARAMANIAM *v.* RAJAH OF VENKATAGIRI, 11 L W. 523 **552**

——— *Gift, validity of, not questioned in trial Court, whether can be questioned in Court of Appeal—Procedure*

In a pre-emption suit the defendant produced a deed of gift showing that, as against him, the plaintiff had no right of pre-emption. The validity of the gift was not questioned in the trial Court and the plaintiff's suit was dismissed. On appeal the plaintiff challenged the validity of the gift deed on the ground that it was not properly attested and that attestation had not been proved, The Appellate Court allowed the objection and decreed the claim:

Held, that the plaintiff, having practically admitted the validity of the deed of gift in the trial Court, ought not to have been allowed to challenge it in appeal, and that the Appellate Court ought not to have entertained the objection without affording the defendant an opportunity of proving the due attestation of the deed **A** LALTA PRASAD *v* NASIR KHAN **179**

Police Act (V of 1861), s. 29—*Superintendent of Police, order by, regulating duties of Police Force—Disobedience of order—Offence.*

An order by a Superintendent of Police regulating the duties of the men under his command is a lawful order under section 29 of the Police Act which the men are bound to obey, and a disobedience of any such order renders the person disobeying liable to conviction under that section.

An order by a Superintendent of Police directing members of the Mounted Police Force to groom their horses is a lawful order which the men are bound to obey. **Pat** MOHAMED YUSUF *v.* EMPEROR, 21 CR. L. J. 465 **497**

Possession and dispossession—
Land in condition unfit for actual enjoyment.

Where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that the state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. **Pat** BRAHMANAND SINGH *v.* DUND BAHADUR SINGH, 1 P L. T. 224; (1920) PAT 245; 2 U. L. R (Pat.) 111 **344**

Practice and procedure—*Pro-note, suit on—Defendant admitting execution but denying consideration—Burden of proof—Pleadings—Court, whether can set up new case.*

Plaintiff Bank sued one *A.* for recovery of Rs. 27,000 on the basis of a pro-note for Rs 25,000. Defendant, while admitting the execution of the pro-note, denied having received any consideration therefor and pleaded that the transaction was a bogus one and that he signed the pro-note on the assurance given him by one *B.*, the Chief Manager of the Bank, who himself stood in need of money, that he defendant) could not be liable as *B.* had a fixed deposit of Rs. 25,000 in the Bank which would cover the transaction. Counsel for the Bank flatly contradicted the suggestion made by the defendant's Pleader that the fixed deposit receipt was obtained by *B.* as consideration for the pro-note and stated that it was given by *B.* as security for a debt already due. The Court held that no cash was paid to *A*, but decreed the claim on the ground that the consideration to *A* was the fixed deposit receipt which was a good consideration. The defendant appealed:

Held, (1) that the suit being based on a pro-note the execution of which was admitted, the onus was on the defendant to prove that no consideration passed;

(2) that as no money was paid to *A* as consideration for the pro-note and as *B.* had paid no money into the Bank in consideration for the fixed deposit receipt the plaintiff's suit should have been dismissed and the Court was wrong in setting up a case for the plaintiff which not only he did not set up but which he through his Counsel definitely repudiated. **L** ANANT RAM *v.* BHARAT NATIONAL BANK LTD., DELHI **638**

Precedents, *value and applicability of.*

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

A case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it. **N** KISANLAL *v.* NATHU, 16 N. L. R. 131 **44**

Pre-emption—*Sale—Vendor and purchaser, evidence of, value of—Representatives appointed to act on behalf of whole village—Minority of some villagers, effect of—Appeal to His Majesty in Council—Practice of Privy Council—Point, fresh, whether can be raised.*

In a suit for pre-emption the persons engaged in the transaction and notably the vendors and the vendees are necessarily essential witnesses, and, in the absence of contradiction, their testimony ought not to be disregarded merely because they are interested parties.

It is not in consonance with the practice of the Privy Council upon the hearing of an appeal to entertain a point not raised in either of the Courts below nor presented upon the appeal.

Where in the matter of effecting a purchase of land two or three trusted and responsible inhabitants of a village are appointed to act on behalf of the whole village, very strong and cogent reasons would be required to hold that the arrangement, which is extremely wise and reasonable and so much in the interests of all the villagers, was bad, merely because one or more of the villagers happened to be an infant. **P C** IDRIS *v.* MRS JANE SKINNER, 82 P. R. 1919; 45 P. W. R. 1919 126 P. L. R. 1920 **723**

——— *suit—Pre-emptor indebted—Good faith.*

The facts that a pre-emptor is indebted, is a minor and is not possessed of any means to enable him to purchase any new property are no justification for the inference that a suit brought on his behalf is not brought in good faith. **O** ATHAR HUSAIN *v.* IDU SHAH, 7 O. L J. 271; 23 O. C. 85; 2 U. P. L. R (J. C.) 105 **691**

Presidency Towns Insolvency Act (III of 1909), s. 33—*Official Assignee, order by, directing insolvent to attend, whether should be in writing—Failure to comply with order—Contempt of Court—Application for committal for contempt, affidavit in support of, service of—Procedure—Irregularity, effect of.*

It is not necessary that an order of the Official Assignee directing an insolvent to attend at his office, in pursuance of section 33 (2) (*c*) of the Presidency Towns Insolvency Act, should be in writing: a verbal order is valid, and casts upon the insolvent the duty to comply therewith. Where in pursuance of a verbal order the insolvent fails to perform the duty imposed upon him, he is guilty of a contempt of Court.

There is no express provision requiring the affidavit in support of an application to commit an insolvent for contempt of Court to be served at the same time as the notice of the application.

An irregularity in the proceedings of an Official Assignee, which is not in any way prejudicial to the insolvent, or does not occasion any failure of justice, does not invalidate the proceedings.

In future if the Official Assignee intends to apply for a committal order for contempt of Court, he will be well advised to put his order into writing and have it served on the person intended to be proceeded against, with a notice that if the order is not complied with proceedings for contempt will be taken Further it is eminently desirable from all points of view that the procedure laid down by the rules should be strictly complied with. **C** BHURAMULL BANKA *v.* OFFICIAL ASSIGNEE OF BENGAL, 47 C 56 **337**

——— **ss. 36, 103 A (1), 104**—*Criminal charge against insolvent—Offence, whether can be committed both before and after adjudication—Books of account, concealment or removal of—Destruction, whether refers only to destruction before the Official Assignee takes possession—Charge, error or*

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irregularity in, effect of— Notice of charge, sufficiency of— Intention—Appellate Court, whether can arrive at finding as to intention—Examination of insolvent in insolvency proceeding, whether admissible in evidence in criminal proceeding—Admission—Evidence Act I of 1872), ss. 17, 132—Voluntary statement—Examination of insolvent under s 36 of Presidency Towns Insolvency Act, whether illegal—Practice—Evidence, weight of, admissibility of—Statement of unreliable witness corroborated by reliable witness, whether can be accepted.

An offence mentioned in section 103 of the Presidency Towns Insolvency Act may be committed by an insolvent either before or after adjudication of insolvency, and the section not only applies to cases of destruction of an insolvent's books of account before they are produced before the Official Assignee but also to cases of destruction in the Official Assignee's office after the latter has taken possession of the documents.

The rule that a charge under section 103 of the Presidency Towns Insolvency Act cannot be maintained if the charge is not framed in pursuance of the notice under section 101 of the Act, is subject to the principle that no error or irregularity in a charge will call for a reversal of an order unless it in fact has occasioned a failure of justice, and in determining whether this is the case, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage of the proceedings.

If an accused person receives notice that the prosecution may seek to prove against him either of two alternative intentions, he cannot, as he must be ready to meet a charge in respect to both, be prejudiced by a charge of having had both intentions.

It is generally necessary that an insolvent should have notice of the charge which it is proposed to make against him A notice having reference to removing or causing to remove certain documents is sufficient notice of a charge of preventing the production of those documents within the meaning of section 103 of the Presidency Towns Insolvency Act, inasmuch as removing a document is a mode of preventing its production.

A Court of appeal with all the materials before it can arrive at a finding of intention if this has been omitted *per incuriam* by the trial Judge, provided it is not a jury case.

The examination of an insolvent purporting to be made under section 36 of the Presidency Towns Insolvency Act and without any objection on the part of the insolvent is voluntary and is admissible in evidence in a criminal proceeding against him under section 103 of the Act.

It is the practice to examine an insolvent under section 36 of the Presidency Towns Insolvency Act.

The Court has power to examine an insolvent even if section 36 is not applicable, for the Court must have full control over the insolvent. There is no illegal compulsion in such examination.

In a criminal proceeding against the insolvent something said by him in other proceedings in the insolvency may be relied on as admissions of fact under section 17 of the Evidence Act. Being admissions, they

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are relevant and admissible, unless they are excluded by sections 18 to 31 of that Act. Even if the examination of the insolvent is not authorised, the answers given on such examination without objection are nonetheless admissible. Even if there was compulsion not being of the kind which excludes a confession, then under the Evidence Act the fact of compulsion might affect the weight of the evidence but not its admissibility.

It is open to a Court to accept part of the story of one witness who is not reliable, if it be corroborated by another who is reliable. **C** PERRY *v.* OFFICIAL ASSIGNEE OF CALCUTTA, 31 C. L. J. 209; 24 C. W. N. 425; 47 C. 254: 21 CR L. J. 522 **778**

——— Part. VIII, ss. 103, 104—*Charge, notice of—Form of charge—Prosecution, duty of—"Alleged creditor," undue preference to, whether offence—Transfer for valuable consideration—Good faith—Criminal proceedings, postponement of, to civil proceedings.*

Where in a proceeding under Part VIII of the Presidency Towns Insolvency Act, the charge framed against the insolvent does not correspond with the notice issued to him, his conviction thereunder cannot be maintained.

Where an insolvent is charged with purposely withholding books, it is the duty of the prosecution to establish that such books do in fact exist: mere suspicion cannot be allowed to pose as proof.

In order to constitute the offence of undue preference under section 103 (*b*) of the Presidency Towns Insolvency Act against an insolvent, the payment must be to a creditor, and not to an "alleged creditor."

Where an insolvent transfers property, and the question is whether in so doing he acted in good faith, the fact that there was valuable consideration for the transfer adequate to the occasion would negative the inference that there was an absence of good faith, in spite of the fact that the transfer was in favour of a relative.

Though no invariable rule can be laid down, it is ordinarily undesirable to institute criminal proceedings until the determination of civil proceedings in which the same issues are involved. Criminal proceedings lend themselves to the unscrupulous application of improper pressure with a view to influencing the course of the civil proceedings, and beyond that there is the mischief of criminal proceedings being instituted with an imperfect appreciation of the facts where they have not been ascertained in the more searching investigation of a Civil Court. **C** LUCAS *v.* OFFICIAL ASSIGNEE OF BENGAL, 24 C. W. N. 418; 21 CR L. J. 481 **577**

Principal and agent—*Agent, collusive act of detrimental to principal—Principal, whether bound.*

Where an agent acting in collusion with a third party does an act without the consent of his principal and the act is detrimental to the interests of the principal, the latter is not bound by the act. **L** RAM KAUR *v.* RAGHBIR SINGH **631**

Probate—*Corporation aggregate, probate, whether can be granted to—Benares Hindu University, whether capable of obtaining probate—Benares Hindu University Act (XVI of 1915), s. 20.*

Probate—concld.

A Court is competent to grant probate to a corporation aggregate as executor, although the enactment creating the corporation does not distinctly provide authority for it to be an executor, where the granting of the probate is not only in no way repugnant to its functions, but is merely a prelude to the obtaining of benefits under the Will which it is permitted to accept both generally and under the provision of the enactment creating it

The Benares Hindu University is not incapable of obtaining probate of a Will as an executor. **O** BENARES HINDU UNIVERSITY *v.* SRI KISHEN DAS, 7 O. L. J. 203; 2 U. P. L. R. (J. C.) 81: 23 O. C. 288 **335**

Probate and Administration Act (V of 1881), s. 8—*Executor, appointment of, provided he is fit for the work, meaning of—Executor, death of—Procedure—Universal or residuary legatee, when may be granted Letters of Administration.*

Where a person appoints one of the sons of his executor to be an executor after the death of the latter provided that the son is fit for the work, this merely means that the person named as executor is free from any of the legal disabilities mentioned in section 8 of the Probate and Administration Act.

Where an executor appointed under a Will dies, a universal or residuary legatee may be admitted to prove the Will, and Letters of Administration with the Will annexed may be granted him of the whole estate or of such portion thereof as may be unadministered, and where such universal or residuary legatee is a minor, his mother may be appointed administrator during his minority. **Pat** MANKI KOER *v.* MANRAKHAN KUER, 2 U. P. L. R. (PAT.) 116 **841**

——— **s. 23**—*Letters of Administration, application for, by two persons—Status of one admitted and of other disputed—Procedure.*

Where two persons apply for Letters of Administration to the estate of a deceased person, and the status of one of the applicants to so apply is disputed, while the other is entitled to a portion of the estate, the correct procedure for the Court is to ignore the question of status and grant Letters of Administration to the applicant entitled to a part of the estate. **L B** MA THU DAW *v.* MA NGWE NU **764**

Procedure—*Trial of suit—Findings to be recorded on evidence adduced—Findings based on inadmissible evidence, effect of—Evidence Act I of 1872), s. 35—Confidential inquiry as to possession, whether admissible.*

In deciding a suit for the possession of a holding, the Court must record a finding on the evidence adduced before it and is not entitled to base its judgment upon matters which are not properly admissible in evidence.

Plaintiff sued for possession of a holding. The suit was dismissed, the Judge relying upon a confidential inquiry conducted by an Assistant Settlement Officer at the time of the Revised Settlement for the purpose of ascertaining to whom the holding belonged:

Held, that the judgment could not be maintained as the proceedings of the confidential inquiry contained an opinion on an *ex parte* investigation which was not admissible in evidence under section 35 of the Evidence Act, and that it was the duty of the Judge to record a finding on the evidence adduced before him. **Pat** BALDEO SINGH *v.* SHEORAJ KUERI, 2 U. P. L. R (PAT.) 135 **807**

Profits, *suit for—Evidence of collections, absence of—Presumption—Basis of calculation.*

Where in a suit for profits of land the recorded collections are suspiciously low, and the defendant neither produces nor gives any evidence to show what was collected, the Court would be justified in presuming that the full amount of the rents had been collected and in assessing the profits on the basis of the gross rental. **O** RAGHUNATH SINGH *v.* HAR DAYAL SINGH, 7 O. L. J. 278 **751**

Promissory note—*Evidence, admissibility of, to fix date of payment—Cause of action, accrual of—Limitation Act (IX of 1908), Sch. I, Arts. 69, 80.*

Where a promissory note is executed for a loan, evidence is receivable to fix the date of payment.

Defendant applied to the plaintiff Bank for a loan on one of the Bank's printed forms, and mentioned therein six months as the period for repayment; his application was accepted and he executed a promissory note in favour of the Bank. Upon a suit by the Bank to recover the amount of the promissory note:

Held, (1) that the application to the Bank was admissible in evidence to fix the date of payment;

(2) that the cause of action arose on the expiry of the six months mentioned in the applicatien, and that either Article 69 or 80 of Schedule I to the Limitation Act provided the period of limitation for bringing the suit. **M** PONNUSWAMI CHETTY *v.* VELLORE COMMERCIAL BANK, LTD, 11 L. W. 28; 38 M. L. J. 70; (1920) M. W. N. 75; 27 M. L. T. 81 **384**

——— Stranger, whether can sue on note. *See* NEGOTIABLE INSTRUMENTS ACT, s. 8 **259**

———, suit on—Defendant admitting execution but denying consideration - Burden of proof. *See* PRACTICE AND PROCEDURE **638**

Provident Funds Act (IX of 1897), s. 4—*Provincial Insolvency Act (III of 1907), ss 16, 43—Provident fund, whether "property"—Provident fund received and paid over by insolvent—Fraudulent transfer.*

By virtue of section 4 of the Provident Funds Act, neither the Receiver nor the creditors of an insolvent have any right to money drawn by the insolvent from his compulsory deposit in a Railway Provident Fund. There can, therefore, be no fraudulent dealing in respect of such money such as is made punishable by section 43 of the Provincial Insolvency Act **B** NAGINDAS *v.* GHELABHAI, 22 BOM. L. R. 822; 44 B. 673 **450**

Provincial Insolvency Act (III of 1907), ss. 4 (c) (ii), 6 (4) (b)—*Contracts of sale and purchase—Difference, whether liquidated sum—Act of insolvency—Departure of debtor from dwelling house—Intention.*

For the purpose of ascertaining the aggregate amount of debts owing to creditors in respect of an application under section 6 (4) of the Provincial Insolvency Act, the difference between contract rates of sale and purchase under a contract entered into by the debtor constitutes a liquidated sum

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within the meaning of clause (*b*) of the sub-section.

In determining whether the departure of a debtor from his dwelling house or place of business amounts to an act of insolvency within the meaning of section 4 (*c*) (*ii*) of the Provincial Insolvency Act, the *intention* with which the debtor actually departed must be considered. The mere fact that he returned having altered his intention would not affect a departure made with the intention to defeat or defraud his creditors **S** *In the matter of an applicntion by* DHOLAN DAS, 13 S. L. R. 187 **158**

——— **ss. 43, 46**—*Application by creditor asking action should be taken against insolvent under s. 43, dismissal of—Appeal, whether lies—Revision, whether competent.*

No appeal lies against an order of a District Judge refusing to take action against an insolvent under section 43 of the Provincial Insolvency Act, nor is such an order open to revision. **L** GUJAR SHAH *v.* BARKAT ALI SHAH, 1 L 2 3; 130 P. L. R. 1920 **744**

——— **ss. 43, 46, 47**—*Civil Procedure Code (Act V of 190-), O. XLI, r. 5—Sentence under s. 43, Provincial Insolvency Act—Appeal—Appellate Court power of, to suspend sentence.*

On an appeal from a sentence of imprisonment under section 43 of the Provincial Insolvency Act, the High Court has power under Order XLI, rule 5 of the Civil Procedure Code, read with clause (2) of section 47 of the Provincial Insolvency Act, to suspend the sentence until the appeal is disposed of. **B** NAGINDAS BUKHANDAS *v.* GHELABHAI GULABDAS, 22 Bom. L. R. 322; 44 B. 673 **449**

Provincial Small Cause Courts Act (IX of 1887), s. 17—Ex parte *decree—Application to set aside decree unaccompanied by decretal amount or security—Time, whether can be granted for furnishing security—Civil Procedure Code (Act V of 1908), s. 148, applicability of, to Provincial Small Cause Court.*

Where an application, under section 17 of the Provincial Small Cause Courts Act, is made to set aside an *ex parte* decree, the applicant must at the time of making the application either deposit in Court the decretal amount or furnish security for the performance of the decree. The provisions of the section are mandatory, and the Court has no power to grant time for furnishing security.

The provisions of section 148 of the Civil Procedure Code cannot be applied to extend the time for doing an act prescribed by the Provincial Small Cause Courts Act. **Pat** RAM CHARITAR RAM *v.* HASHIM KHAN, (1920) Pat 203; 1 P. L. T. 323 **810**

——— **s. 17**—*Review, application for, unaccompanied by deposit—Application filed on last day of limitation—Time, extension of, for making deposit, legality of—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 161.*

An application for review of the judgment of a Small Cause Court can be entertained only if the applicant complies with the provisions of section 17 of the Provincial Small Cause Courts Act.

Where an application for review unaccompanied by the deposit, or security for the same, was, presented on the last day of the period prescribed for making such application and the Court accepted

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the application and granted time for making the deposit:

Held, that the application was not made in a proper manner and as the order granting time for making the deposit was passed after the period for presenting the application had expired, the application was not entertainable. **C** ABDUL SHEIKH *v.* MAHAMAD AYUB, 24 C. W. N. 380; 31 C. L. J. 197 **551**

——— **s. 25**—*Revision—High Court, power of interference of, when to be exercised.*

The powers of interference vested in the High Court under section 25 of the Provincial Small Cause Courts Act should only be exercised to remedy injustice. **S** GUL MAHOMED *v.* FAIZ MAHOMED, 13 S. L. R 210 **69**

——— **Sch. II, Arts. 15, 35 (ii)**—*Suit for return of article lent or for compensation, whether cognisable by Court of Small Causes.*

A suit for the return of an article lent by the plaintiff to the defendant or, in the alternative, for compensation is not cognisable by a Court of Small Causes. **O** MATA DIN *v.* MADHO CHARAN **877**

Public Gambling Act (III of 1867), ss. 3, 6—*Presumption as to occupation—Warrant, issue of, legality of—Criminal Procedure Code (Act V of 1898), s 260—Summary trial—Non-appealable sentence—Judgment, contents of—Trials, separate—Judgment, joint, legality of.*

Where there is a fair presumption under section 6 of the Public Gambling Act that a person is the occupier, or has the use of a room, within the meaning of section 3 of the Act, as a common gaming house, the issue of a warrant is not illegal.

In the case of two separate trials where the law requires a judgment to be written in each, it is improper to record a single judgment.

In a summary trial, where a non-appealale sentence is passed, the Magistrate need only record a finding and his reasons therefor. **A** BHOLA NATH *v.* EMPEROR, 21 Cr L J. 442 **234**

——— **s. 6**—*U. P. Public Gambling (Amendment) Act (I of 1917), s. 3—Common gaming house, what is.*

Where upon the search of a house persons are found therein engaged in gambling and instruments of gaming are also found, and there is evidence that the owner made a profit by allowing his house to be used as a place for gambling, it must be presumed under section 6 of the Public Gambling Act, as amended by the U. P Public Gambling Amendment Act of 1917, in the absence of evidence to the contrary, that the house in question is a common gaming house. **A** BHAGGI LAL *v.* EMPEROR, 2 U P. L. R. All 119; 18 A. L. J. 562; 21 Cr. L. J. 438; 42 A. 470 **230**

——— **s. 13**—*Place exposed to public view whether public place.*

Where the accused were found gambling at a place near a public street and exposed to public view, but which was not part of the public street:

Held, that they could not be convicted of gambling in a public place **L** MOULA *v.* EMPEROR, 104 P. L. R. 1920; 21 Cr. L. J. 512 **672**

Punjab Courts Act (III of 1914), s. 41—*Custom—General rule, whether abrogated by special custom—Appeal, second—Certificate, whether necessary.*

Plaintiffs, the sister's son and grandson of one *N.*, the last male owner, sued for a declaration that a gift made by defendant No. 1 in favour of one *M*, the deceased husband of defendant No. 2, shall not affect their reversionary rights, alleging that both under Hindu Law and by custom they were entitled to succeed to the property in suit. The Court, holding that the plaintiffs had established a special custom which entitled them to succeed to the property, decreed their claim. On appeal the District Judge held that the special custom had not been proved and dismissed the plaintiffs' suit. An application for the grant of a certificate under the Punjab Courts Act was also dismissed. The plaintiffs filed a second appeal in the High Court:

Held, that the question for decision before the lower Appellate Court was whether the general rule of custom had been abrogated by a special custom and, therefore, no second appeal was competent without a certificate. **L** FITHA *v.* DEVKEE **651**

Punjab Courts Act (IX of 1919), s. 44—*Revision—Error of law, whether good ground for interference.*

An error of law does not amount to a material irregularity and is not a good ground for interference in revision

Where upon an examination of all the relevant facts and the law bearing upon the subject a suit was dismissed as time-barred:

Held, that the High Court could not interfere in revision simply on the ground that the Court below had come to a wrong conclusion. **L** FAKIR CHAND *v.* DULLAH **848**

Punjab Municipal Act (III of 1911), Ss. 3, 171—Public street, what is. *See* HIGHWAY **1**

Punjab Pre-emption Act (II of 1905), ss. 13, fourthly, fifthly, 14 (3)—*"Staircase," meaning of—Step to a thara, whether an "entrance from the street"—Election between two equal pre-emptors—Suit instituted and decree passed before repeal of Act—Applicability of Act.*

One *D.* sold a house to *J.* for Rs. 1,000. *T.* and others brought a suit for pre-emption on the ground that their house was adjacent to the house sold and that a party-wall was jointly owned by them and the vendor. *N.* and others brought a second suit for pre-emption of the same house on similar allegations *T.* and others claimed a superior right of pre-emption by reason of the fact that a step leading to a *thara* which formed part of their house and the house sold was common to both. The first Court held that both sets of plaintiffs had equal rights of pre-emption and that the vendors having elected *N.* and others, they were entitled to a decree under section 14 (3) of the Punjab Pre-emption Act, 1905. On appeal the District Judge held that *T* and others had a preferential right under section 13, fifthly, and passed a decree in their favour. *N.* and others thereupon preferred a second appeal to the High Court:

Held, (1) that the sale having been made and the suit having been instituted while the old Act was in force, it was governed by the Punjab Pre-emption Act of 1905;

(2) that the step leading to the *thara* could not be called a "staircase" within the meaning of section 13, fourthly, of that Act;

(3) that it could not be said to be an entrance from the street within the meaning of section 13, clause fifthly

(4) that, therefore, *T.* and others did not have a preferential right of pre-emption and *N.* and others having been elected by the vendor, were entitled to a decree. **L** NANAK CHAND *v.* TEK CHAND **17**

Punjab Tenancy Act (XVI of 1887), s. 77 (3) (d), (c)—*Occupancy rights, creation of, by widow—Reversioner, suit by, to contest alienation—Jurisdiction of Civil and Revenue Courts*

A suit by a reversioner to contest the validity of the creation of occupancy rights by the widow of the last male owner is cognizable by a Civil Court. **L** SARDHA *v.* LAKHU **465**

Railways Act (IX of 1890), ss. 72, 80 **714**

Receiver, *suit against—Leave of Court not obtained before institution of suit—Leave obtained subsequently, whether cures defect.*

Where a suit is filed against a Receiver without first obtaining the leave of the Court which appointed him, the defect can be cured by leave subsequently granted. **B** JAMSEDJI *v.* HUSSEINBHAI AHMEDBHAI, 22 Bom L.R. 319 **424**

Registration Act (XVI of 1908), s. 17—*Agreement by reversioner to transfer his rights, whether requires registration.*

An agreement by the reversioner of a holder of property to transfer a portion of it to the promisee after the vesting of the estate in the reversioner does not require registration. **L** INDAR SINGH *v.* MUNSHI, 1 L. 124; 134 P. L. R. 1920 **272**

——— **s. 17**—*Agreement to give up rights in property on certain conditions, whether compulsorily registrable—Agreement, whether admissible in evidence in so far as it relates to moveable property—Oral evidence, whether admissible to prove contents—Evidence Act (I of 1872), s. 91.*

Plaintiff sued for possession of certain property, moveable and immoveable, left by one *B.* on the ground that the widow in possession had forfeited her rights in her husband's estate owing to her unchastity. It was pleaded that the plaintiff had waived his rights by means of an agreement by which he gave up all his rights in *B.'s* estate, real and personal, on the condition that the widow paid Rs. 1,000 to the *gowshala*:

Held, (1) that the document was inadmissible in evidence for want of registration;

(2) that the fact that the plaintiff admitted execution of the document did not make any difference;

(3) that oral evidence was inadmissible to prove the contents of the document.

(4) that the document was not admissible even in so far as it related to moveable property. **L** BISHESHAR LAL *v.* BHURI, 1 L. 436 **595**

——— **s. 17**—*Memorandum of partition, whether requires registration—Admissibility in evidence.*

Registration Act—concld.

A memorandum in an account-book of a partition which has already taken place does not require registration and is admissible in evidence. **L** KANSHI RAM *v.* LAL CHAND, 2 U. P. L. R. (L) 93 **182**

——— **ss. 17, 49**—*Mortgage—Agreement between first and second mortgagees to share moneys equally—Registration, whether necessary.*

An agreement between first and second mortgagees to share equally monies realised is, although not registered, admissible in evidence to prove such agreement. **P C** VYRAVAN CHETTY *v.* SUBRAMANIAN CHETTI, (1920) M. W. N. 368; 18 A. L. J. 726; 39 M. L. J. 37; 12 L. W. 143; 24 C. W. N. 1053; 43 M. 660; 22 BOM. L. R. 1357 **642**

——— **s. 28**—*Sale-deed, entry in, of property not intended to be sold, effect of, on registration—Sale, validity of—Suit to recover such property—Limitation Act (IX of 1908), Sch. I, Arts. 44, 144.*

Where, in order to secure the registration of a deed of sale of immoveable property in a particular district, a piece of property situated in that district is included in the deed but without any intention of conveying that property to the vendee, the registration of the deed in that district is not a valid registration and amounts to a fraud upon the Law of Registration; consequently no valid title is conveyed to the vendee, and the sale-deed is void. A suit to recover such property from the vendee is, therefore, governed by Article 144 and not by Article 11 of Schedule I to the Limitation Act **M** GOKARAKONDA NARASIMHA RAO *v.* GOKARAKONDA PAPANNA, L. W. 394; 38 M. L. J. 327; 43 M. [illegible] **519**

Religious endowment—*General and particular trusts—General trustee, claim by, for possession of property, subject to particular trust, whether maintainable—Idol, position of—Adverse possession—Limitation.*

The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property in the possession of persons who have the right and the duty to manage such property, collect the income and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee is not entitled to the possession of the properties out of which that portion of the revenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession

An idol may have not merely a general trustee but also other subordinate representatives having the right to manage certain special portions of his property, and pay over the income so collected to the endowment, and even to some degree control its use. Such rights are not inconsistent with the existence of a general trustee, but they are fatal to his claim to possession of the properties from which those revenues are derived.

When in such a case it is necessary to consider limitation, the possession of such subordinate representatives will be held to be adverse to that of the general trustee. **P C** AMBALAVANA PANDARA SANNIDHI AVERGAL *v* MEENAKSHI SUNDARESWARAL DEVASTANAM OF MADURA, 18 A. L. J. 594; 2 U. P. L. R. P C 95; 39 M. L. J. 50; 28 M. L. T. 83; 12 L. W. 212; 43 M. 685; 25 C. W. N. 1 **730**

Religious endowment—concld.

Res judicata—*Law, wrong application of, whether arrests rule of* res judicata.

The fact that in a previous suit the law was wrongly applied to a particular state of facts, does not prevent the operation of the rule of *res judicata* in a subsequent suit where these facts come into issue therein **U P 3 R** ULFAT *v.* BARKAT-UN-NISA, 2 U P L R. B R 66 **983**

——— Previous suit, dismissal of, effect of. *See* PARTITION **610**

Revision—*Limitation, plea of, not taken in trial Court, whether can be taken in High Court—Plea depending on evidence—Procedure—Remand*

The fact that a defendant omits to plead limitation in the trial Court, would not estop him from taking the plea in revision before the High Court. If such plea depends upon evidence, the proper course is to remand the case for re-trial. **A** FIRM DEBI DIN-BHAGWAN DIN *v.* FIRM SARKAR AND CO, 2 U P L R. (A) 143 **513**

Sanction to prosecute, refusal to grant by trial Court—Sessions Judge, interference by, when justified. *See* CRIMINAL PROCEDURE CODE, s [illegible] **660**

Scotch Law—Holograph writing without witnesses, whether Will. *See* WILL **683**

Separate cases *decided by one judgment—Appeals, separate, whether necessary—Procedure*

Where two separate cases are finally decided and disposed of in one judgment, two separate appeals should be filed **L** DEVI DITTA MAL *v.* OFFICIAL LIQUIDATOR, AMRITSAR BANK LTD., 1 L. 368 **69**

Settlement records, value of, as evidence of title or possession *See* HINDU LAW—JOINT FAMILY **306**

Settlement of Oudh after Mutiny, entries in, whether recognised existing rights or constituted a fresh root of title. *See* HINDU LAW—JOINT FAMILY **306**

Sind Encumbered Estates Act (XX of 1896), s. 28—*Hindu female, purchase from Presumption as to limited interest, whether arises in case of Muhammadan zemindar—Estoppel Person taking active part in bringing about sale, whether estopped from challenging it—Purchase in good faith—Improvements by purchaser—Compensation, purchaser, whether entitled to—Transfer of Property Act (IV of 1882), s. 51—Good faith, what constitutes.*

The rule that a purchaser from a Hindu female must be presumed to know that he is dealing with a person who has only a limited interest, does not arise in the case of a Muhammadan *zemindar* who, but for the operation of section 28 of the Sind Encumbered Estates Act, would have been the absolute owner of the property.

There is no estoppel against a person challenging a sale merely because he took an active part in bringing about the sale, was present at the execution of the document, and who, at the time, repre-

Sind Encumbered Estates Act—concld.

sented that no claims of his would affect the vendee's title.

Where a purchaser of immoveable property, under the honest belief that he is the absolute owner thereof, undertakes permanent improvements on the property, he is in enquity entitled to compensation for the improvements made by him, on the sale being annulled on the ground that the vendor had only a limited interest in the property and could not convey an absolute title, but he is liable for mesne profits from the date his possession became wrongful, *i. e.*, from the date of the death of the vendor.

What constitutes "good faith" within the meaning of section 51 of the Transfer of Property Act is a question of fact, and a person may act in good faith even if he acts under a mistake of law, or is negligent in investigating title Whether there is good faith or not must depend upon the facts of each case. **S** SHAHAB-UD-DIN *v* VOHIDBUX, 14 S. L. R 12 **492**

Sind Frontier Regulation (III of 1892), ss. 17, 20, 24—*Security for good behaviour, order for– Revision Judicial Commissioner, power of, to interfere—Criminal Procedure Code Act V of* 1898), *s* 43).

The Court of the Judicial Commissioner of Sind has no jurisdiction, either by express enactment or by necessary implication, to interfere in revision with an order made by a District Magistrate under sections 20 (1) and 24 (1) of the Sind Frontier Regulation requiring a person to furnish security for good behaviour. **S** BHAWAL KHAN *v.* EMPEROR, 13 S. L. R. 215; 21 Cr. L. R. 513 **769**

Specific performance *of contract of sale, suit for – Possession, whether can be decreed.*

In a suit for specific performance of a contract for sale of land, it is open to the plaintiff to join with his prayer for specific performance a claim for delivery of possession, unless the contract expressly disentitles him to such relief. **Pat** DEONANDAN PRASAD SINGH *v.* JANKI SINGH, 5 P. L. J. 314; 1 P. L. T. 325; 2 U. P. L. R. (Pat) 108; (1920 Pat. 266 **322**

Specific Relief Act (I of 1877), s. 42—*Declaration, suit for, by reversioner of lunatic that certain property acquired by defendant belongs to lunatic, maintainability of.*

A suit by the immediate reversioner of a lunatic for a declaration that a mortgage acquired by the manager of the lunatic's estate in his own name belongs to the lunatic is maintainable. **L** VIR SINGH *v.* HARNAM SINGH, 1 L. 137; 135 P. L. R. 1920 **191**

——— **s. 42**—*Declaration, suit for – Persons interested to deny title—Defendants acting in concert, though all do not deny plaintiff's title, effect of—Title established—Possession, presumption as to.*

In a suit brought for the purpose of obtaining a declaration that the defendants were the plaintiff's *riaya* and for an injunction against certain of them restraining them from interfering with any rights of the plaintiff for the services of these *riaya*, it was found that although some of the defendants had not made an overt denial of the plaintiff's rights, yet they were acting in concert and sympathy with those who had and that all the defendants were acting in collusion:

Held, that the whole body of defendants were persons interested to deny the plaintiff's title within the meaning of section 42 of the Specific Relief Act.

Where in a suit relating to land the plaintiff's title and possession within limitation is challenged, and he establishes his title by purchase, the presumption, in the absence of evidence to the contrary, is that he was in possession up to the time of the suit. **O** JANKI SARAN *v* WIDOW OF MUHAMMAD SADIQ, 7 O L J 258: 2 U P L R (J. C.) 106 **720**

——— **s. 54**—*Injunction, suit for—Injunction, when can be granted.*

Where a suit is in essence one for a perpetual injunction with prayers for declarations ancillary thereto, the plaintiff must establish that the injunction is required to prevent the breach of an obligation, and unless he does so, the injunction claimed cannot be granted, more especially if equally efficacious relief can be obtained by any other usual mode of proceedings **C** RAM KISSEN JOYDOYAL *v* POORAN MULL; 31 C L.J. 259; 47 C. 733 **571**

——— **s. 54**—*Joint Hindu family—Injunction at instance of one member to restrain others from entering on possession, grant of.*

The remedy by injunction should not ordinarily be granted to one member of a Hindu family in possession of certain property against other members of the family who are out of possession.

When a plaintiff is entitled to sole possession of certain property and the defendant who has a right to part enjoyment is likely to enter on the property, such entry cannot be prevented by injunction The proper remedy for the plaintiff is to sue for partition.

In a prior suit for partition by the plaintiffs as representing one branch of a joint Hindu family against the defendants, who represented another branch, there was a reference to arbitration and a decree was passed in accordance with the award. According to that decree plaintiffs were to remain in possession for 6 years, at the end of which period the defendants could recover their half share either amicably or through Court. As the plaintiffs did not give possession amicably after the six years, defendants attempted to take possession. There were possession proceedings under the Criminal Procedure Code, wherein plaintiffs were asked to establish their right in a Civil Court. Plaintiffs filed the present suit for an injunction restraining defendants from entering on the lands:

Held, that as the parties were restored to the *status quo ante* after six years from the date of the prior decree and the plaintiffs were not entitled to sole possession, the suit for injunction was not maintainable. **M** SRINIVASA AIYANGAR *v.* NARAYANA AIYANGAR, 11 L. W. 606; (1920) M. W. N. 364 **608**

Stamp Act (II of 1899), s. 5—*Sale-deed including mortgage of properties as security for performance of covenants—Stamp duty.*

A deed of sale, which includes a mortgage of properties not included in the sale as security for the due performance by the vendor of his covenants, need not be stamped both as a sale and as a mortgage, as the sale-deed is not an instru-

Stamp Act—concld.

ment comprising or relating to distinct matters within the meaning of section 5 of the Stamp Act. M SECRETARY TO THE COMMISSIONER, SALT AND BKARI, *In re*, (1920) M. W. N. 247; 43 M. 365: 38 A M. L. J. 506 154

——— **s. 35**—*Unstamped document, validation of—Original not forthcoming, effect of—Document lost, contents of, proof of—Oral evidence, admissibility of.*

The procedure for validating unstamped instruments prescribed by Chapter IV of the Stamp Act has no application to an instrument the original of which is lost and is not forthcoming, as under section 35 of the Act it is only an original unstamped instrument which can be validated by payment of stamp duty and penalty.

Where the original of an instrument is not forthcoming, oral evidence to prove its contents is inadmissible. N PENTAYYA *v.* KESHORAO, 16 N. L. R. 68 249

Succession Act (X of 1865), s. 160, *applicability of.*

The principle enunciated in section 160 of the Succession Act cannot apply when a contrary intention appears in the document. C RAJLAKHI DEBYA *v* SAROLA SUNDARI DEBYA 803

Succession Certificate Act (VII of 1889), s. 4(a)—*Plea that suit not maintainable, without production of succession certificate—Procedure—Court, duty of.*

Where a defendant raises the plea that the suit is not maintainable without the production of a succession certificate, the Court ought not to dismiss the suit without giving the plaintiff an opportunity of obtaining the necessary certificate and filling it. A JAWAD ALI SHAH *v* KAMLAPAT RAI, 18 A. L. J. 514 641

——— **s. 18, cls. (d), (e)**—*Succession certificate, grant of, in respect of entire debt—Partial revocation or modification, when can be ordered.*

If a certificate has once been granted in respect of an entire debt, and it becomes apparent to the Court that circumstances have subsequently changed so as to bring into operation clause (*d*), or (*e*), or both, of section 18 of Act VII of 188', it is open to the Court to pass orders having the effect of a partial revocation of the succession certificate once granted, or to modify the terms of that grant in such manner as the interests of justice may seem to require. A SHARIF-UN NISSA *v* MASOOM ALI, 2 U. P. L R (A) 57; 18 A L. J 314; 42 A 347 380

——— **s. 19**—*Order granting certificate—Appeal, whether lies—Remedy, proper*

Under section 19 of the Succession Certificate Act, an appeal lies from an order granting a certificate, and it is not absolutely incumbent on the appellant to move the Court granting the certificate to revoke it A RADHE LAL *v.* BINDO, 18 A. L. J. 609; 2 U. P. L R (A) 215; 42 A 512 181

Suit *against legal representative of deceased debtor—Assets, extent of, proof of, whether necessary.*

In a suit against the legal representative of a debtor, the plaintiff is entitled to a decree if he proves that any assets belonging to the deceased debtor exist. He is not bound to prove the extent of such assets. N SHEOLAL *v.* CHINDHU 962

Suits Valuation Act (VII of 1887), s. 11, applicability of. *See* VALUATION OF SUIT 762

——— **s. 11,** *applicability of—Undervaluation of relief as to injunction—Value fixed by rules—Jurisdiction.*

Section 11 of the Suits Valuation Act applies only where the valuation of the suit depends on the discretion of the parties or the Court and is not applicable when the valuation is fixed by rules having the force of law.

Plaintiff sued for possession of a vacant site and for perpetual injunction, to the effect that the defendants should not prevent him from building a house thereon. He valued his relief for possession at Rs. 50 and that for injunction at Rs. 10. The Munsif, 2nd Class, having decreed the claim in part, both parties appealed to the Senior Subordinate Judge, who modified the decree without any objection being raised as to jurisdiction. Defendants filed a second appeal to the High Court on the ground of undervaluation of the relief as to injunction and of the want of jurisdiction of the Senior Subordinate Judge:

Held, (1) that section 11 of the Suits Valuation Act did not cure the defect, as the valuation of the suit did not depend entirely on the discretion of the defendants but was fixed by the rules of the Court;

(2) that the order of the lower Appellate Court was defective, having been passed without jurisdiction. L MUHAMMAD SHAH *v.* ABDULLAH SHAH 918

Talab baki papers, evidentiary value of. *See* EVIDENCE ACT, s. 32 (2) 38

Trade mark—*General rule of law—Defendant, whether can be restrained from carrying on busines in his own name—Injunction.*

No one may use a name in such a way as to be calculated to lead the public to believe that the business carried on by him is the business of some other person with whom the name has come to be associated.

The Court ought not to restrain a man from carrying on business in his own name simply because there are other people who are doing the same and who will be injured by what he is doing. It must appear that the person who is carrying on the business in his own name is doing it in such a way as to pass off his goods as the goods of some body else.

Where, therefore, the defendant was carrying on business in his own name which also happened to be the name of the plaintiff:

Held, that the defendant could not be restrained from using his own name. L UBEROI LIMITED *v.* KIRPAL SINGH 709

Transfer of Property Act (IV of 1832), s. 51—*Good faith, what constitutes.*

What constitutes "good faith" within the meaning of section 51 of the Transfer of Property Act is a question of fact, and a person may act in good faith even if he acts under a mistake of law, or is negligent in investigating title Whether there is good faith or not must depend upon the facts of each case. S SHAHAB UD-DIN *v* VAHIDBUX, 14 S. L. R. 12 492

—— **s. 54**—*Sale-deed, unregistered, of immoveable property of the value of Rs. 20, admissibility of, to prove nature of possession.*

Transfer of Property Act—contd.

Defendant relied upon an unregistered sale-deed to prove a sale of an open site for Rs. 20. There was oral evidence of the delivery of the site in dispute:

Held, (1) that the sale-deed did not require registration under the provisions of the Registration Act, but it created no title to the site by virtue of section 54 of the Transfer of Property Act;

(2) that although inoperative as a conveyance, the sale-deed was admissible as evidence of the agreement in pursuance of which delivery of possession took place. **N** HARSALSA *v.* BAPU **382**

——— **s. 55**—*Venodr and purchaser—Registered conveyance—Non-payment of price—Suit by vendee for possession, maintainability of—Decree, form of.*

A vendee of immoveable property under a registered deed of conveyance; who has not paid the purchase-money of the property, can maintain a suit for possession of the property without paying for it, or submitting to a decree for payment, or a condition attached to the decree as to the purchase-money which he had agreed to pay. **M** YELLA KRISHNAMMA *v.* KOTIPALLE MALI, 38 M. L. J. 467; 11 L. W. 563; (1920) M. W. N. 380; 28 M. L. T. 89: 43 M. 712 **530**

——— **s. 59**—Attestation of mortgage-deed—Execution by *pardanashin* lady—Proof. *See* EVIDENCE ACT, s. 68 **247**

——— **s. 59**—*Attesting witness—Writer of document signing as scribe, whether attesting witness.*

The writer of a document who signs it as scribe is not an attesting witness within the meaning of section 59 of the Transfer of Property Act He can only be an attesting witness if he subscribes the document as a witness. **L B** CHETTY *v.* PO MYA, 12 Bur. L. T. 261 **945**

——— **s. 63**—*Mortgage—Redemption—Accessions, payment for.*

Where one of several mortgagees acquires tenancies while in possession and claims the cost of such acquisitions upon redemption, it is unnecessary, under section 63 of the Transfer of Property Act to invoke the doctrine of merger. The section does not require the accessions to have been made by the mortgagee by availing himself of his position as such, nor can it be urged that the acquisitions might have been made even if the mortgage had not been taken. **N** PYARELAL *v.* PANNALAL **193**

——— **ss. 88, 89**. *See* LIMITATION ACT, SCH. I, ART. 181 **563**

——— **s. 98**—*Mortgage, anomalous—Sale, mortgagee, whether entitled to—Puisne incumbrancer, right of, to pay off prior incumbrance.*

In considering the nature of a mortgage and the true conclusion to be drawn from its terms what has to be considered is the intention of the parties to be gathered from the terms of the instrument of mortgage If these show that the parties never contemplated a sale, the mortgagee has no right to a judicial sale.

In the case of a prior incumbrance, it is always open to a puisne incumbrancer to pay off the prior incumbrancer and the mortgagor, who has created both, has no interest or right to object. **P C** MADHO RAO *v.* GULAM MOHIUDDIN, 15 N. L. R. 134 **717**

Transfer of Property Act—concld.

——— **s. 106**, applicability of: *See* LANDLORD AND TENANT. **7**

Trespassers, *rival, on Government land—Revenue, payment of, effect of—Title, superiority of.*

As between two trespassers upon land which is the property of Government, the one who pays the Government revenue and is allowed to stay on the land has a title superior to the one who has made no such payment. **L B** TUN AUNG *v* MA HTEE, 12 Bur. L T 763 **935**

Trial by Jury—Charge to Jury—Judge, duty of—Jury, function of—Burden of proof. *See* PENAL CODE ACT XLV OF 1860, s. 411 **849**

Trials, *separate—Judgment, joint, legality of.*

In the case of two separate trials where the law requires a judgment to be written in each, it is improper to record a single judgment. **A** BHOLA NATH *v* EMPEROR, 21 Cr. L. J. 442 **234**

Trust, *private—Plaintiff having no interest in trust property—Suit questioning acts of trustees, whether maintainable.*

Unlike a public trust, the acts of a trustee of a private trust cannot be impeached in a suit by a person who has no interest relating to the property of the trust. **O** TAHAWWAR HUSAIN *v.* LACHHMAN DAS, 7 O. L. J. 246 **707**

Trusts Act (II Of 1882), s. 83—*Resulting trust—Purchase in name of one person with money supplied by several, effect of.*

A resulting trust takes place where several persons jointly furnish the purchase-money and the purchase is made in the name of one of them. **N** NARHAR *v.* NARAIN **396**

Unstamped document, validation of—Original not forthcoming, effect of. *See* STAMP ACT, s. 35 **249**

U. P. Land Revenue Act (III of 1901), ss. 3 (1), 4 (12) (b)—*Agra Tenancy Act II of 1901, s. 2 (4)—Sir land, status of, whether affected by subsequent passing of Agra Tenancy Act—Interpretation of Statutes "So far as may be", meaning of.*

Land which has once acquired the status of "*sir*" before the Agra Tenancy Act came into force might lose its status by the passing of that Act and by the change of definition therein, if it does not satisfy the requirements of the new definition.

A land is not "*sir*" within the meaning of section 4 (12) (*b*) of the U P Land Revenue Act if it was not in a proprietor's personal cultivation immediately before the commencement of that Act.

In interpreting a Statute, where there is no ambiguity in the language used, it must be accepted as it stands, and a Court is not justified in questioning whether the meaning conveyed by the language used was what was in reality intended by the Legislature.

The expression "so far as may be" in section 3 (1) of the U. P. Land Revenue Act or in section 2 (4) of the U. P. Tenancy Act means "unless a different intention appears from the wording of the Act itself" or "unless it would be inconsistent with the provisions of the Act" **U P B R** SHEOGHULAM KOERI *v.* PERMESHRI LAL, 2 U. P. L. R. (B. R) 10 **649**

U. P. Land Revenue Act—concld.

——— **ss. 110, 111**—*Partition proceedings pending—Suit in Civil Court to determine question of title, whether competent—Jurisdiction of Civil Court.*

Where the partition of a village is applied for and notices of the application are served on the parties under section 110 of the U. P. Land Revenue Act, and they have ample opportunity of raising a claim to the land under section 111 of the Act, but they fail to do so, and no reference is made to the Civil Court for the purpose of having the question of title determined, nor does the partition Court decide any such question, the Civil Court has no jurisdiction to entertain a suit for a declaration of ownership of a particular plot of land in the village. **O** RATIPALI *v.* BHAGWAN DIN, 7 O. L. J. 279; 2 U. P. L. R. (J. C.) 102 **755**

Vakil preparing and presenting petition without authority from his clients—Misconduct. *See* LETTERS PATENT (ALL) **501**

Valuation of suit—*Objection as to correctness of valuation—Court, jurisdiction of, to decide question—Declaration, suit for, value of—Appeal, second—Valuation, objection to—Suits Valuation Act (VII of 1887), s. 11, applicability of.*

Where a plaintiff puts a value, for the purpose of jurisdiction, upon the subject-matter of a suit, and an objection is taken to the correctness of such valuation, the Court has jurisdiction to decide the question.

The value of a suit for a declaratory decree must, for the purpose of jurisdiction, be taken to be the value of the property in respect of which the declaration is asked for.

Where an objection to valuation is taken in the pleadings, and again before issues are framed, and again in the Appellate Court, section 11 of the Suits Valuation Act is no bar to the objection being taken and entertained in second appeal. **Pat** MOHINI MOHAN MISSER *v.* GOUR CHANDRA RAI, 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R (Pat) 123 **762**

Vendor and purchaser—Registered conveyance—Non-payment of price—Suit by vendee for possession, maintainability of—Decree, form of. *See* TRANSFER OF PROPERTY ACT, s. 55 **530**

Wajib-ul-arz, *entry in, construction of—Custom—Widow, childless—Estate taken by widow, nature of.*

A *wajib-ul-arz* purporting to record a custom prevailing in the family of the proprietors of a particular village contained an express direction that a childless widow can hold the property of her husband for her life to the exclusion of the heirs of her husband who get it after her death. On a question arising as to whether the widow had powers of alienation:

Held, that the widow took a life-estate merely and consequently had no power of alienation. **O** HAFIZUDDIN *v.* MUBARAK ALI, 7 O. L. J 242 **699**

———, *entry in, construction of*—Hissadar qaribi, *whether denotes blood relation.*

Wajib-ul-arz—concld.

The expression "*hissadar qaribi*" in a *wajib-ul-arz* does not necessarily indicate a blood relation. **A** BHAGWAN DAS *v.* TEJ RAM **148**

———, entry in, not stating facts, value of. *See* CUSTOM—PRE-EMPTION **73**

Will, *construction of—Intention of testator—Estates taken by devisees.*

A testator by his Will gave full *maliki* rights in his estate to his sons and grandsons, but placed certain restrictions on their powers of alienation, and the question was what was the interest the sons got under the Will:

Held, that upon a construction of the Will as a whole the intention of the testator was to grant an absolute interest to the sons and grandsons **C** GIRINDRA CHANDRA SEN *v.* MAHESH RAM DEB **170**

——— *Probate—District Judge, order of, holding that objector has no* locus standi*—Appeal, whether lies—Revision—Civil Procedure Code Act (V of 1908), s. 115—Hindu Law*—Dayabhaga—*Person interested, right of, to oppose application by stranger for Probate.*

An order by a District Judge, holding that the objector to the grant of Probate of a Will has no *locus standi* to object and that the applicant is entitled to Probate on proof of the Will in common form, is not open to appeal but the order can be revised by the High Court upon an application made to it under section 115 of the Civil Procedure Code.

Where a person applying for Probate of the Will of a Hindu governed by the Dayabhaga School of Hindu Law is a stranger to the family of the deceased testator, a person having some sort of relationship with the family of the deceased has some interest to appear and oppose the application for Probate and is, consequently, entitled to be present at the hearing of the application. **C** RADHARAMAN CHOUDHURI *v.* GOPAL CHANDRA, 31 C. L. J. 81; 24 C. W. N. 316 **122**

——— *Scotch Law—Holograph writing without witnesses, whether Will.*

A holograph writing proved to be in the handwriting of a person who at the time of his death was a domiciled Scotchman, constitutes a valid Will according to Scotch Law, even though there are no witnesses to such writing **A** MACINTYRE, *In the goods of.* 17 A. L. J. 247; 41 A. 248 **683**

Workman's Breach of Contract Act (XIII of 1859), ss. 2, 3—*Loan disguised as advance—Breach of contract—Workman, whether liable*

However carefully it may be sought to disguise the fact that an advance is really a loan, the Workman's Breach of Contract Act would not apply to such a case.

S. received Rs. 30 from the firm of *K.* in advance and agreed to work in their factory. Rs. 2 were to be deducted from his monthly wages to make up the money received in advance. Not having fulfilled the terms of the agreement, he was prosecuted under Act XIII of 1859:

Held, that the advance was really a loan and, therefore, the Act did not apply. **L** SANDHI *v.* KHEM CHAND, 2 [illegible] L. J. 546 **350**

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